

**Pages 1 to / à 3  
are not relevant  
sont non pertinentes**

**Pages 4 to / à 500**  
**are withheld pursuant to section**  
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**23**

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**de la Loi sur l'accès à l'information**



**Pages 501 to / à 525**  
**are not relevant**  
**sont non pertinentes**

Federal Court



Cour fédérale

## Facsimile Transmittal Form / Formulaire d'acheminement par télécopieur

**TO / DESTINATAIRE(S):**1. Name / Nom : **ANTHONY BRATSHITSCH**Facsimile / Télécopieur : **905-628-2532**

Telephone / Téléphone :

- ☐ As requested / tel que demandé  
☐ Left voice message / suite au message vocal

2. Name / Nom : **MICHAEL J. SIMS**Facsimile / Télécopieur : **416-973-4323**

Telephone / Téléphone :

- ☐ As requested / tel que demandé  
☐ Left voice message / suite au message vocal

3. Name / Nom :

Facsimile / Télécopieur :

Telephone / Téléphone :

- ☐ As requested / tel que demandé  
☐ Left voice message / suite au message vocal

**FROM / EXPÉDITEUR : Vanessa George****DATE : September 14, 2011**Telephone / Téléphone : **416-954-0380****TIME / HEURE : 10:40 AM**Facsimile / Télécopieur : **416-973-2154****Total number of pages (including this page) /  
Nombre de pages (incluant cette page) : 6****SUBJECT / OBJET :**Court File No. / N° du dossier de la Cour: **T-2112-10**Between / entre: **ANTHONY BRATSHITSCH v. AGC ET AL**

Enclosed is a true copy of the Order / Judgment / Reasons for Assessment of Costs: // Vous trouverez ci-joint une copie conforme de l'ordonnance / jugement / motifs de: **Johanne Parent, Assessment Officer**

dated / daté du **13- SEP-2011****COMMENTS / REMARQUES :**

*Pursuant to section 20 of the Official Languages Act all final decisions, orders and judgments, including any reasons given therefore, issued by the Court are issued in both official languages. In the event that such documents are issued in the first instance in only one of the official languages, a copy of the version in the other official language will be forwarded on request when it is available.*  
*Conformément à l'article 20 de la Loi sur les langues officielles, les décisions, ordonnances et jugements définitifs avec les motifs y afférents, sont émis dans les deux langues officielles. Au cas où ces documents ne seraient émis, en premier lieu, que dans l'une des deux langues officielles, une copie de la version dans l'autre langue officielle sera transmise, sur demande, dès qu'elle sera disponible.*

N.B.: If you do not receive all pages being transmitted, please call the sender at the above telephone number. / Si vous ne recevez pas toutes les pages transmises, prière de communiquer avec l'expéditeur au numéro de téléphone ci-haut.

Page: 2

[3] The assessable services claimed under Tariff B of the *Federal Courts Rules* for the preparation and filing of the respondents' record and materials (respondents' motion to strike the application) claimed under Item 5 as well as the claims for appearance at the motion (Item 6), for the assessment of costs (Item 26) and for such other services (Item 27) have not been contested and will be allowed as demanded.

[4] Under Item 2 of Tariff B, the respondents claimed four units (\$130 per unit) for the preparation of the Notice of Appearance. Although this service has not been contested, it cannot be allowed as claimed considering that Item 2 pertains to the "preparation and filing of all defences, replies, counterclaims or respondent's records and materials". Given that Tariff B does not cover for the preparation of the notice of appearance, Item 27 is the Tariff item that has generally been allowed by assessment officers for this service (see *Bayer Healthcare AG v Sandoz Canada Inc.*, 2009 FC 691 par 27). Considering the amount of work required for this type of service, the document on file and the actual jurisprudence, I will allow one unit for the Notice of Appearance.

[5] Seven units are claimed by the respondents for the preparation and filing of the responding record to applicant's contested motion in writing to strike the respondents' notice of motion (Item 5). The respondents argue that:

"... in an attempt to take improper advantage of counsel's oversight, the applicant brought a motion in writing to strike the respondents' notice of motion. The respondents submit that such behaviour is deserving of costs sanctions. This Court has clearly held that motions should be opposed on their merits and should not be made the subject of further procedural motions".

The applicant opposes that claim.

Page: 3

[6] In the Reasons disposing of the matter on April 28, 2011, the Court held that because of his "disposition of the motion of the respondents there is no need to consider the motion of the applicant". Where a contested motion results in an Order that is silent as to costs, the assessment officer does not have the authority to award costs. The jurisprudence is consistent that for costs to be assessed on any motions, they must have been awarded by the Court. Considering the principle that there is no award of costs on motions where the order disposing of the motion is silent as to costs, I will disallow the claim for this service.

[7] The respondents claimed five units under Item 13(a) for the preparation for the hearing of motions. Although this Item had not been contested by the applicant, it cannot be allowed. Undoubtedly, efforts were put by the respondents to prepare for the hearing of the motion but costs have already been allowed under Item 5 for said service. Item 13(a) of Tariff B is found under the sub-heading "Pre-Trial and Pre-Hearing Procedures" and covers for the services attached to the preparation for a trial or hearing and not for the preparation of a motion already covered under Item 5.

[8] I examined the disbursements claimed along with the supporting material and consider them necessary charges to the conduct of this matter. They are not contested. The amounts are reasonable and are therefore allowed.

[9] The Bill of Costs is allowed for a total amount of \$2,829.36.

Toronto, Ontario  
September 13, 2011

"Johanne Parent"  
Assessment Officer

**Pages 529 to / à 830  
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**Pages 831 to / à 840**  
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## POCKET LIST

s.23

ANTHONY BRATSCHITSCH v ATTORNEY GENERAL OF CANADA and the CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA

ORO FILE NO. 2-595438

FEDERAL COURT NO.: T-2112-10



**Counsel Notes:**

**Laws**

**Total Disbursements**





**Pages 1091 to / à 1112  
are withheld pursuant to section  
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No.

NAME  
NOM

Laws

*BRATSCHITSCH, A. v AGC et al*

*File No. 2-595438*

Ethier, JoAnne [NCR]

31230-7-3

**From:** Sims, Michael [Michael.Sims@justice.gc.ca]  
**Sent:** February 28, 2011 2:53 PM  
**To:** Jessome, Kimberley [NCR]  
**Subject:** Bratchitsch v. AGC, et al.; T-2112-10

s.23

**Attachments:** Document.pdf

Regards,

Michael

Michael J. Sims  
Counsel | Avocat  
Department of Justice Canada | Ministère de la Justice Canada Tel. / Tél.: (416)  
952-7116

<<Document.pdf>>

**Pages 1115 to / à 1117  
are withheld pursuant to section  
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31230-7-3

Ethier,JoAnne [NCR]

---

From: Sims, Michael [Michael.Sims@justice.gc.ca]  
Sent: March 24, 2011 11:07 AM  
To: Jessome, Kimberley [NCR]  
Subject: RE: Bratschitsch

s.23

Hi Kim,

Michael

Michael J. Sims  
Counsel | Avocat  
Department of Justice Canada | Ministère de la Justice Canada Tel. / Tél.: (416)  
952-7116

-----Original Message-----

From: Jessome, Kimberley [NCR] [mailto:Kimberley.Jessome@ec.gc.ca]  
Sent: March 23, 2011 4:11 PM  
To: Sims, Michael  
Cc: Jessome, Kimberley (EC)  
Subject: RE: Bratschitsch

Okay, thanks.

Kim

-----Original Message-----

From: Sims, Michael [mailto:Michael.Sims@justice.gc.ca]  
Sent: March 23, 2011 4:07 PM  
To: Jessome, Kimberley [NCR]  
Subject: RE: Bratschitsch

[REDACTED]

Michael J. Sims  
Counsel | Avocat  
Department of Justice Canada | Ministère de la Justice Canada Tel. / Tél.: (416)  
952-7116

-----Original Message-----

From: Jessome, Kimberley [NCR] [mailto:Kimberley.Jessome@ec.gc.ca]  
Sent: March 23, 2011 4:02 PM  
To: Sims, Michael  
Cc: Jessome, Kimberley (EC)  
Subject: RE: Bratschitsch

Thanks Michael.

[REDACTED]

Thanks,

Kim

-----Original Message-----

From: Sims, Michael [mailto:Michael.Sims@justice.gc.ca]  
Sent: March 23, 2011 3:35 PM  
To: Jessome, Kimberley [NCR]  
Subject: Bratschitsch

Kim,

[REDACTED]

Michael J. Sims  
Counsel | Avocat  
Regulatory Law | La loi du droit réglementaire Department of Justice Canada | Ministère  
de la Justice Canada Ontario Regional Office | Bureau régional de l'Ontario 130 King  
Street West | 130, rue King ouest Suite 3400 | pièce 3400 Toronto, Ontario M5X 1K6  
Tel. / Tél.: (416) 952-7116 Fax / Téléc.: (416) 973-4323 E-mail / courriel.:  
michael.sims@justice.gc.ca

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31230-7-3

Ethier, JoAnne [NCR]

---

From: Jessome, Kimberley [NCR]  
Sent: March 9, 2011 8:42 AM  
To: 'Sims, Michael'  
Cc: Jessome, Kimberley [NCR]  
Subject: RE: Bratschitsch et al.

Thanks Michael,

Kim

-----Original Message-----

From: Sims, Michael [mailto:Michael.Sims@justice.gc.ca]  
Sent: March 7, 2011 10:27 AM  
To: Jessome, Kimberley [NCR]  
Subject: Bratschitsch et al.

s.23

Hi Kim,



Regards,

Michael

Michael J. Sims  
Counsel | Avocat  
Regulatory Law | La loi du droit réglementaire Department of Justice Canada | Ministère  
de la Justice Canada Ontario Regional Office | Bureau régional de l'Ontario 130 King  
Street West | 130, rue King ouest Suite 3400 | pièce 3400 Toronto, Ontario M5X 1K6  
Tel. / Tél.: (416) 952-7116 Fax / Téléc.: (416) 973-4323 E-mail / courriel.:  
michael.sims@justice.gc.ca

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31230-7-3

**Ethier, JoAnne [NCR]**

---

**From:** Sims, Michael [Michael.Sims@justice.gc.ca]  
**Sent:** January 27, 2011 1:25 PM  
**To:** Jessome, Kimberley [NCR]  
**Subject:** RE: Bratschitsch v AGC - Affidavit of Applicant.

I will have a copy made and couriered to you.

Michael J. Sims  
Counsel | Avocat  
Department of Justice Canada | Ministère de la Justice Canada Tel. / Tél.: (416)  
952-7116

-----Original Message-----

**From:** Jessome, Kimberley [NCR] [mailto:Kimberley.Jessome@ec.gc.ca]  
**Sent:** January 27, 2011 1:24 PM  
**To:** Sims, Michael  
**Cc:** Jessome, Kimberley (EC)  
**Subject:** RE: Bratschitsch v AGC - Affidavit of Applicant.

Thanks Michael,

Would it be possible to have someone from your office send a copy of the exhibits to my attention?

Thanks

Kim

s.23

Kim Jessome-Lortie

Avocate | Legal Counsel  
Ministère de la Justice Canada | Department of Justice Canada Service juridique,  
Environnement Canada | Environment Canada Legal Services 351, boul. St-Joseph | 351  
St-Joseph Blvd.  
Gatineau QC K1A 0H3  
Téléphone (819) 934-5192 | Fax (819) 953-9110 Gouvernement du Canada |  
Government of Canada

-----Original Message-----

**From:** Sims, Michael [mailto:Michael.Sims@justice.gc.ca]

Sent: January 27, 2011 10:40 AM  
To: Jessome, Kimberley [NCR]  
Subject: FW: Bratschitsch v AGC - Affidavit of Applicant.

s.23

Kim,

Michael

Michael J. Sims  
Counsel | Avocat  
Department of Justice Canada | Ministère de la Justice Canada Tel. / Tél.: (416)  
952-7116

>  
> From: Dyke, Diane  
> Sent: January 26, 2011 11:08 AM  
> To: Sims, Michael  
> Subject: Bratschitsch v AGC - Affidavit of Applicant.

>  
> <<9334452.pdf>>  
>

> Attached here is the Affidavit of Anthony Bratschitsch scanned with the cover letter  
and without exhibits. This was received in the mail today, on January 26, 2011 (30  
days after January 26, 2011 is Friday, February 25, 2011).

> This document is on iCase and will be delivered to your office.  
> FYI - to date, I have not received an Affidavit for the Bratschitsch et.al. file.  
> Diane  
>

January 24, 2011

**Sent by Registered Parcel Mail**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-595438  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10  
Affidavit and Exhibits

Dear Mr. Sims,

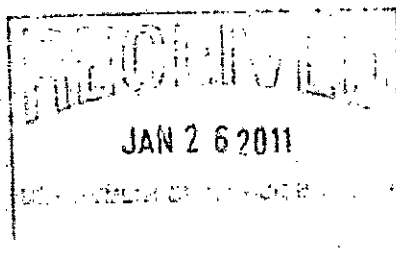
I wish to serve this Affidavit with Exhibits.

If needed, I can be contacted at (289) 260-1153.

Yours truly,



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6



T-2112-10

FORM 80A - Rule 80

**AFFIDAVIT**

FEDERAL COURT

BETWEEN:

ANTHONY BRATSCHITSCH

Applicant

and

THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA AND THE ATTORNEY  
GENERAL OF CANADA

Respondents

---

**AFFIDAVIT OF ANTHONY BRATSCHITSCH**

---

I, Anthony Bratschitsch, of the Town of Dundas, in the amalgamated City of Hamilton, in the Province of Ontario SWEAR THAT:

1. I am a Canadian citizen and I am employed as a consultant in the environmental waste industry affected by Section 36 of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* (EIHWHRMR). The EIHWHRMR, published in the Canada Gazette, is provided as **Exhibit A**. Section 36 is found on page 1220;
2. I am very knowledgeable of EIHWHRMR, the *Canadian Environmental Protection Act, 1999* (CEPA 1999) and the three relevant international agreements affecting the transboundary movement of hazardous wastes referred to in Item No. 8 in the Application. One of those three international agreements, *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, Amended 1992*, commonly known as "The Bilateral Agreement", is used to bridge the discrepancies of the other two international agreements to accommodate Canadian and American requirements. A copy of The Bilateral Agreement has been provided from Environment Canada's web site as **Exhibit B**;

3. I am also very knowledgeable of the typical operating procedures used by the hazardous waste industry that is utilized to achieve regulatory compliance, such as manifesting and tracking procedures;
4. I have known and provided industry-related services to Mr. Patrick Whitty and the three companies that he co-owns, including RPR Environmental Inc. (RPR), since 1998;
5. I am very knowledgeable of the facts involving the particular Environment Canada Enforcement (ECE) investigation of RPR and Mr. Whitty concerning alleged violations of Section 36 and of the subsequent prosecution. The ECE investigation file number (3007-2007-12-19-014) is shown on a copy of an ECE power point slide. This is **Exhibit C**.
6. The ECE Section 36 investigation and prosecution of RPR is a matter of public information and is of significant concern to the industry, for the reasons including fairness, predictability and consistency. **Exhibit D** is an internet publication by a reknown environmental law practioner, Dr. Dianne Saxe, detailing the Section 36 violation and her own reaction to it. Also, Environment Canada published an internet Enforcement Notification, last modified on August 11, 2009 (**Exhibit E**);
7. Dr. Saxe's internet publication refers to ECE enforcement and compliance in this manner (last paragraph) :

***We need it to be fair, and proportional to the real fault involved.***

As explained in the Application, the Canadian exporter has no control over the issuance of confirmations, commonly described as Certificates of Destruction, from the United States.

As a result, there is a perception in the industry of, at least, unfairness in the enforcement of Section 36 on Canadian exporters.

It is also my belief that there is no real fault because American legislation does not require the issuance of those Certificates, as explained in the Application.

8. Section 2.(1)(o) of CEPA 1999 states

*2. (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),*

*(o) apply and enforce this Act in a fair, predictable and consistent manner.*



9. The *Canadian Manifesting Mechanism Will Say* of Mr. Joachim Wittwer, Head of Operations Section, Waste Management Division of Environment Canada succinctly describes the functions and applications of various mechanisms used to ensure compliance with CEPA 1999 and The Bilateral Agreement for the transboundary movement of hazardous waste. Mr. Wittwer's document also refers to the importance of each country's domestic legislation. As stated in the Application, the Certificates of Destruction specified in Section 36 of EIHWHRM are not part of The Bilateral Agreement. Mr. Wittwer's Will Say also does not make any reference to confirmations or Certificates of Destruction. It is clear that the confirmations or Certificates of Destruction are not a requirement of the international agreements governing the transboundary movement of hazardous wastes. Mr. Wittwer's Will Say is provided as Exhibit F.

Sworn (or Affirmed) before me at the City of Hamilton in the Province of Ontario

on January 24, 2011 (date).

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

Commissioner for Taking Affidavits  
(or as the case may be)

Anthony Bratschitsch  
Anthony Bratschitsch  
(Signature of Deponent)

Exhibits :

- A. Canada Gazette Part II, Volume 139, No. 11: *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*
- B. *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992*
- C. Environment Canada Enforcement power point slide identifying investigation file and Section 36 investigation
- D. Internet publication by Dr. Dianne Saxe publishing information about concerns over the fairness of the enforcement of the Section 36 regulation
- E. Internet Publication by Environment Canada
- F. *Canadian Manifesting Mechanism Will Say* of Joachim Wittwer, Head of Operations Section, Waste Management Division of Environment Canada

**Pages 1195 to / à 1200**  
**are not relevant**  
**sont non pertinentes**

31230-7-3

**Ethier,JoAnne [NCR]**

---

**From:** Jessome,Kimberley [NCR]  
**Sent:** January 11, 2011 2:52 PM  
**To:** 'Sims, Michael'  
**Cc:** Jessome,Kimberley [NCR]  
**Subject:** RE: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

Hi Michael,

Thanks for the documents.

Regards,

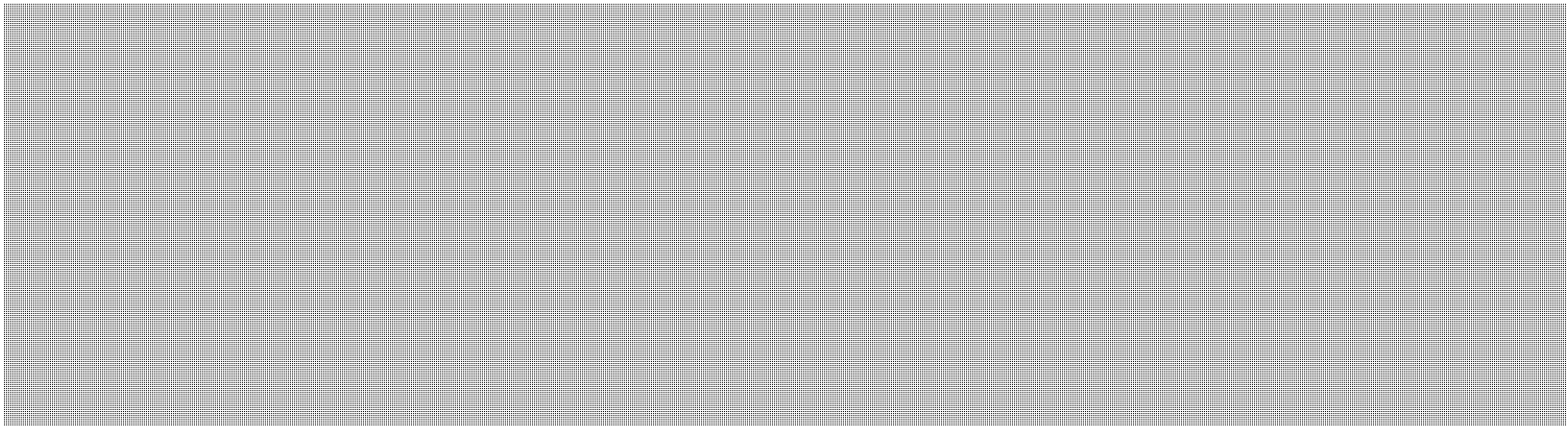
Kim

-----Original Message-----

**From:** Sims, Michael [mailto:Michael.Sims@justice.gc.ca]  
**Sent:** January 11, 2011 12:17 PM  
**To:** Jessome,Kimberley [NCR]  
**Subject:** RE: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

s.23

Hi Kim,



Michael

Michael J. Sims  
Counsel | Avocat  
Department of Justice Canada | Ministère de la Justice Canada Tel. / Tél.: (416)  
952-7116

-----Original Message-----

**From:** Jessome,Kimberley [NCR] [mailto:Kimberley.Jessome@ec.gc.ca]  
**Sent:** January 10, 2011 3:50 PM  
**To:** Sims, Michael  
**Cc:** Jessome, Kimberley (EC)  
**Subject:** RE: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

Hi Michael,

Thanks,

Kim

Kim Jessome-Lortie

Avocate | Legal Counsel  
Ministère de la Justice Canada | Department of Justice Canada Service juridique,  
Environnement Canada | Environment Canada Legal Services 351, boul. St-Joseph | 351  
St-Joseph Blvd.  
Gatineau QC K1A 0H3  
Téléphone (819) 934-5192 | Fax (819) 953-9110 Gouvernement du Canada |  
Government of Canada

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-----Original Message-----

From: Sousa,Michael [NCR]

Sent: January 6, 2011 8:14 AM

To: 'Sims, Michael'

Cc: Mercier,Melanie-Anne [NCR]; Jessome,Kimberley [NCR]

Subject: RE: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

Michael: Kimberly Jessome of our unit will be the DLSU contact on this file.

Cheers,

Mike

Michael Sousa  
Avocat général/General Counsel  
Directeur adjoint/Deputy Director  
Service juridique, Environnement Canada/Environment Canada Legal Services Justice  
Canada 351, boul. St-Joseph Gatineau, QC K1A 0H3  
Tel: 819 934-6642  
Fax: 819 953-9110

-----Original Message-----

From: Sousa, Michael [NCR]  
Sent: January 4, 2011 3:56 PM  
To: 'Sims, Michael'  
Cc: Sousa, Michael [NCR]  
Subject: RE: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC s.23

Thanks for your email, Michael.

We will assign someone here to work on this and will get back with the name of counsel in the very near future.

Cheers,

Mike

Michael Sousa  
Avocat général/General Counsel  
Directeur adjoint/Deputy Director  
Service juridique, Environnement Canada/Environment Canada Legal Services Justice  
Canada 351, boul. St-Joseph Gatineau, QC K1A 0H3  
Tel: 819 934-6642  
Fax: 819 953-9110

-----Original Message-----

From: Sims, Michael [mailto:Michael.Sims@justice.gc.ca]  
Sent: January 4, 2011 3:03 PM

To: Sousa, Michael [NCR]  
Subject: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

Michael,

We have been served with the two attached notices of application for judicial review. They are related, both to each other and to a series of proceedings against Environment Canada and the PPSC arising out of the prosecution of RPR Environmental. Please let me know when counsel from your office has been assigned to these matters.

> > <<Bratschitsch -Notice of Application.pdf>> > > <<Bratsch. et al  
> > -Notice of Application.pdf>>  
>

Regards,

Michael

Michael J. Sims  
Counsel | Avocat  
Regulatory Law | La loi du droit réglementaire Department of Justice Canada | Ministère  
de la Justice Canada Ontario Regional Office | Bureau régional de l'Ontario 130 King  
Street West | 130, rue King ouest Suite 3400 | pièce 3400 Toronto, Ontario M5X 1K6  
Tel. / Tél.: (416) 952-7116 Fax / Téléc.: (416) 973-4323 E-mail / courriel.:  
michael.sims@justice.gc.ca

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>



Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

January 6, 2011

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel. (289) 260-1153

Dear Mr. Bratschitsch:

Re: **BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

Enclosed please find the Notice of Appearance of the Respondents, served upon you in accordance with the *Federal Courts Rules*.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Encl.

FORM 305 – NOTICE OF APPEARANCE – APPLICATION  
Federal Court Rules, 1998, Rule 305

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

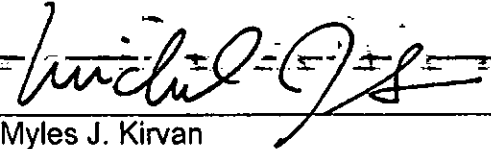
**THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

Respondents

**NOTICE OF APPEARANCE**

The Respondents intend to oppose this application.

January 6, 2011

  
Myles J. Kirvan  
Deputy Attorney General of Canada  
Per: Michael J. Sims  
Department of Justice  
Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6  
Tel: (416) 952-7116  
Fax: (416) 973-4323

Solicitor for the Respondents

TO: Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel. (289) 260-1153

Applicant





Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
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Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595439  
Notre dossier:

Your File:  
Votre dossier:

January 6, 2011

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Dear Mr. Bratschitsch:

**Re: BRATSCHITSCH, Anthony et al v. Attorney General of Canada et al**  
**Court File No.: T-2176-10**

---

Enclosed please find the Notice of Appearance of the Respondents, served upon you in accordance with the *Federal Courts Rules*.

I draw your attention to Rules 119 and 120 of the *Rules*, which I believe will prohibit you from representing the corporate Applicant and Mr. Whitty.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Encl.

FORM 305 – NOTICE OF APPEARANCE – APPLICATION  
Federal Court Rules, 1998, Rule 305

T-2176-10

FEDERAL COURT

BETWEEN:

**ANTHONY BRATSCHITSCH on his own behalf  
and on behalf of 876947 ONTARIO LIMITED  
O/A RPR ENVIRONMENTAL AND PATRICK WHITTY**

Applicants

and

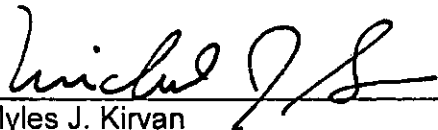
**ATTORNEY GENERAL OF CANADA as represented by  
THE MINISTER OF THE ENVIRONMENT AND  
RENZO A. BENOCCI AND BRADLEY MAY**

Respondents

**NOTICE OF APPEARANCE**

The Respondents intend to oppose this application.

January 6, 2011



Myles J. Kirvan  
Deputy Attorney General of Canada

Per: Michael J. Sims  
Department of Justice  
Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Tel: (416) 952-7116

Fax: (416) 973-4323

Solicitor for the Respondents

- 2 -

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel. (289) 260-1153

Applicant

31230-7-3

**Ethier,JoAnne [NCR]**

---

**From:** Jessome,Kimberley [NCR]  
**Sent:** January 10, 2011 3:38 PM  
**To:** Martineau,Diane [NCR]  
**Cc:** Jessome,Kimberley [NCR]  
**Subject:** FW: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

**Attachments:** Bratschitsch -Notice of Application.pdf; Bratsch. et al -Notice of Application.pdf



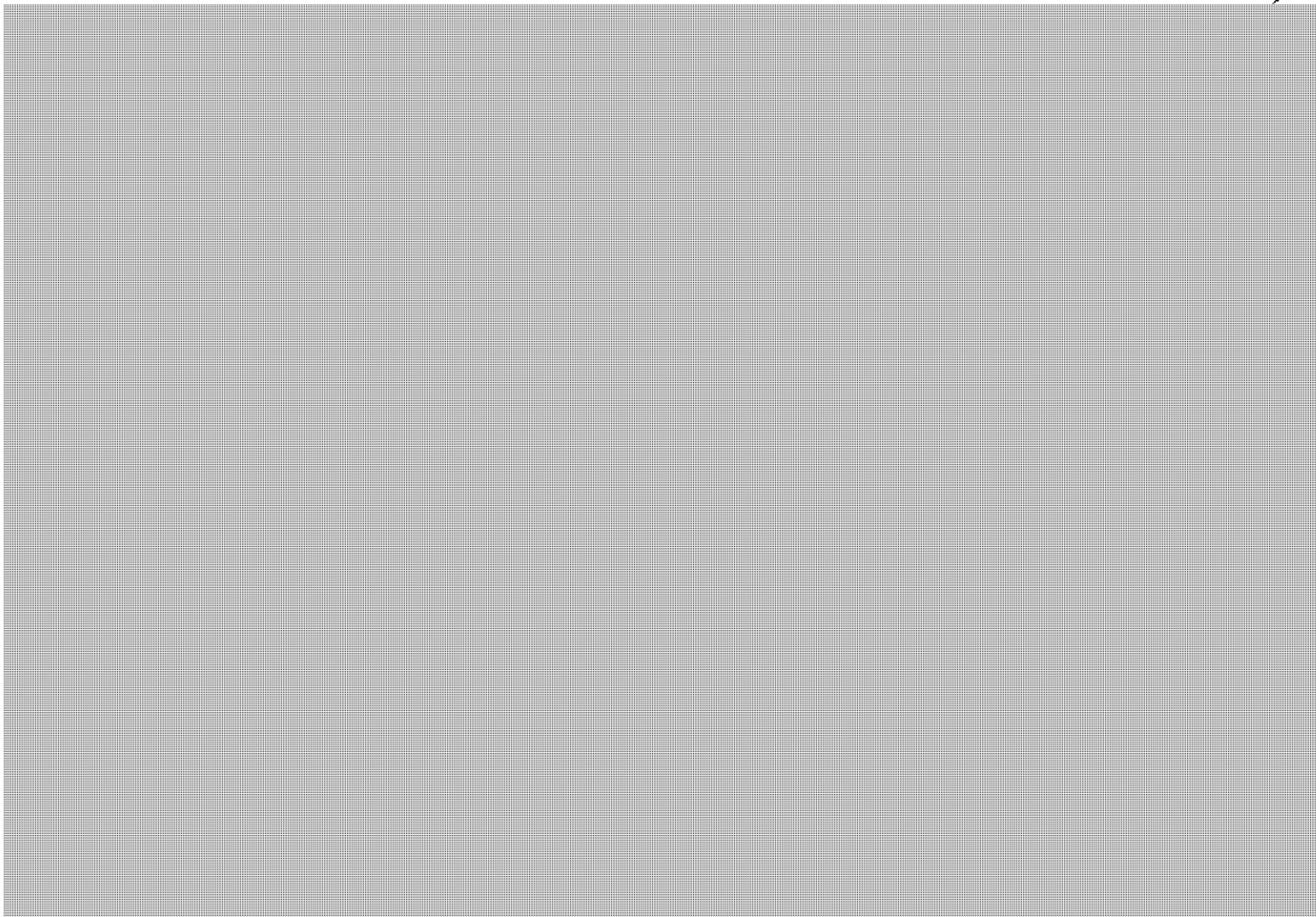
Bratschitsch      Bratsch. et al  
Notice of Applic..-Notice of Appl...

Merci Diane

-----Original Message-----

s.23

**From:** Sousa,Michael [NCR]  
**Sent:** January 4, 2011 4:21 PM  
**To:** Roussel,Kathleen [NCR]; Blasioli,Dan [NCR]; Tingley,Linda [NCR]  
**Cc:** Mercier,Melanie-Anne [NCR]; Jessome,Kimberley [NCR]; Martineau,Diane [NCR]  
**Subject:** Bratschitsch v. AGC and Bratschitsch, et al. v. AGC



Michael Sousa  
Avocat général/General Counsel  
Directeur adjoint/Deputy Director  
Service juridique, Environnement Canada/Environment Canada Legal Services Justice  
Canada 351, boul. St-Joseph Gatineau, QC K1A 0H3  
Tel: 819 934-6642  
Fax: 819 953-9110

-----Original Message-----

From: Sims, Michael [mailto:Michael.Sims@justice.gc.ca]  
Sent: January 4, 2011 3:03 PM  
To: Sousa, Michael [NCR]  
Subject: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

Michael,

We have been served with the two attached notices of application for judicial review. They are related, both to each other and to a series of proceedings against Environment Canada and the PPSC arising out of the prosecution of RPR Environmental. Please let me know when counsel from your office has been assigned to these matters.

> > <<Bratschitsch -Notice of Application.pdf>> > > <<Bratsch. et al  
> > -Notice of Application.pdf>>  
>

Regards,

Michael

Michael J. Sims  
Counsel | Avocat  
Regulatory Law | La loi du droit réglementaire Department of Justice Canada | Ministère  
de la Justice Canada Ontario Regional Office | Bureau régional de l'Ontario 130 King  
Street West | 130, rue King ouest Suite 3400 | pièce 3400 Toronto, Ontario M5X 1K6  
Tel. / Tél.: (416) 952-7116 Fax / Téléc.: (416) 973-4323 E-mail / courriel.:

michael.sims@justice.gc.ca

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>

T-2112-10

FORM 301- Rule 301

**NOTICE OF APPLICATION**

Federal Court of Canada

Between:

Anthony Bratschitsch

Applicant

And

The Attorney General of Canada and The Chief Enforcement Officer,  
Environmental Enforcement, Environment Canada

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on page 6.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: DEC 20 2010

Issued by: ABIGAIL GRIMES  
REGISTRY OFFICER  
AGENT DU GREFFE  
(Registry Officer)

Address of local office: 180 Queen Street West 180, rue Queen Ouest  
Suite 200 bureau 200  
Toronto, Ontario Toronto, Ontario  
M5V 3L6 M5V 3L6

TO:

The Chief Enforcement Officer  
Environmental Enforcement  
National Enforcement Headquarters  
Environment Canada  
200 Sacré-Coeur Blvd., 13th Floor  
Gatineau, Quebec  
K1A 0H3

The Attorney General of Canada  
Department of Justice  
284 Wellington St.  
Ottawa, ON  
K1A 0H8



## APPLICATION

This is an application for judicial review in respect of:

The Canadian Environmental Protection Act, 1999 and Environmental Enforcement, Environment Canada

The applicant, Anthony Bratschitsch, requests the judicial review of the validity of Section 36 (herein after referred to as the "Section 36") of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations (herein after referred to as the "EIHWHRMR") under the Canadian Environmental Protection Act, 1999 (herein after referred to as the "CEPA 1999").

This is a matter that consists of the prospect of persons in Canada facing the possibilities of imprisonment due to circumstances beyond their control and occurring outside Canada.

This matter also applies to Canadian entities, i.e. commercial, institutional, etc. (herein after referred to as the "entity"), facing other forms of punishment under the same circumstances.

Since at least one Canadian and at least one entity have already faced such prospects, which occurred without precedence, the applicant is applying to the court for remedies.

The applicant seeks public interest standing as established by the Supreme Court of Canada in cases such as *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 and *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147 in that:

1. The issue raises serious legal questions;
2. The applicant has a genuine interest as a citizen in the resolution of the questions; and
3. That there is no other reasonable and effective means in which the questions may be brought to court.

The applicant is a Canadian citizen employed as a consultant in the industry affected by Section 36.

The applicant makes a reference to *R v. RPR ENVIRONMENTAL INC. AND PATRICK WHITTY* (Ontario Court of Justice) in which the Enforcement Branch of Environment Canada (herein after referred to as the "ECE") laid 63 counts of charges in 2008 involving summary conviction against the Canadian exporter of hazardous wastes and a company director, Patrick Whitty.

The ECE charges were based on that the RPR ENVIRONMENTAL INC. (herein referred to as the "Company") did not obtain "confirmations", i.e. "Certificates of Destruction" (herein referred to as the "Certificates"), within the time period prescribed by provisions of Section 36.

All of the Certificates described in the charges were to be drawn from authorized disposal facilities in the United States.

However, there are circumstances in the United States, such as facility closures, inefficiencies or apathy that may restrict or prevent the issuance or release of the Certificates.

American law or regulations or any relevant international agreement between Canada and the USA does not require the Certificates.

In this case, a Canadian citizen, Patrick Whitty, residing within Canada did suffer from the threat of the loss of liberty during a twelve-month period by the actions of a Canadian government body, ECE.

As well, the Company faced punitive penalties.

The applicant does not know if this occurrence has since been repeated elsewhere in Canada because a search in Environment Canada's registry did not reveal similar cases and also because requests for information through the Access to Information Act are still in process.

The below items are relevant to this matter:

1. Section 36. (1) of "EIHWHRMR" states:  
*"Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled*
  - (a) in accordance with the export or import permit;*
  - (b) in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and*
  - (c) Within the period referred to in paragraph 9(o) or 16(n)."*

(Note: the word "confirmation" in the fifth line of above Item 1 has been described in this document as a "Certificate of Destruction".)

2. Section 9. (o) of "EIHWHRMR" states:  
*"In the case of operation D13, D14, or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the authorities of the jurisdiction in which the authorized facility is located require shorter time periods, in which case those time periods apply"*
3. Section 185(1) of "CEPA 1999" states:  
*"No person shall import, export or convey in transit a hazardous waste or hazardous recyclable material, or prescribed non-hazardous waste for final disposal, except*
  - (a) after notifying the Minister and paying the prescribed fee;*
  - (b) after receiving from the Minister which-ever one of the following permits is applicable:*
    - i. an import or export permit that, except in a case of a permit issued under subsection (4), states that the authorities of the country of destination and, if applicable, of the country of transit have authorized the movement, and that the authorities of the jurisdiction of destination have authorized the final disposal or recycling of the waste or material, or*
    - ii. a transit permit that states the Minister has authorized the movement; and*
    - iii. In accordance with the prescribed conditions."*
4. Section 272. (1) of "CEPA 1999" states:  
*"Every person commits an offence who contravenes*
  - (a) a provision of the Act or the regulations*
  - (b) an obligation or a prohibition arising from the Act or the regulations"*
5. Section 272. (2) of "CEPA 1999" states:  
*"Every person who commits an offence under subsection (1) is liable*
  - (a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both; and*
  - (b) on summary conviction, to a fine of not more than \$300,000 or to imprisonment for a term of not more than six months, or to both."*

6. Section 280(1) of "CEPA 1999" states:  
*"Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted."*
7. Section 280.1(1) of "CEPA 1999" states:  
*"Every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with*
  - (a) this Act and the regulations; and*
  - (b) orders and directions of, and prohibitions and requirements imposed by, the Minister and enforcement officers and review officers"*
8. Canada is a signatory to the following international agreements governing the transboundary movement of hazardous waste:
  - (a) The United Nations Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1992);
  - (b) The Organization for Cooperation and Economic Development (OECD) Council Decision concerning the control of Transfrontier movements of wastes destined for recovery operations (revised 2001);
  - (c) The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992 (herein after referred to as the "Bilateral Agreement").

### The applicant makes application for:

The applicant requests relief from the court as it deems necessary under the Canadian Charter of Rights and Freedoms (herein after referred to as the "Charter"), as per:

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The applicant also requests a remedy that, within Section 36 of the EIHWHRM under CEPA 1999, the phrase "*exporter or importer*" be removed and that the words "*authorized facility of disposal or recycling*" be added in its place or, simply, that Section 36 be struck in its entirety from EIHWHRM.

### The grounds for the application are:

The applicant submits that the standard of review is based on correctness concerning questions of law and questions of jurisdiction (*Dunsmuir v. New Brunswick*, 2008 SCC 9, paragraph 50).

Concerning the request for a judicial review for potential matters of the same nature, the applicant cites *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147, paragraph 69:

"Moreover, the absence of a "decision" is not an absolute bar to an application for judicial review under the *Federal Courts Act*, and the role of the court has been found to extend beyond the review of formal decisions, and to include the review of a "diverse range of administrative action that does not amount to a 'decision or order' ..."

The applicant argues that:

#### A) Section 36 has the effect of violating a person's right to liberty as guaranteed under Section 7 of the "Charter"

If an American disposal facility, authorized to receive and dispose hazardous wastes from a Canadian exporter, is not able to, or chooses not to supply a Certificate of Destruction within the prescribed time period of Section 36 to the Canadian exporter, that same American facility has not violated any domestic law or international regulation that it is bound to.

Yet, in the case of the above, the provisions within Section 36 would place a Canadian exporter and any of its directors in the position of committing an offence under Sections 272(1), 272(2), 280(1) and 280.1(1) of CEPA 1999 which provide for the possibility of imprisonment.

Section 36 unfairly places the exporter and directors at fault for failing to submit the Certificates even though the exporter and directors have no provenance or Chain of Custody with those documents.

Canadian directors would then be subjected to the threat of their rights to liberty of persons as guaranteed by Section 7 of the "Charter".

B) Section 36 is not valid due to jurisdictional issues:

Extraterritorial jurisdiction is governed by international law, rather than being at the absolute discretion of individual states and that jurisdiction *"cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention"*, see *R. v. Hape* SCC 26 (para. 65).

Therefore, Section 36 is invalid because it is not provided for and does not comply with the principles of the three relevant international agreements concerning the transboundary movement of hazardous waste.

The "Bilateral Agreement" which is used to bridge the other two international agreements, stipulates:

Article 2- General Obligation:

*"The parties shall permit the export, import, and transit of hazardous waste and other waste across their common border for treatment, storage, or disposal pursuant to the terms of their domestic laws, regulations and administrative practices, and the provisions of this agreement."*

---

The issuance of Certificates by an authorized American facility is not pursuant to any American domestic rules and the facility is not compelled to produce them.

---

Furthermore, if the American facility does not provide a Certificate to the Canadian exporter for whatever reason, that means that the Canadian exporter has never been involved in the Chain of Custody of the Certificate – a document that the Canadian exporter is not capable of authoring.

In fact, there is no standard form for Certificates under Section 36, EIHWHRM or CEPA 1999.

Yet, Section 36 creates a situation where a company and its directors can be held liable for not obtaining a foreign document, whether it exists or not, outside its Chain of Custody.

In such cases, there is an absence of mens rea by the exporter and its directors to commit an offence while, at the same time, there is also an absence of actus reus by the only possible authors of the Certificates – the American facilities.

Therefore, Section 36 deems that a serious violation worthy of penal punishment has been committed outside of domestic laws and international agreements.

Furthermore, the requirement for Certificates from authorized American facilities is not necessary to achieve the objectives and principles of the three international agreements governing the transboundary shipment of hazardous wastes.

The reason for this is that one of the major components of the three international agreements is the "prior informed consent regime" (PIC).

For many years, the PIC has been very effective in achieving the principles of the three international agreements.

Under CEPA 1999 and EIHWHRM, a Canadian export notice needs to be completed by the exporter and to be submitted to Environment Canada.

Once the notice has been reviewed, as well as meeting the contract and insurance requirements, the notice is forwarded to the competent American authority for their consent.

In this case, no permit will be issued until the American authority has authorized the movement and has confirmed that the final disposal of the hazardous waste is authorized.

The PIC is an effective, time-tested process that has not required Certificates of Destruction before and is not recognized and used by the Americans now.

Therefore, there would be no loss of effect to protecting human health or the environment by applying the requested remedies.

The "Bilateral Agreement" also states:

Article 5 – Cooperative Efforts:

1. *The parties will cooperate to ensure, to the extent possible, that all transboundary shipments of hazardous waste and other waste comply with the **manifest requirements** of both countries.*
2. *The parties will cooperate in monitoring and spot-checking transboundary shipments of hazardous waste and other waste to ensure, to the extent possible, that such shipments conform to the requirements of the applicable legislation and of this Agreement.*
3. *To the extent any implementing laws and regulations are necessary to comply with this Agreement, the parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the Parties will make best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The Parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such laws and regulations."*

Certificates are not a "manifest requirement" under CEPA 1999 or EIHWHRM and, therefore, are not a requirement for any of the three relevant international agreements including the "Bilateral Agreement".

Should the remedy of replacing the phrase "*exporter or importer*" within Section 36. (1) of EIHWHRM" with the words "authorized facility of disposal or recycling", the Canadian party to the "Bilateral Agreement" would have to comply with Article 5, section 3 (above).

The "Bilateral Agreement" also states:

Article 7 – Enforcement:

*"The Parties shall ensure, to the extent possible, that within their respective jurisdictions, their domestic laws and regulations are enforced with respect to the transportation, storage, treatment and disposal of transboundary shipments of hazardous waste and other waste."*

The applicant contends that it is sufficient that the Americans apply their own enforcement of their local laws and their obligations under the three international agreements without the need of the intrusion of the provisions of Section 36.

C) Section 36 violates Canadians' expectations of fair justice

In *R. v. Gibbons, 2003 ABPC 114*, the court reiterated the legal concept of reasonable doubt (paragraph 20) namely,

- (i) *the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;*
- (ii) *the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;*
- (iii) *a reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense;*
- (iv) *it is logically connected to the evidence or absence of evidence;*
- (v) *it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and*
- (vi) *more is required than proof that the accused is probably guilty (emphasis added)*



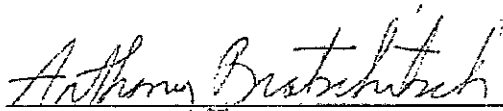
The application of Section 36 clearly places an inference of guilt onto an exporter and a person in Canada when an American facility does not provide a Certificate for whatever the reason.

This is not fair.

This application will be supported by the following material:

1. Canada Gazette Part II, Volume 139, No. 11: Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations
2. The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992

December 19, 2010

  
(Signature of applicant)

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel (289) 260-1153

SOR/2004-283, ss. 35 and 38

ORIGINAL COPY DESTROYED

DEC 23 2019

*L. G. Grimes*  
4:09

DEC 20 2010  
DEC 20 2010  
20

ABIGAIL GRIMES  
REGISTRY OFFICER  
AGENT DU GREFFE

FORM 301- Rule 301

**NOTICE OF APPLICATION**

Court File No. T-2176-10

Federal Court

Between:

Anthony Bratschitsch on his own behalf  
and on behalf of 876947 Ontario Limited o/a RPR Environmental  
and Patrick Whitty

Applicants

And

The Attorney General of Canada  
as represented by the Minister of the Environment  
and Renzo A. Benocci and Bradley May

Respondents

**NOTICE OF APPLICATION**

Application under sections 17, 18, 18.1 and 18.1(1) of the *Federal Courts Act*  
R.S.C. 1985, c. F-7 and Rule 302 of the Federal Court Rules, 1998.

**TO THE RESPONDENTS:**

The Attorney General of Canada as represented by the Minister of Environment;  
and Renzo A. Benocci and Bradley May

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief  
claimed by the applicant appears on page 3.

THIS APPLICATION will be heard by the Court at a time and place to be  
fixed by the Judicial Administrator. Unless the Court orders otherwise, the place  
of hearing will be as requested by the applicant. The applicant requests that this  
application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any  
step in the application or to be served with any documents in the application, you  
or a solicitor acting for you must prepare a notice of appearance in Form 305  
prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or

where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: DEC 29 2010  
JOHN GORNICK  
REGISTRY OFFICER  
Issued by: AGENT DU GREFFE  
(Registry Officer) 189 Queen Street West 180, rue Queen Ouest  
suite 200 bureau 200  
Toronto, Ontario Toronto, Ontario  
Address of local office: M5V 3L6 M5V 3L6

TO:

The Attorney General of Canada  
Department of Justice  
284 Wellington St.  
Ottawa, Ontario K1A 0H8

The Minister of Environment  
The Honourable John Baird  
Les Terrasses de la Chaudière  
10 Wellington Street, 28<sup>th</sup> Floor  
Hull, Quebec K1A 0H3

Mr. Renzo A. Benocci  
c/o National Director of Environmental Enforcement Directorate  
Enforcement Branch Headquarters, Environment Canada  
351, St-Joseph Blvd., 17<sup>th</sup> Floor  
Gatineau, Quebec K1A 0H3

Mr. Bradley May  
c/o Manager, Investigation Services  
Environment Canada  
4905 Dufferin Street,  
Toronto, Ontario M3H 5T4

## APPLICATION

This is an application for judicial review in respect of a matter commencing on January 11, 2008, with no decision or result being received, by the National Director of Environmental Enforcement Directorate, Enforcement Branch of Environment Canada ("ECE"), on behalf of the Minister of Environment, regarding 876947 Ontario Limited operating as RPR Environmental ("RPR") and Patrick Whitty and Bailey Mylleville pursuant to Section 17 of the *Canadian Environmental Protection Agency, 1999 Act* ("CEPA 1999").

The applicants make application for:

- (a) an order setting aside the matter commenced by the Minister of Environment on January 11, 2008, to investigate RPR and Patrick Whitty and Bailey Mylleville pursuant to Section 17 of CEPA 1999;

or, in the alternative,

- (b) an order for *mandamus* compelling the Minister of Environment to send a copy of the final report of the investigation to RPR and Patrick Whitty pursuant to Section 21.(2) of CEPA 1999;

and

- (c) a declaration that the investigation was time barred under Section 275.(1) of CEPA 1999;

and

- (d) an order to void a Warrant to Search signed on March 25, 2008 and executed on March 27, 2008;

or, in the alternative,

- (e) a declaration that the search was illegal;

and

- (f) a declaration that Renzo A. Benocci, then National Director of Environmental Enforcement Directorate, Enforcement Branch of Environment Canada ("ND-EED"), was in violation of his responsibilities as detailed in the *Procedures relating to section 17: Requests for Investigation of alleged offences under the Canadian Protection Act, 1999* ("Procedures") and pursuant to Section 2.(1) and Section 2.(1)(o) of CEPA 1999;

and

- (g) a declaration that Renzo A. Benocci committed an error of law by disregarding evidence of which he had knowledge of;

and

- (h) a declaration that Bradley May, then Manager, Investigation Section, Ontario Region – Toronto, Environment Canada, committed an error of law by disregarding evidence of which he had knowledge of; and of acting contrary to law by providing misleading information;

and

- (i) an order or writ to a competent authority to verify the legal status of the complainant of the Section 17 Application dated December 12, 2007, in the possession of the ND-EED;

and

- (j) a declaration that Patrick Whitty's right to liberty under Section 7 of the Canadian Charter of Rights and Freedoms ("Charter") had been infringed upon;

and

- (k) relief from the court as it deems necessary under Section 24.(1) of the Charter;

and

- (l) such other relief as this Honourable Court may deem appropriate;

and

- (m) costs.

The grounds for the application are:

1. Anthony Bratschitsch is a Canadian citizen and resident. He is employed as a consultant working in the environmental industry. He has unique knowledge of information directly affecting the other applicants regarding this application and, having its permission, seeks to act on behalf of RPR. He also seeks public interest standing as established by the Supreme Court of Canada in cases such as *Chaouilli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 and *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147 in that:
  - (a) The issue raises serious legal questions;
  - (b) The applicant has a genuine interest as a citizen in the resolution of the questions; and
  - (c) That there is no other reasonable and effective means in which the questions may be brought to court.
2. Patrick Whitty is a Canadian citizen and resident. He is the co-owner, director and general manager of 876947 Ontario Limited o/a RPR Environmental, located in Stoney Creek, Ontario, one of three related companies involved in the handling of hazardous and non-hazardous materials. At the time of the commencement of the Section 17 investigation, he was in business for eighteen years.
3. Renzo A. Benocci was the then National Director of Environmental Enforcement Directorate, Enforcement Branch of Environment Canada ("ND-EED"). By virtue of paragraph 24(2)(d) of the *Interpretation Act*, and for the purpose of Sections 17 to 21 of CEPA 1999, he acted for and behalf of the Minister of Environment and also in his own name.
4. Bradley May was the then Manager, Investigation Section, Ontario Region – Toronto, Environment Canada Enforcement Branch ("ECE").
5. The application for judicial review is based on the standard of correctness of the matter regarding the investigation, which concerns questions of law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, paragraph 50).
6. Section 17. (1) of CEPA 1999 allows an eligible Canadian resident to submit a request for an investigation if that resident believes that an offence under the Act has occurred. The Procedures emphasize a strict adherence to the principles of CEPA 1999 and assign specific responsibilities to ECE officials. EC Legal Services is also required to confirm that the application meets all legal requirements and statutes. The ND-EED and other members of the Directorate must initial their approval of a Section 17 investigation request after due diligence has been exercised.

7. A Section 17 application was sent to the attention of the ND-EED on December 14, 2007. The complainant requested anonymity per Section 16(2) of CEPA 1999.
8. On the same day, Bradley May withdrew information concerning Patrick Whitty and one of the RPR companies on charges that were laid in September, 2007.
9. On the same day, Bradley May also decided to lay new information against RPR and Patrick Whitty regarding other alleged violations.
10. A few days earlier, November 29, 2007, Bradley May also approved another separate investigation of the same parties on an incident that occurred in 2006.
11. The Section 17 application was regarding an incident that occurred in The Township of Wainwright, Alberta, on December 1, 2000. Background information concerning this occurrence can be obtained at <http://www.canlii.org/en/ab/abca/doc/2010/2010abca23/2010abca23.html>.
12. The complainant wrote in his application "*Environment Canada personnel were made aware of the offences on March 31, 2006.*"
13. However, on January 21, 2008, the Manager of the EC Intelligence Unit in Edmonton, Alberta emailed Bradley May that the occurrence file had actually been forward to Bradley May in early 2001.
14. In his reply, Bradley May wrote that, for the purposes of a 2-year summary conviction timeline, he would use the complainant's information. He also wrote that the Section 17 investigation target date was before March 31, 2008.
15. On March 10, 2008, Renzo Benocci wrote a Progress Report to the complainant and, in the letter, stated, "*The Ontario Region has located a file related to the complaint last dated January 22, 2002.*" This is a confirmation of the earlier discoverability date that was presented to Bradley May by the Intelligence Unit.
16. On March 27, 2008, just within a few days of the March 31 deadline, ECE executed a search of RPR's facilities.
17. However, the Section 17 investigation was not presented in the Warrant or Information to Obtain when it was given to the justice for signing on March 25. The justice approved the warrant based on information provided concerning an unrelated investigation.



18. On March 26, 2008, one day after the signing of the warrant and one day before its execution, ECE added the Section 17 investigation and two other investigations onto the search warrant through an Enforcement Action Briefing Note (EAB) without the justice's knowledge and approval.
19. The applicants of this application for judicial review state that those three additional investigations would have been time barred at that date.
20. On July 5, 2010, RPR Environmental Inc. received an information disc from Environment Canada through the *Access to Information Act*. The disc contained 568 portable file documents, which, in turn, contained approximately 8,000 documents of varying size and matters.
21. On July 7, 2010, Anthony Bratschitsch, obtained the information disc from RPR for the purposes of researching new evidence concerning the known ECE investigations of RPR and Patrick Whitty.
22. It was during that research, that Anthony Bratschitsch first came across references to the Section 17 investigation.
23. On August 30, 2010, when Anthony Bratschitsch presented his preliminary findings of the investigation to Patrick Whitty, Mr. Whitty expressed that, until then, he was unaware of the investigation and of Section 17, itself.
24. On November 19, 2010, Anthony Bratschitsch provided a summary of his research of the information disc regarding the Section 17 investigation to Patrick Whitty.
25. In that summary, Anthony Bratschitsch expressed a suspicion that the complainant was not a legal Canadian resident. Although the Section 17 complainant did request anonymity as per Section 16.(2) of CEPA 1999 and although it appears that great effort was made to accommodate that request, Anthony Bratschitsch believed that he found a "partial" name on one of the PDF documents from the disc that belonged to the complainant. After a scope analysis was done on the complainant's letter, the applicants have reason to believe that the complainant is an American known to Patrick Whitty and that, if so, was not a legal resident of Canada, at least at the time of the complaint. In respect of privacy and confidentiality, and with awareness that these suspicions and findings may be wrong, the applicants would only provide this information to the Court, if it deemed so.
26. Considering that the search of March 27, 2008, was for a combined four investigations and that there were also two other investigations approved at the time and another approved later, the applicants state that RPR and Patrick Whitty were suffering from significant prejudice at the time from ECE.

8.

27. Furthermore, the timing of the Section 17 complaint is suspiciously close to the actions described in paragraphs 8, 9 and 10 that were performed by Bradley May.
28. Also taking into account that Bradley May ignored the evidence provided by EC's Intelligence Unit (paragraph 13) in favour of the complainant's, the applicants believe that they have reason to suspect foul play.
29. The applicants are currently unaware of the status of the investigation with the most recent information dating to 2009.
30. Concerning the nature of this matter for an application for judicial review, the applicants cite *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147, paragraph 69:

*"Moreover, the absence of a "decision" is not an absolute bar to an application for judicial review under the Federal Courts Act, and the role of the court has been found to extend beyond the review of formal decisions, and to include the review of a "diverse range of administrative action that does not amount to a 'decision or order' ..."*

31. The applicants allege that the Minister had made errors of law, as follows:
  - (a) Renzo Benocci ignored evidence (paragraph 15) regarding the discoverability date of the matter despite providing that evidence himself, in his letter of March 10, 2008;
  - (b) Bradley May ignored evidence (paragraph 13) despite receiving it from EC's Intelligence Unit on January 21, 2008;
  - (c) ECE acted contrary to law by adding three other investigations onto a signed warranted search without the justice's knowledge or approval;
  - (d) ECE acted contrary to the law by contravening Section 275.(1) of CEPA by proceeding with the Section 17 investigation beyond two-years after the Minister became aware of the matter;
  - (e) ECE acted contrary to the law by failing to respect the Constitution and laws of Canada pursuant to Section 2.(1) and to apply and enforce the Act in a fair, predictable and consistent manner pursuant to Section 2.(1)(b) of CEPA 1999;
  - (f) ECE failed to observe a principle of natural justice by neglecting to advise RPR and Patrick Whitty that they were under investigation (the "hearing rule");
  - (g) ECE violated a principle of natural justice by adding the three investigations, as per paragraph 31.(c) (the "bias rule").

32. The applicants allege that the Minister infringed Patrick Whitty's right to liberty under Section 7 of The Canadian Charter of Rights and Freedoms ("Charter"). Even though Patrick Whitty was not aware that he was being investigated, as a director of RPR, he was at risk of being charged for an offence under Sections 272(1), 272.(2), 280(1) and 280.1(1) of CEPA 1999 which provides for the possibility of imprisonment.

The following material will support this application:

1. Information disc obtained from Environment Canada through the Access to Information Act (note: this disc contains 568 portable file documents (PDF) that were given an alphanumeric identity by Environment Canada. All of the below attachments that the applicants have drawn from this disc have the corresponding EC alphanumeric identity and page numbers.)
2. Memorandum to Associate Deputy Minister 04945-A0079618 p. 66-68
3. Application To the Minister For An Investigation Of An Offence(s) Under CEPA, i.e. "Complaint". 02641-A0079622 pages 33-34
4. WILL SAY of Bradley May 05811-A0079115 page 3
5. WILL SAY of Bradley May 04543-A0079608 pages 11-12
6. Procedures relating to section 17: Requests for Investigation of alleged offences under the Canadian Protection Act, 1999 (CEPA 1999) draft 04945-A0079618 pages 73-85
7. Email from Bradley May: initiate investigation 04945-A0079618 page 56
8. Enforcement Action Briefing Note 2008/01/17 06344-A0079589 p 26-27
9. Chain of email messages on discoverability 04945-A0079618
10. Progress Report, March 10: discoverability date 04731-A0079616 p. 84
11. Enforcement Action Briefing Note 05220-A0079112 pages 67-68
12. Warrant To Search and Information To Obtain A Search Warrant
13. Enforcement Action Briefing Note: 4 investigations 07032-A0079110 pages 1-3
14. ECE email confirmation of search warrant execution on March 27, 2008 05220-A0079112 page 74
15. ECE email indicating section 17 investigation ongoing in 2009

December 28, 2010



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel (289) 260-1153

SOR/2004-283, ss. 35 and 38

OFFICE OF A TRUE COPY ADMITTED ON

DEC 30 2010

221  
CANADA  
*[Signature]*  
3:51

I HEREBY CERTIFY that the above document is a true copy of  
the original of *7* DEC 29 2010

day of \_\_\_\_\_

Dated this \_\_\_\_\_ day of DEC 29 2010

*[Signature]*

**Sims, Michael**

---

**From:** Sims, Michael  
**Sent:** January 11, 2011 12:17 PM  
**To:** 'Jessome, Kimberley [NCR]'  
**Subject:** RE: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

**Attachments:**



Hi Kim,



Michael

Michael J. Sims  
Counsel | Avocat  
Department of Justice Canada | Ministère de la Justice Canada  
Tel. / Tél.: (416) 952-7116

-----Original Message-----

**From:** Jessome, Kimberley [NCR] [<mailto:Kimberley.Jessome@ec.gc.ca>]  
**Sent:** January 10, 2011 3:50 PM  
**To:** Sims, Michael  
**Cc:** Jessome, Kimberley (EC)  
**Subject:** RE: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

Hi Michael,



Thanks,

Kim

Kim Jessome-Lortie

Avocate | Legal Counsel  
Ministère de la Justice Canada | Department of Justice Canada Service juridique, Environnement Canada | Environment  
Canada Legal Services 351, boul. St-Joseph | 351 St-Joseph Blvd.  
Gatineau QC K1A 0H3  
Téléphone (819) 934-5192 | Fax (819) 953-9110 Gouvernement du Canada | Government of Canada

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-----Original Message-----

From: Sousa, Michael [NCR]  
Sent: January 6, 2011 8:14 AM  
To: 'Sims, Michael'  
Cc: Mercier, Melanie-Anne [NCR]; Jessome, Kimberley [NCR]  
Subject: RE: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

s.23

Michael: Kimberly Jessome of our unit will be the DLSU contact on this file.

Cheers,

Mike

Michael Sousa  
Avocat général/General Counsel  
Directeur adjoint/Deputy Director  
Service juridique, Environnement Canada/Environment Canada Legal Services Justice Canada 351, boul. St-Joseph  
Gatineau, QC K1A 0H3  
Tel: 819 934-6642  
Fax: 819 953-9110

-----Original Message-----

From: Sousa, Michael [NCR]  
Sent: January 4, 2011 3:56 PM  
To: 'Sims, Michael'  
Cc: Sousa, Michael [NCR]  
Subject: RE: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

Thanks for your email, Michael.

Cheers,

Mike

Michael Sousa  
Avocat général/General Counsel  
Directeur adjoint/Deputy Director  
Service juridique, Environnement Canada/Environment Canada Legal Services Justice Canada 351, boul. St-Joseph  
Gatineau, QC K1A 0H3  
Tel: 819 934-6642  
Fax: 819 953-9110

-----Original Message-----

From: Sims, Michael [<mailto:Michael.Sims@justice.gc.ca>]

Sent: January 4, 2011 3:03 PM  
To: Sousa, Michael [NCR]  
Subject: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

Michael,

We have been served with the two attached notices of application for judicial review. They are related, both to each other and to a series of proceedings against Environment Canada and the PPSC arising out of the prosecution of RPR Environmental.

Please let me know when counsel from your office has been assigned to these matters.

> > <<Bratschitsch -Notice of Application.pdf>> > > <<Bratsch. et al  
> > -Notice of Application.pdf>>

>

Regards,

Michael

Michael J. Sims  
Counsel | Avocat  
Regulatory Law | La loi du droit réglementaire Department of Justice Canada | Ministère de la Justice Canada Ontario  
Regional Office | Bureau régional de l'Ontario 130 King Street West | 130, rue King ouest Suite 3400 | pièce 3400 Toronto,  
Ontario M5X 1K6 Tel. / Tél.: (416) 952-7116 Fax / Téléc.: (416) 973-4323 E-mail / courriel.: michael.sims@justice.gc.ca

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>

**Pages 1238 to / à 1241**  
**are not relevant**  
**sont non pertinentes**





**Department of Justice  
Canada**

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

**Ministère de la Justice  
Canada**

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Released under the Access to Information Act /  
Divulgué(s) en vertu de la Loi sur l'accès à l'information.

Tel: (416) 952-7114  
Fax: (416) 973-4323  
Email: Diane.Dyke@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

January 27, 2011

**VIA REGISTERED MAIL**

Kim Jessome-Lortie  
Place Vincent Massey  
351 St-Joseph Blvd  
6th Floor  
Gatineau, Quebec  
Canada  
K1A 0H3

Dear Ms. Jessome-Lortie,

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

As requested, I am sending the complete Affidavit of the Applicant in the above noted matter.

Yours truly,

Diane Dyke  
Legal Assistant for  
Michael J. Sims  
Counsel  
Regulatory Law Division

Enclosure

Canada

T-2112-10

FORM 80A - Rule 80

## AFFIDAVIT

FEDERAL COURT

BETWEEN:

ANTHONY BRATSCHITSCH

Applicant

and

THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA AND THE ATTORNEY  
GENERAL OF CANADA

Respondents

### AFFIDAVIT OF ANTHONY BRATSCHITSCH

I, Anthony Bratschitsch, of the Town of Dundas, in the amalgamated City of Hamilton, in the Province of Ontario SWEAR THAT:

1. I am a Canadian citizen and I am employed as a consultant in the environmental waste industry affected by Section 36 of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* (EIHWHRMR). The EIHWHRMR, published in the Canada Gazette, is provided as **Exhibit A**. Section 36 is found on page 1220;
2. I am very knowledgeable of EIHWHRMR, the *Canadian Environmental Protection Act, 1999* (CEPA 1999) and the three relevant international agreements affecting the transboundary movement of hazardous wastes referred to in Item No. 8 in the Application. One of those three international agreements, *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, Amended 1992*, commonly known as "The Bilateral Agreement", is used to bridge the discrepancies of the other two international agreements to accommodate Canadian and American requirements. A copy of The Bilateral Agreement has been provided from Environment Canada's web site as **Exhibit B**;

3. I am also very knowledgeable of the typical operating procedures used by the hazardous waste industry that is utilized to achieve regulatory compliance, such as manifesting and tracking procedures;
4. I have known and provided industry-related services to Mr. Patrick Whitty and the three companies that he co-owns, including RPR Environmental Inc. (RPR), since 1998;
5. I am very knowledgeable of the facts involving the particular Environment Canada Enforcement (ECE) investigation of RPR and Mr. Whitty concerning alleged violations of Section 36 and of the subsequent prosecution. The ECE investigation file number (3007-2007-12-19-014) is shown on a copy of an ECE power point slide. This is **Exhibit C**.
6. The ECE Section 36 investigation and prosecution of RPR is a matter of public information and is of significant concern to the industry, for the reasons including fairness, predictability and consistency. **Exhibit D** is an internet publication by a reknown environmental law practioner, Dr. Dianne Saxe, detailing the Section 36 violation and her own reaction to it. Also, Environment Canada published an internet Enforcement Notification, last modified on August 11, 2009 (**Exhibit E**);
7. Dr. Saxe's internet publication refers to ECE enforcement and compliance in this manner (last paragraph) :

***We need it to be fair, and proportional to the real fault involved.***

As explained in the Application, the Canadian exporter has no control over the issuance of confirmations, commonly described as Certificates of Destruction, from the United States.

As a result, there is a perception in the industry of, at least, unfairness in the enforcement of Section 36 on Canadian exporters.

It is also my belief that there is no real fault because American legislation does not require the issuance of those Certificates, as explained in the Application.

8. Section 2.(1)(o) of CEPA 1999 states


*2. (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),*

*(o) apply and enforce this Act in a fair, predictable and consistent manner.*

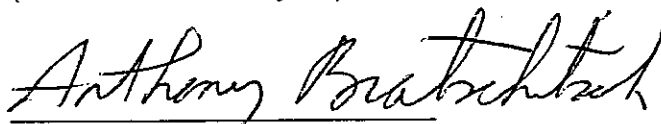
9. The *Canadian Manifesting Mechanism Will Say* of Mr. Joachim Wittwer, Head of Operations Section, Waste Management Division of Environment Canada succinctly describes the functions and applications of various mechanisms used to ensure compliance with CEPA 1999 and The Bilateral Agreement for the transboundary movement of hazardous waste. Mr. Wittwer's document also refers to the importance of each country's domestic legislation. As stated in the Application, the Certificates of Destruction specified in Section 36 of EIHWHRMR are not part of The Bilateral Agreement. Mr. Wittwer's Will Say also does not make any reference to confirmations or Certificates of Destruction. It is clear that the confirmations or Certificates of Destruction are not a requirement of the international agreements governing the transboundary movement of hazardous wastes. Mr. Wittwer's Will Say is provided as **Exhibit F**.

Sworn (or Affirmed) before me at the City of Hamilton in the Province of Ontario

on January 24, 2011 (date).

  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

  
Anthony Bratschitsch  
(Signature of Deponent)

Exhibits :

- A. Canada Gazette Part II, Volume 139, No. 11: *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*
- B. *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992*
- C. Environment Canada Enforcement power point slide identifying investigation file and Section 36 investigation
- D. Internet publication by Dr. Dianne Saxe publishing information about concerns over the fairness of the enforcement of the Section 36 regulation
- E. Internet Publication by Environment Canada
- F. *Canadian Manifesting Mechanism Will Say* of Joachim Wittwer, Head of Operations Section, Waste Management Division of Environment Canada

**A**

This is Exhibit A referred to in the Affidavit  
of Anthony Bratschkov  
sworn before me on this 24<sup>th</sup> day  
of January, 2011

[Signature]  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

Vol. 139, No. 11

Vol. 139, n° 11

# Canada Gazette



# Gazette du Canada

## Part II

## Partie II

OTTAWA, WEDNESDAY, JUNE 1, 2005

OTTAWA, LE MERCREDI 1<sup>er</sup> JUIN 2005

Statutory Instruments 2005

Textes réglementaires 2005

SOR/2005-131 to 159 and SI/2005-43 to 53

DORS/2005-131 à 159 et TR/2005-43 à 53

Pages 1036 to 1356

Pages 1036 à 1356

### NOTICE TO READERS

The *Canada Gazette* Part II is published under authority of the *Statutory Instruments Act* on January 12, 2005, and at least every second Wednesday thereafter.

Part II of the *Canada Gazette* contains all "regulations" as defined in the *Statutory Instruments Act* and certain other classes of statutory instruments and documents required to be published therein. However, certain regulations and classes of regulations are exempted from publication by section 15 of the *Statutory Instruments Regulations* made pursuant to section 20 of the *Statutory Instruments Act*.

The *Canada Gazette* Part II is available in most libraries for consultation.

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The *Canada Gazette* is also available free of charge on the Internet at <http://canadagazette.gc.ca>. It is accessible in PDF (Portable Document Format) and in HTML (HyperText Mark-up Language) as the alternate format.

Copies of Statutory Instruments that have been registered with the Clerk of the Privy Council are available, in both official languages, for inspection and sale at Room 418, Blackburn Building, 85 Sparks Street, Ottawa, Canada.

### AVIS AU LECTEUR

La *Gazette du Canada* Partie II est publiée en vertu de la *Loi sur les textes réglementaires* le 12 janvier 2005, et au moins tous les deux mercredis par la suite.

La Partie II de la *Gazette du Canada* est le recueil des « règlements » définis comme tels dans la loi précitée et de certaines autres catégories de textes réglementaires et de documents qu'il est prescrit d'y publier. Cependant, certains règlements et catégories de règlements sont soustraits à la publication par l'article 15 du *Règlement sur les textes réglementaires*, établi en vertu de l'article 20 de la *Loi sur les textes réglementaires*.

On peut consulter la *Gazette du Canada* Partie II dans la plupart des bibliothèques.

Pour les résidents du Canada, le prix de l'abonnement annuel à la *Gazette du Canada* Partie II est de 67,50 \$ et le prix d'un exemplaire, de 3,50 \$. Pour les résidents d'autres pays, le prix de l'abonnement est de 67,50 \$US et le prix d'un exemplaire, de 3,50 \$US. Veuillez adresser les commandes à : Publications du gouvernement du Canada, Travaux publics et Services gouvernementaux Canada, Ottawa, Canada K1A 0S5.

La *Gazette du Canada* est aussi disponible gratuitement sur Internet au <http://gazetteducanada.gc.ca>. La publication y est accessible en format PDF (Portable Document Format) et en HTML (langage hypertexte) comme média substitut.

Des exemplaires des textes réglementaires enregistrés par le greffier du Conseil privé sont à la disposition du public, dans les deux langues officielles, pour examen et vente à la Pièce 418, Édifice Blackburn, 85, rue Sparks, Ottawa, Canada.

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

Registration  
SOR/2005-149 May 17, 2005

Enregistrement  
DORS/2005-149 Le 17 mai 2005

CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999

LOI CANADIENNE SUR LA PROTECTION DE  
L'ENVIRONNEMENT (1999)

**Export and Import of Hazardous Waste and  
Hazardous Recyclable Material Regulations**

**Règlement sur l'exportation et l'importation de  
déchets dangereux et de matières recyclables  
dangereuses**

P.C. 2005-930 May 17, 2005

C.P. 2005-930 Le 17 mai 2005

Whereas, pursuant to subsection 332(1)<sup>a</sup> of the *Canadian Environmental Protection Act, 1999*<sup>b</sup>, the Minister of the Environment published in the *Canada Gazette, Part I*, on March 20, 2004 a copy of the proposed *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, substantially in the annexed form, and persons were given an opportunity to file comments with respect to the proposed Regulations or to file a notice of objection requesting that a board of review be established and stating the reasons for the objection;

Attendu que, conformément au paragraphe 332(1)<sup>a</sup> de la *Loi canadienne sur la protection de l'environnement (1999)*<sup>b</sup>, le ministre de l'Environnement a fait publier dans la *Gazette du Canada Partie I*, le 20 mars 2004, le projet de règlement intitulé *Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuses*, conforme en substance au texte ci-après, et que les intéressés ont ainsi eu la possibilité de présenter leurs observations à cet égard ou un avis d'opposition motivé demandant la constitution d'une commission de révision,

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to section 191 of the *Canadian Environmental Protection Act, 1999*<sup>b</sup>, hereby makes the annexed *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*.

À ces causes, sur recommandation du ministre de l'Environnement et en vertu de l'article 191 de la *Loi canadienne sur la protection de l'environnement (1999)*<sup>b</sup>, Son Excellence la Gouverneure générale en conseil prend le *Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuses*, ci-après.

<sup>a</sup> S.C. 2004, c. 15, s. 31  
<sup>b</sup> S.C. 1999, c. 33

<sup>a</sup> L.C. 2004, ch. 15, art. 31  
<sup>b</sup> L.C. 1999, ch. 33



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

**EXPORT AND IMPORT OF HAZARDOUS WASTE  
AND HAZARDOUS RECYCLABLE  
MATERIAL REGULATIONS**

**TABLE OF CONTENTS**

**Interpretation**

- 1 Hazardous Waste
- 2 Hazardous Recyclable Material
- 3 *Transportation of Dangerous Goods Regulations*
- 4 Definitions

**PART 1**

**Notice**

- 5 Application
- 6-7 Notice Procedure
- 8 Content of Notice

**PART 2**

**Export**

- 9 Conditions
- 10-14 Movement Document

**PART 3**

**Import**

- 15 Department of National Defence Exemption
- 16 Conditions
- 17-21 Movement Document

**PART 4**

**Transit**

- 22 Conditions
- 23-27 Movement Document - Transits Through Canada
- 28-32 Movement Document - Transits Through a Country Other than Canada

**PART 5**

**Returns**

- 33 Application
- 34 Returns to Canada
- 35 Returns to the Country of Export

**PART 6**

**Miscellaneous Matters**

- 36 Confirmation of Disposal or Recycling
- 37 Liability Insurance
- 38 Export Reduction Plans
- 39 Environmentally Sound Management

**Consequential matters**

- 40 Consequential Amendment

**Repeal**

- 41 Repeal

**Coming into Force**

- 42 Coming into Force

**RÈGLEMENT SUR L'EXPORTATION ET  
L'IMPORTATION DE DÉCHETS DANGEREUX ET DE  
MATIÈRES RECYCLABLES DANGEREUSES**

**TABLE DES MATIÈRES**

**Définitions et interprétation**

- 1 Déchet dangereux
- 2 Matière recyclable dangereuse
- 3 *Règlement sur le transport des marchandises dangereuses*
- 4 Définitions

**PARTIE 1**

**Notification**

- 5 Champ d'application
- 6-7 Procédure de notification
- 8 Éléments de la notification

**PARTIE 2**

**Exportation**

- 9 Conditions
- 10-14 Document de mouvement

**PARTIE 3**

**Importations**

- 15 Exemption visant le ministère de la Défense nationale
- 16 Conditions
- 17-21 Document de mouvement

**PARTIE 4**

**Transit**

- 22 Conditions
- 23-27 Document de mouvement pour les transits au Canada
- 28-32 Document de mouvement pour les transits dans un pays autre que le Canada

**PARTIE 5**

**Renvois**

- 33 Champ d'application
- 34 Renvoi au Canada
- 35 Renvoi au pays d'exportation

**PARTIE 6**

**Dispositions générales**

- 36 Déclaration d'élimination ou de recyclage
- 37 Assurance responsabilité
- 38 Plans de réduction des exportations de déchets
- 39 Gestion écologiquement rationnelle

**Modification corrélative**

- 40 Modification corrélative

**Abrogation**

- 41 Abrogation

**Entrée en vigueur**

- 42 Entrée en vigueur

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

TABLE OF CONTENTS — <i>Continued</i>			TABLE DES MATIÈRES (suite)	
Schedule 1	Disposal Operations for Hazardous Waste	Annexe 1	Opérations d'élimination des déchets dangereux	
Schedule 2	Recycling Operations for Hazardous Recyclable Material	Annexe 2	Opérations de recyclage des matières recyclables dangereuses	
Schedule 3	Hazardous Wastes and Hazardous Recyclable Materials	Annexe 3	Déchets dangereux et matières recyclables dangereuses	
Schedule 4	Part 1 - Hazardous Wastes and Hazardous Recyclable Materials from Non-Specific Sources	Annexe 4	Partie 1 – Déchets dangereux et matières recyclables dangereuses de sources non spécifiques	
	Part 2 - Hazardous Wastes and Hazardous Recyclable Materials from Specific Sources		Partie 2 – Déchets dangereux et matières recyclables dangereuses de sources spécifiques	
Schedule 5	Environmentally Hazardous Substances	Annexe 5	Matières dangereuses pour l'environnement	
Schedule 6	Hazardous Constituents Controlled under Leachate Test and Regulated Limits	Annexe 6	Constituants dangereux faisant l'objet d'un contrôle au moyen de l'épreuve relative aux lixiviats et des limites réglementaires	
Schedule 7	Part 1 - Acute Hazardous Waste and Hazardous Recyclable Material Chemicals	Annexe 7	Partie 1 – Déchets dangereux et matières recyclables dangereuses (substances chimiques aiguës)	
	Part 2 - Hazardous Waste and Hazardous Recyclable Material Chemicals		Partie 2 – Déchets dangereux et matières recyclables dangereuses (substances chimiques)	
Schedule 8	Excluded Materials			
Schedule 9	Movement Document	Annexe 8	Matières exclues	
Schedule 10	Persistent Organic Pollutants	Annexe 9	Document de mouvement	
		Annexe 10	Substances polluantes organiques persistantes	

**EXPORT AND IMPORT OF HAZARDOUS  
WASTE AND HAZARDOUS RECYCLABLE  
MATERIAL REGULATIONS**

**DEFINITIONS AND INTERPRETATION**

Definition of  
"hazardous  
waste"

1. (1) In Division 8 of Part 7 and Part 10 of the Act and in these Regulations, "hazardous waste" means anything that is intended to be disposed of using one of the operations set out in Schedule 1 and that

- (a) is set out in column 2 of Schedule 3;
- (b) is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (c) is set out in column 2 of Schedule 4 and is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (d) is set out in column 1 of Schedule 5 in a concentration equal to or greater than the applicable concentration set out in column 2 of that Schedule;
- (e) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure*, July 1992, in *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, Third Edition, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3;
- (f) is set out in column 2 of Schedule 7, is pure or is the only active ingredient, and is unused; or
- (g) according to information that Canada has received from the United States or in accordance with the Convention, is considered or defined as hazardous under the legislation of the country receiving it and is prohibited by that country from being imported or conveyed in transit.

Exclusion

(2) The definition "hazardous waste" in subsection (1) does not include anything that is

- (a) exported, imported or conveyed in transit in a quantity of less than 5 kg or 5 L per shipment or, in the case of mercury, in a quantity of less than 50 mL per shipment, other than anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*;
- (b) collected from households in the course of regular municipal waste collection services; or
- (c) part of the exporter's or importer's personal effects or household effects not resulting from commercial use.

**RÈGLEMENT SUR L'EXPORTATION  
ET L'IMPORTATION DE DÉCHETS  
DANGEREUX ET DE MATIÈRES  
RECYCLABLES DANGEREUSES**

**DÉFINITIONS ET INTERPRÉTATION**

Définition de  
« déchet  
dangereux »

1. (1) Pour l'application de la section 8 de la partie 7 et de la partie 10 de la Loi et du présent règlement, « déchet dangereux » s'entend de toute chose qui est destinée à être éliminée selon une opération prévue à l'annexe 1 et qui répond à l'une ou l'autre des conditions suivantes :

- a) elle figure à la colonne 2 de l'annexe 3;
- b) elle est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- c) elle figure à la colonne 2 de l'annexe 4 et est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- d) elle figure à la colonne 1 de l'annexe 5 et se trouve dans une concentration égale ou supérieure à la concentration applicable prévue à la colonne 2 de cette annexe;
- e) produit un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de cette annexe, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, 3<sup>e</sup> édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3;
- f) elle figure à la colonne 2 de l'annexe 7, elle est pure ou est le seul ingrédient actif, et elle est inutilisée;
- g) selon les informations que le Canada a obtenues des États-Unis ou aux termes de la Convention, elle est considérée ou définie comme dangereuse par la législation du pays où elle est destinée et son importation ou son transit est interdit dans ce pays.

(2) Ne sont pas considérés comme des déchets dangereux :

- a) les déchets qui sont exportés ou importés ou qui transitent en une quantité inférieure à 5 kg ou 5 L par envoi ou, dans le cas de mercure, en une quantité inférieure à 50 mL par envoi, sauf ceux qui sont compris dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*;
- b) ceux qui sont enlevés dans le cours normal des services municipaux d'enlèvement des ordures ménagères;

Exceptions

Definition of  
"hazardous  
recyclable  
material"

2. (1) In Division 8 of Part 7 and Part 10 of the Act and in these Regulations, "hazardous recyclable material" means anything that is intended to be recycled using one of the operations set out in Schedule 2 and that

- (a) is set out in column 2 of Schedule 3;
- (b) is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (c) is set out in column 2 of Schedule 4 and is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (d) is set out in column 1 of Schedule 5 in a concentration equal to or greater than the applicable concentration set out in column 2 of that Schedule;
- (e) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure*, July 1992, in *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, Third Edition, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3;
- (f) is set out in column 2 of Schedule 7, is pure or is the only active ingredient, and is unused; or
- (g) according to information that Canada has received from the United States or in accordance with the Convention, is considered or defined as hazardous under the legislation of the country receiving it and is prohibited by that country from being imported or conveyed in transit.

Exclusion

(2) The definition "hazardous recyclable material" in subsection (1) does not include anything that is

- (a) exported, imported or conveyed in transit in a quantity of less than 5 kg or 5 L per shipment or, in the case of mercury, in a quantity of less than 50 mL per shipment, other than anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*;
- (b) collected from households in the course of regular municipal waste collection services;
- (c) part of the exporter's or importer's personal effects or household effects not resulting from commercial use;
- (d) exported to, imported from, or conveyed in transit through a country that is a party to OECD Decision C(2001)107/Final and that

c) ceux qui font partie des effets personnels ou des articles ménagers de l'exportateur ou de l'importateur et qui ne résultent pas d'un usage commercial.

2. (1) Pour l'application de la section 8 de la partie 7 et de la partie 10 de la Loi et du présent règlement, « matière recyclable dangereuse » s'entend de toute chose qui est destinée à être recyclée selon une opération prévue à l'annexe 2 et qui répond à l'une ou l'autre des conditions suivantes :

- a) elle figure à la colonne 2 de l'annexe 3;
- b) elle est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- c) elle figure à la colonne 2 de l'annexe 4 et est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- d) elle figure à la colonne 1 de l'annexe 5 et se trouve dans une concentration égale ou supérieure à la concentration applicable prévue à la colonne 2 de cette annexe;
- e) elle produit un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de cette annexe, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, 3<sup>e</sup> édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3;
- f) elle figure à la colonne 2 de l'annexe 7, elle est pure ou est le seul ingrédient actif, et elle est inutilisée;
- g) selon les informations que le Canada a obtenues des États-Unis ou aux termes de la Convention, elle est considérée ou définie comme dangereuse par la législation du pays où elle est destinée et son importation ou son transit est interdit dans ce pays.

Définition de  
« matière  
recyclable  
dangereuse »

(2) Ne sont pas considérées comme des matières recyclables dangereuses :

- a) les matières qui sont exportées ou importées ou qui transitent en une quantité inférieure à 5 kg ou 5 L par envoi ou, dans le cas de mercure, en une quantité inférieure à 50 mL par envoi, sauf celles qui sont comprises dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*;
- b) celles qui sont enlevées dans le cours normal des services municipaux d'enlèvement des ordures ménagères;
- c) celles qui font partie des effets personnels ou des articles ménagers de l'exportateur ou de l'importateur et qui ne résultent pas d'un usage commercial;

Exceptions

- (i) is in a quantity of 25 kg or 25 L or less,
- (ii) is exported or imported for the purpose of conducting measurements, tests or research with respect to the recycling of that material,
- (iii) is accompanied by a shipping document, as defined in section 1.4 of the *Transportation of Dangerous Goods Regulations*, that includes the name and address of the exporter or importer and the words "test samples" or "échantillons d'épreuve", and
- (iv) is not and does not contain an infectious substance as defined in section 1.4 of the *Transportation of Dangerous Goods Regulations*; or
- (e) exported to, imported from, or conveyed in transit through a country that is a party to OECD Decision C(2001)107/Final and that
  - (i) is set out in Schedule 8,
  - (ii) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure*, July 1992, in *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods, Third Edition*, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3, and
  - (iii) is intended to be recycled at an authorized facility in the country of import using one of the operations set out in Schedule 2.

d) celles qui sont exportées dans un pays partie à la décision C(2001)107/Final de l'OCDE, qui en sont importées ou qui y transitent, et qui, à la fois :

- (i) le sont en une quantité de 25 kg ou moins ou de 25 L ou moins,
- (ii) sont exportées ou importées aux fins d'évaluation, d'essai ou de recherche concernant leur recyclage,
- (iii) sont accompagnées d'un document d'expédition, au sens de l'article 1.4 du *Règlement sur le transport des marchandises dangereuses*, qui porte les nom et adresse de l'exportateur ou de l'importateur, selon le cas, et la mention « échantillons d'épreuve » ou « test samples »,
- (iv) ne sont pas des matières infectieuses au sens de l'article 1.4 du *Règlement sur le transport des marchandises dangereuses*, et n'en contiennent aucune;

e) celles qui sont exportées dans un pays partie à la décision C(2001)107/Final de l'OCDE, qui en sont importées ou qui y transitent, et qui, à la fois :

- (i) figurent à l'annexe 8,
- (ii) produisent un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de l'annexe 6, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, 3<sup>e</sup> édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3,
- (iii) sont destinées à être recyclées dans une installation agréée dans le pays d'importation selon une opération prévue à l'annexe 2.

*Transportation of Dangerous Goods Regulations*

3. For the purposes of sections 1 and 2, references to the *Transportation of Dangerous Goods Regulations* shall be read as follows:

- (a) the reference to "public safety" in subparagraph 2.43(b)(i) shall be read as a reference to "the environment and human health"; and
- (b) subparagraph 2.43(b)(i) shall be read without reference to "during transport".

Definitions

"Act"  
« Loi »

"authorities of the country"  
« autorités du pays »

4. The following definitions apply in Division 8 of Part 7 of the Act and in these Regulations.

"Act" means the *Canadian Environmental Protection Act, 1999*.

"authorities of the country" means the competent authorities designated in the *Compilation of Country Fact Sheets (CFS)*, Basel Convention

3. Pour l'application de la définition de « déchet dangereux » prévue à l'article 1 et de la définition de « matière recyclable dangereuse » prévue à l'article 2, le *Règlement sur le transport des marchandises dangereuses* se lit avec les adaptations suivantes :

- a) « la santé publique » est remplacé par « l'environnement et la santé humaine », au sous-alinéa 2.43b)(i);
- b) « pendant le transport » est supprimé au sous-alinéa 2.43b)(i).

4. Les définitions qui suivent s'appliquent à la section 8 de la partie 7 de la Loi et au présent règlement.

« accord Canada-États-Unis » L'Accord entre le gouvernement du Canada et le gouvernement des États-Unis d'Amérique concernant les déplacements transfrontaliers de déchets dangereux,

*Règlement sur le transport des marchandises dangereuses*

Définitions

« accord Canada-États-Unis »  
« Canada-USA Agreement »

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

	Series No. 01/04, as amended from time to time, and the United States Environmental Protection Agency.	entré en vigueur le 8 novembre 1986, avec ses modifications successives.	
"authorized carrier" « transporteur agréé »	"authorized carrier" means a carrier that is authorized by the authorities of the jurisdiction in which the waste or material is transported, to transport the hazardous waste or hazardous recyclable material that is to be exported, imported or conveyed in transit.	"autorités du pays" Les autorités compétentes mentionnées dans le <i>Compilation of Country Fact Sheets (CFS)</i> , <i>Basel Convention Series No. 01/04</i> , avec ses modifications successives, ou la United States Environmental Protection Agency.	"autorités du pays" "authorities of the country"
"authorized facility" « installation agréée »	"authorized facility" means a facility that is authorized by the authorities of the jurisdiction in which the facility is located to (a) dispose of the hazardous waste being exported or imported using an operation set out in Schedule 1; or (b) recycle the hazardous recyclable material being exported or imported using an operation set out in Schedule 2.	"Convention" La Convention de Bâle sur le contrôle des mouvements transfrontières de déchets dangereux et de leur élimination, entrée en vigueur le 5 mai 1992. "décision C(94)152/Final de l'OCDE" La décision C(88)90/Final de l'Organisation de coopération et de développement économiques intitulée <i>Décision du conseil sur les mouvements transfrontières de déchets dangereux</i> , en date du 27 mai 1988 et modifiée par la décision C(94)152/Final intitulée <i>Décision du conseil portant amendement à la décision sur les mouvements transfrontières de déchets dangereux</i> , en date du 28 juillet 1994.	"Convention" "Convention" "décision C(94)152/Final de l'OCDE" "OECD Decision C(94)152/Final"
"Canada-USA Agreement" « accord Canada - États-Unis »	"Canada-USA Agreement" means the Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, which entered into force on November 8, 1986, as amended from time to time.	"décision C(2001)107/Final de l'OCDE" La décision C(2001)107/Final de l'Organisation de coopération et de développement économiques intitulée <i>Décision du conseil concernant la révision de la décision C(92)39/Final sur le contrôle des mouvements transfrontières de déchets destinés à des opérations de valorisation</i> , en date du 21 mai 2002.	"décision C(2001)107/Final de l'OCDE" "OECD Decision C(2001)107/Final"
"Convention" « Convention »	"Convention" means the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which entered into force on May 5, 1992.	"destinataire étranger" Toute personne qui importe des déchets dangereux ou des matières recyclables dangereuses dans un pays autre que le Canada.	"destinataire étranger" "foreign receiver"
"foreign exporter" « expéditeur étranger »	"foreign exporter" means the person who exports hazardous waste or hazardous recyclable material from a country other than Canada.	"document de mouvement" Document établi en la forme prévue à l'annexe 9.	"document de mouvement" "movement document"
"foreign receiver" « destinataire étranger »	"foreign receiver" means the person who imports hazardous waste or hazardous recyclable material into a country other than Canada.	"expéditeur étranger" Toute personne qui exporte des déchets dangereux ou des matières recyclables dangereuses d'un pays autre que le Canada.	"expéditeur étranger" "foreign exporter"
"movement document" « document de mouvement »	"movement document" means the form set out in Schedule 9.	"installation agréée" Installation qui est autorisée par les autorités du territoire où elle est située à, selon le cas : a) éliminer des déchets dangereux exportés ou importés selon une opération prévue à l'annexe 1; b) recycler des matières recyclables dangereuses exportées ou importées selon une opération prévue à l'annexe 2.	"installation agréée" "authorized facility"
"notice" « notification »	"notice" means the notice of export, import or transit referred to in paragraph 185(1)(a) of the Act.	"Loi" La Loi canadienne sur la protection de l'environnement (1999).	"Loi" "Act"
"OECD Decision C(94)152/Final" « décision C(94)152/Final de l'OCDE »	"OECD Decision C(94)152/Final" means Decision C(88)90/Final of the Organization for Economic Co-operation and Development, <i>Decision of the Council on Transfrontier Movements of Hazardous Wastes</i> , dated May 27, 1988, as amended by Decision C(94)152/Final, <i>Decision of the Council Amending the Decision on Transfrontier Movements of Hazardous Wastes</i> , dated July 28, 1994.	"notification" La notification préalable visée à l'alinéa 185(1)(a) de la Loi.	"notification" "notice"
"OECD Decision C(2001)107/Final" « décision C(2001)107/Final de l'OCDE »	"OECD Decision C(2001)107/Final" means Decision C(2001)107/Final of the Organization for Economic Co-operation and Development, <i>Decision of the Council Concerning the Revision of Decision C(92)39/FINAL on the Control of Transboundary Movements of Wastes Destined for Recovery Operations</i> , dated May 21, 2002.	"numéro d'immatriculation" Numéro qui est attribué par une province ou un pays et qui atteste du droit d'exercer une activité se rapportant aux déchets dangereux ou aux matières recyclables dangereuses.	"numéro d'immatriculation" "registration number"
"permit" « permis »	"permit" means the export, import or transit permit referred to in paragraph 185(1)(b) of the Act.		

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

"registration number"  
« numéro d'immatriculation »

"registration number" means the number assigned by a province or country indicating the authority to undertake an activity with respect to a hazardous waste or hazardous recyclable material.

« permis » Tout permis d'exportation, d'importation ou de transit visé à l'alinéa 185(1)b) de la Loi.

« permis »  
"permit"

« transporteur agréé » Transporteur autorisé, par les autorités du territoire où il effectue le transport, à transporter des déchets dangereux ou des matières recyclables dangereuses en vue de leur exportation, importation ou transit.

« transporteur agréé »  
"authorized carrier"

## PART I

### NOTICE

#### Application

Application 5. This Part applies to the export, import and transit of hazardous waste and hazardous recyclable material other than returns of that waste or material under Part 5.

#### Notice Procedure

Notice reference number 6. The Minister shall provide a notice reference number to any person who requests one for the purpose of submitting a notice.

Delivery of notice 7. (1) The person that proposes to export, import or convey in transit a hazardous waste or hazardous recyclable material must submit a notice to the Minister in writing within 12 months before the export, import or transit.

Separate notices (2) In the case of an export or import, the notice must not include both hazardous waste and hazardous recyclable material.

Notice for multiple hazardous wastes or hazardous recyclable materials (3) The notice may provide for more than one hazardous waste or more than one hazardous recyclable material, as the case may be, if they

- (a) are to be shipped
  - (i) to the same authorized facility at the same location,
  - (ii) through the same port of exit or the same port of entry, and
  - (iii) within the same 12-month period;
- (b) are to be reported to the same customs office;
- (c) originate from the same person and the same facility; and
- (d) in the case of an export or import, have essentially the same physical and chemical characteristics.

Language (4) In the case of an export or a transit where the French or English language is not acceptable to the authorities of the country of import or transit, the person who submits the notice must submit it in the French or English language and in a language used by those authorities.

Application for permit (5) The notice shall serve as an application for a permit.

New notice (6) A person must submit a new notice to the Minister if there is a change to any of the information contained in the permit, except that the person

## PARTIE 1

### NOTIFICATION

#### Champ d'application

5. La présente partie s'applique à l'exportation, à l'importation et au transit de déchets dangereux et de matières recyclables dangereuses, sauf s'il s'agit d'un renvoi visé à la partie 5.

Champ d'application

#### Procédure de notification

6. Le ministre attribue un numéro de référence à quiconque en fait la demande pour une notification.

Numéro de référence de la notification

7. (1) Quiconque projette d'exporter, d'importer ou de faire transiter des déchets dangereux ou des matières recyclables dangereuses doit présenter au ministre une notification écrite, dans les douze mois précédant l'exportation, l'importation ou le transit.

Notification

(2) Dans le cas d'une exportation ou d'une importation, la notification ne peut viser à la fois des déchets dangereux et des matières recyclables dangereuses.

Objet de la notification

(3) La notification peut viser plusieurs déchets dangereux ou matières recyclables dangereuses, selon le cas, s'ils satisfont aux conditions suivantes :

Notification visant plus d'un déchet ou d'une matière

- a) ils seront expédiés, à la fois :
  - (i) à la même installation agréée et au même endroit,
  - (ii) par le même point de sortie ou d'entrée,
  - (iii) durant la même période de douze mois;
- b) ils seront déclarés au même bureau de douane;
- c) ils proviennent de la même personne et de la même installation;
- d) dans le cas d'une exportation ou d'une importation, ils ont essentiellement les mêmes propriétés physiques et chimiques.

(4) Dans le cas d'une exportation ou d'un transit, si l'utilisation du français ou de l'anglais n'est pas jugée acceptable par les autorités du pays d'importation ou de transit, l'auteur de la notification rédige celle-ci en français ou en anglais et dans une langue utilisée par ces autorités.

Langue

(5) La notification tient lieu de demande de permis.

Demande de permis

(6) Une nouvelle notification doit être présentée en cas de modification d'un renseignement figurant au permis. Toutefois, la présentation au ministre

Nouvelle notification

who submitted the notice may advise the Minister in writing of a change to quantity of hazardous waste or hazardous recyclable material or the number of shipments, or may add authorized carriers, ports of exit or entry or customs offices.

#### Content of Notice

Content

8. The person who submits the notice must include the following information in the notice:

- (a) the notice reference number provided by the Minister under section 6;
- (b) the name, registration number, civic, mailing and electronic addresses and telephone and facsimile numbers of, and the name of the contact person for,
  - (i) the person submitting the notice,
  - (ii) the foreign receiver or the foreign exporter, as the case may be,
  - (iii) the facility from which the hazardous waste or hazardous recyclable material will be shipped,
  - (iv) the authorized carriers that will transport the hazardous waste or hazardous recyclable material, and
  - (v) all authorized facilities that will receive the hazardous waste or hazardous recyclable material;
- (c) all modes of transport that will be used;
- (d) the proposed number of shipments;
- (e) the port of exit or the port of entry through which the export or import will take place, as the case may be and, in the case of a transit, the port of exit and entry through which the transit will take place;
- (f) the customs office at which the hazardous waste or hazardous recyclable material is to be reported, if applicable;
- (g) the proposed date of the first and last shipments or, in the case of a transit, the proposed dates of entry of the first shipment and exit of the last shipment;
- (h) the name of each insurance company and the policy number for each insurance policy required under these Regulations;
- (i) the countries of transit through which the hazardous waste or hazardous recyclable material will be conveyed and the length of time it will be in each country of transit;
- (j) the following information with respect to each hazardous waste or hazardous recyclable material, namely,
  - (i) the International Waste Identification Code under OECD Decision C(94)152/Final, substituting the disposal or recycling code with the disposal or recycling code set out in column 1 of Schedule 1 or 2 to these Regulations for the applicable operation set out in column 2 of that Schedule and, if the hazardous waste or hazardous recyclable material is a gas, substituting the letter G for the letter L, P or S in the International Waste Identification Code,

d'un simple avis écrit suffit dans le cas d'une modification de la quantité de déchets ou de matières ou du nombre d'envois ou de l'ajout d'un transporteur agréé, d'un point de sortie ou d'entrée ou d'un bureau de douane.

#### Éléments de la notification

8. L'auteur de la notification doit y inscrire les renseignements suivants :

Éléments de la notification

- a) le numéro de référence attribué par le ministre aux termes de l'article 6;
- b) les nom, numéro d'immatriculation, adresses municipale, postale et électronique et numéros de téléphone et de télécopieur des personnes et installations ci-après, ainsi que le nom de leur personne-ressource :
  - (i) l'auteur de la notification,
  - (ii) le destinataire étranger ou l'expéditeur étranger, selon le cas,
  - (iii) l'installation d'où proviendront les déchets dangereux ou les matières recyclables dangereuses,
  - (iv) les transporteurs agréés qui effectueront le transport,
  - (v) toutes les installations agréées où les déchets ou les matières seront reçus;
- c) les moyens de transport qui seront utilisés;
- d) le nombre d'envois prévus;
- e) le point de sortie ou d'entrée prévu pour l'exportation ou l'importation, selon le cas, ou, dans le cas d'un transit, les points de sortie et d'entrée prévus;
- f) le bureau de douane où seront déclarés les déchets ou les matières, le cas échéant;
- g) la date prévue pour les premier et dernier envois ou, dans le cas d'un transit, la date d'entrée prévue pour le premier envoi et la date de sortie prévue pour le dernier envoi;
- h) le numéro de chaque police d'assurance exigée par le présent règlement, ainsi que le nom de l'assureur;
- i) tout pays de transit des déchets ou des matières, ainsi que la durée du transit dans chaque pays;
- j) relativement à chaque déchet ou matière :
  - (i) le code international d'identification des déchets applicable selon la décision C(94)152/Final de l'OCDE, sauf que son code d'élimination ou de recyclage est remplacé par celui prévu à la colonne 1 des annexes 1 ou 2 du présent règlement pour l'opération applicable figurant à la colonne 2, et que les lettres « L », « P » ou « S » sont remplacées par la lettre « G » si le déchet ou la matière est un gaz,
  - (ii) si le pays d'importation, d'exportation ou de transit n'est pas partie à la décision C(2001)107/Final de l'OCDE, le code applicable figurant à la liste A de l'annexe VIII de la Convention, avec ses modifications successives,



- (ii) for hazardous waste, or for hazardous recyclable material that will be exported to, imported from or transited through a country that is not a party to OECD Decision C(2001)107/Final, the applicable code set out in List A of Annex VIII of the Convention, as amended from time to time,
- (iii) for hazardous recyclable material that will be exported to, imported from or transited through a country that is a party to OECD Decision C(2001)107/Final, the applicable code set out in Part II of Appendix 4 to that Decision,
- (iv) the tariff item and the statistical suffix set out in the *Customs Tariff Departmental Consolidation*, published by the Canada Border Services Agency, as amended from time to time,
- (v) the applicable identification number set out in column 1 of Schedule 3, 4 or 7 for the hazardous waste or hazardous recyclable material set out in column 2 of that Schedule, or the applicable hazardous constituent code number set out in column 1 of Schedule 6 for the hazardous constituent set out in column 2 of that Schedule,
- (vi) the following information set out in the applicable schedules to the *Transportation of Dangerous Goods Regulations*, namely:
  - (A) the applicable UN number set out in column 1 of Schedule 1 or column 5 of Schedule 3,
  - (B) the applicable class set out in column 3 of Schedule 1 or the primary class set out in column 4 of Schedule 3, and
  - (C) the applicable packing group and risk group set out in column 4 of Schedule 1,
- (vii) the total quantity in kilograms or litres of each hazardous waste or hazardous recyclable material,
- (viii) the applicable disposal or recycling code set out in column 1 of Schedule 1 or 2 for every applicable operation set out in column 2 of that Schedule, and the name and description of the processes to be employed with respect to those operations, and
- (ix) in the case of an export, the options considered for reducing or phasing out the export of the hazardous waste and the reason that the final disposal is taking place outside Canada;
- (k) the name, quantity and concentration of any persistent organic pollutant set out in column 2 of Schedule 10 that is contained in the hazardous waste or hazardous recyclable material, if the concentration is equal to or greater than the concentration set out in column 3;
- (l) distinct line item numbers for each hazardous waste or hazardous recyclable material;
- (m) in the case of an export or import, a copy of the contract or series of contracts, excluding financial information, or the statement referred to in paragraph 9(f) or 16(e); and
- (iii) si le pays d'importation, d'exportation ou de transit est partie à la décision C(2001)107/Final de l'OCDE, le code applicable figurant à la partie II de l'appendice 4 de la décision,
- (iv) le numéro tarifaire et le suffixe de statistique selon la *Codification ministérielle du Tarif des douanes*, publiée par l'Agence des services frontaliers du Canada, avec ses modifications successives,
- (v) le numéro d'identification applicable prévu à la colonne 1 des annexes 3, 4 ou 7 pour le déchet ou la matière figurant à la colonne 2 ou le numéro de code du constituant dangereux applicable prévu à la colonne 1 de l'annexe 6 pour le constituant dangereux figurant à la colonne 2,
- (vi) les renseignements ci-après, tirés des annexes applicables du *Règlement sur le transport des marchandises dangereuses* :
  - (A) le numéro UN applicable prévu à la colonne 1 de l'annexe 1 ou à la colonne 5 de l'annexe 3,
  - (B) la classe applicable prévue à la colonne 3 de l'annexe 1 ou la classe primaire applicable prévue à la colonne 4 de l'annexe 3,
  - (C) le groupe d'emballage/groupe de risque applicable prévu à la colonne 4 de l'annexe 1,
- (vii) le poids en kilogrammes ou le volume en litres de chaque déchet ou matière,
- (viii) le code d'élimination ou de recyclage prévu à la colonne 1 des annexes 1 ou 2 pour toutes les opérations applicables figurant à la colonne 2, ainsi que le nom et la description du processus qui sera mis en œuvre,
- (ix) dans le cas d'une exportation, les solutions qui ont été envisagées en vue de réduire ou de supprimer les exportations de déchets et les raisons pour lesquelles l'élimination a lieu à l'étranger;
- k) les nom, quantité et concentration de toute substance polluante organique persistante visée à la colonne 2 de l'annexe 10 qui se trouve dans les déchets ou les matières, si la concentration est égale ou supérieure à la concentration applicable prévue à la colonne 3;
- l) un numéro de ligne distinct pour chaque déchet ou matière;
- m) dans le cas d'une exportation ou d'une importation, une copie du contrat ou de la série de contrats, sans les renseignements financiers, ou de la déclaration qui sont visés aux alinéas 9f) ou 16e);
- n) une déclaration signée et datée par l'auteur de la notification, comportant ce qui suit :
  - (i) dans le cas d'une exportation ou d'une importation, une mention que le contrat ou la série de contrats visé aux alinéas 9f) ou 16e) est en vigueur.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

(n) a statement signed and dated by the person submitting the notice indicating that

(i) in the case of an export or import, the contract or series of contracts referred to in paragraph 9(f) or 16(e) is in force,

(ii) in the case of an export or import, if the hazardous waste cannot be disposed of or the hazardous recyclable material cannot be recycled in accordance with the export or import permit, the exporter or importer will implement the alternative arrangements required under Part 5 or, if alternative arrangements cannot be made, the exporter or importer will return the waste or material to the facility from which it originated in accordance with section 34 or 35,

(iii) the insurance policy referred to in section 37 will cover the period referred to in that section, and

(iv) the information in the notice is complete and correct.

## PART 2

### EXPORT

#### Conditions

Conditions of  
export

9. An exporter may export hazardous waste and hazardous recyclable material if

(a) at the time of the export

(i) the export is not prohibited under the laws of Canada,

(ii) the country of import is a party to the Convention, the Canada-USA Agreement or OECD Decision C(2001)107/Final and the import of the hazardous waste or hazardous recyclable material is not prohibited by that country, and

(iii) the country of transit does not prohibit the transit of the hazardous waste or hazardous recyclable material;

(b) the hazardous waste or hazardous recyclable material is not to be disposed of or recycled south of 60° south latitude;

(c) in the case of biomedical wastes set out in column 2 of Schedule 3 or anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*, the export is only for the purposes of disposal;

(d) the exporter is a resident of Canada or, in the case of a corporation, has a place of business in Canada;

(e) the exporter

(i) is the owner or operator of the facility from which the hazardous waste or hazardous recyclable material is exported, or

(ii) buys and sells hazardous recyclable material for the purposes of recycling and exports it to a country that is a party to OECD Decision C(2001)107/Final;

(ii) dans le cas d'une exportation ou d'une importation, si les déchets ne peuvent être éliminés ou les matières ne peuvent être recyclées conformément au permis d'exportation ou d'importation, un engagement de l'exportateur ou de l'importateur à mettre en œuvre les mesures de renvoi prévues à la partie 5 ou, à défaut, à ramener les déchets ou les matières à l'installation d'origine conformément aux articles 34 ou 35,

(iii) un engagement à maintenir en vigueur la police d'assurance visée à l'article 37 pour la période prévue à cet article,

(iv) une mention portant que les renseignements figurant à la notification sont complets et exacts.

## PARTIE 2

### EXPORTATIONS

#### Conditions

Conditions

9. L'exportation de déchets dangereux ou de matières recyclables dangereuses est assujettie aux conditions suivantes :

a) au moment de l'exportation :

(i) les lois du Canada n'en interdisent pas l'exportation,

(ii) le pays d'importation est partie à la Convention, à l'accord Canada - États-Unis ou à la décision C(2001)107/Final de l'OCDE et n'en interdit pas l'importation,

(iii) le pays de transit n'en interdit pas le transit;

b) l'élimination ou le recyclage n'aura pas lieu au sud du 60° degré de latitude Sud;

c) dans le cas d'un déchet biomédical figurant à la colonne 2 de l'annexe 3 ou de toute chose comprise dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*, le déchet ou la chose est exporté pour être éliminé;

d) l'exportateur est un résident du Canada ou, s'il s'agit d'une personne morale, il a un établissement au Canada;

e) l'exportateur, selon le cas :

(i) est le propriétaire ou l'exploitant de l'installation d'où les déchets ou les matières sont exportés,

(ii) achète ou vend, à des fins de recyclage, des matières exportées dans un pays qui est partie à la décision C(2001)107/Final de l'OCDE;

f) il existe un contrat ou une série de contrats écrit et signé par l'exportateur, le destinataire

(f) there is a signed, written contract or a series of contracts among the exporter, the foreign receiver and the authorized facilities or, if any of those persons are the same legal entity, a written statement signed by that entity, that

(i) describes the hazardous waste or hazardous recyclable material,

(ii) sets out the quantity of hazardous waste or hazardous recyclable material to be exported,

(iii) indicates that the hazardous waste will be disposed of, or the hazardous recyclable material will be recycled, in accordance with the export permit,

(iv) describes the operation set out in Schedule 1 or 2 that will be used,

(v) requires the foreign receiver to complete Part C of the movement document, or authorizes the exporter to complete Part C on the foreign receiver's behalf if the waste or material is not considered or defined as hazardous under the legislation of the country of import, and to provide a copy of the movement document and a copy of the export permit to the exporter on delivery of the hazardous waste or hazardous recyclable material to the authorized facility, and

(vi) requires the foreign receiver

(A) to complete the disposal of the hazardous waste or recycling of the hazardous recyclable material within the time set out in paragraph (o),

(B) to submit written confirmation to the exporter of the disposal of the hazardous waste or recycling of the hazardous recyclable material within 30 days after the day on which the disposal or recycling is completed, and

(C) to take all practicable measures to assist the exporter in fulfilling the terms of the exporter's obligations under these Regulations if delivery is not accepted by the authorized facility named in the export permit, or if the authorized facility cannot, or refuses to, dispose of the hazardous waste or recycle the hazardous recyclable material in accordance with the export permit;

(g) the exporter and the authorized carrier if other than Her Majesty in right of Canada or of a province are insured in accordance with section 37;

(h) the hazardous waste or hazardous recyclable material is transported by the authorized carriers named in the export permit;

(i) the applicable safety mark is displayed on each shipment of hazardous waste or hazardous recyclable material in accordance with Part 4 of the *Transportation of Dangerous Goods Regulations*;

(j) the hazardous waste or hazardous recyclable material is exported through the port of exit named in the export permit;

étranger et l'installation agréée ou, dans le cas où deux ou trois de ces personnes sont la même entité juridique, il existe une déclaration écrite et signée par celle-ci :

(i) décrivant les déchets ou les matières,

(ii) indiquant la quantité de déchets ou de matières qui sera exportée,

(iii) portant que l'élimination ou le recyclage sera effectué conformément au permis d'exportation,

(iv) décrivant l'opération visée aux annexes 1 ou 2 qui sera utilisée,

(v) stipulant que le destinataire étranger doit remplir la partie C du document de mouvement – ou, si les déchets ou les matières ne sont pas considérés ou définis comme dangereux selon les lois du pays d'importation, autorisant l'exportateur à signer la partie C en son nom – et remettre une copie du document de mouvement et du permis d'exportation à l'exportateur lors de la livraison des déchets ou des matières à l'installation agréée,

(vi) stipulant que le destinataire étranger doit :

(A) achever l'élimination ou le recyclage dans le délai prévu à l'alinéa o),

(B) remettre à l'exportateur une confirmation écrite de l'élimination ou du recyclage dans les trente jours suivant l'achèvement de l'opération,

(C) prendre toutes les mesures possibles pour aider l'exportateur à remplir ses obligations au titre du présent règlement si l'installation agréée indiquée dans le permis d'exportation n'accepte pas les déchets ou les matières ou si elle est incapable ou refuse de les éliminer ou de les recycler conformément au permis d'exportation;

g) l'exportateur et le transporteur agréé, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détiennent l'assurance responsabilité visée à l'article 37;

h) le transport des déchets ou des matières est effectué par les transporteurs agréés nommés dans le permis d'exportation;

i) chaque envoi de déchets ou de matières porte une indication de danger conforme aux exigences de la partie 4 du *Règlement sur le transport des marchandises dangereuses*;

j) l'exportation se fait via le point de sortie indiqué dans le permis d'exportation;

k) la quantité de déchets ou de matières n'excède pas celle prévue dans le permis d'exportation;

l) une copie du permis d'exportation et une copie du document de mouvement rempli conformément aux articles 11 à 13 :

(i) accompagnent les déchets ou les matières,

(ii) sont déposées par l'exportateur ou le transporteur agréé au bureau de douane où les déchets et les matières doivent être déclarés en vertu de l'article 95 de la *Loi sur les douanes*;

(k) the quantity of hazardous waste or hazardous recyclable material exported does not exceed the quantity set out in the export permit;

(l) a copy of the export permit and a copy of the movement document completed in accordance with sections 11 to 13

(i) accompanies the hazardous waste or hazardous recyclable material, and

(ii) is deposited by the exporter or the authorized carrier at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under section 95 of the Customs Act;

(m) the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at the authorized facility named in the export permit using the disposal or recycling operation set out in the export permit;

(n) after operation D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2 is completed, the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at an authorized facility using an operation set out in Schedule 1 or 2 other than operation D13, D14 or D17 or R12, R13 or R16;

(o) in the case of operation D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the authorities of the jurisdiction in which the authorized facility is located require shorter time periods, in which case those time periods apply; and

(p) in the event that the hazardous waste or hazardous recyclable material is exported but is not accepted by the authorized facility named in the export permit, or if the authorized facility cannot, or refuses to, dispose of or recycle it in accordance with the export permit, the exporter

(i) immediately notifies the Minister, the foreign receiver and the authorities of the country of import of the non-acceptance or refusal and the reason for it,

(ii) if necessary, stores the hazardous waste or hazardous recyclable material in a facility authorized to store the waste or material by the authorities of the jurisdiction in which the facility is located, and

(iii) within 90 days after the day on which the Minister is notified, makes arrangements to return the hazardous waste or hazardous recyclable material to the facility in Canada from which it was shipped in accordance with section 34 or makes arrangements for the disposal of the waste or the recycling of the material in the country of import at an authorized facility other than the one named in the export permit and provides the Minister with the name and address of that facility and the name of a contact person.

m) l'élimination ou le recyclage est effectué dans l'installation agréée indiquée dans le permis d'exportation, selon l'opération qui y est indiquée;

n) une fois les opérations D13, D14 ou D17 figurant à l'annexe 1 ou les opérations R12, R13 ou R16 figurant à l'annexe 2 achevées, l'élimination ou le recyclage est effectué dans une installation agréée, selon une opération prévue aux annexes 1 ou 2, autre que D13, D14 ou D17 ou R12, R13 ou R16;

o) dans le cas de l'une ou l'autre des opérations D13, D14 ou D17 figurant à l'annexe 1 ou des opérations R12, R13 ou R16 figurant à l'annexe 2, elle est achevée dans les cent quatre-vingts jours suivant l'acceptation des déchets ou des matières par l'installation agréée ou, dans le cas d'une autre opération, elle est achevée dans l'année suivant cette acceptation, ou dans toute autre période plus courte exigée par les autorités du territoire où est située l'installation agréée;

p) si l'installation agréée indiquée dans le permis d'exportation n'accepte pas les déchets ou les matières ou est incapable ou refuse de les éliminer ou de les recycler conformément au permis :

(i) l'exportateur en avise aussitôt le ministre, le destinataire étranger et les autorités du pays d'importation, en précisant la raison du refus,

(ii) il les entrepose, au besoin, dans une installation autorisée à ces fins par les autorités du territoire où l'installation est située,

(iii) dans les quatre-vingt-dix jours suivant l'avis au ministre, il prend les arrangements en vue de leur renvoi à l'installation d'où ils proviennent au Canada, conformément à l'article 34, ou en vue de leur élimination ou recyclage dans le pays d'importation, dans une installation agréée autre que celle indiquée dans le permis, et communique au ministre les nom et adresse de l'installation ainsi que le nom d'une personne-ressource de celle-ci.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

	<i>Movement Document</i>	<i>Document de mouvement</i>	
Movement document reference number	10. The Minister shall provide a movement document reference number to an exporter who requests one for the purpose of completing a movement document.	10. Le ministre attribue un numéro de référence à tout exportateur qui en fait la demande pour un document de mouvement.	Numéro de référence
Exporter	11. (1) Prior to shipping the hazardous waste or hazardous recyclable material, the exporter must complete Part A of a movement document, indicate the movement document reference number and provide a copy of the movement document and a copy of the export permit to the first authorized carrier.	11. (1) Avant l'expédition de déchets dangereux ou de matières recyclables dangereuses, l'exportateur remplit la partie A d'un document de mouvement, en indiquant le numéro de référence attribué par le ministre, et remet une copie du document et du permis d'exportation au premier transporteur agréé.	Exportateur
First authorized carrier	(2) Immediately on receipt of the movement document, the first authorized carrier must complete Part B of the movement document and provide a copy to the exporter.	(2) Sur réception du document de mouvement, le premier transporteur agréé en remplit la partie B et remet sans délai une copie de celui-ci à l'exportateur.	Premier transporteur agréé
Copy of movement document	(3) Within three working days after the day on which the hazardous waste or hazardous recyclable material is shipped, the exporter must send a copy of the movement document completed in accordance with subsections (1) and (2) to (a) the Minister; and (b) the authorities of the province of export, if they require it.	(3) Dans les trois jours ouvrables suivant le jour de l'expédition des déchets ou des matières, l'exportateur envoie une copie du document de mouvement rempli conformément aux paragraphes (1) et (2) : a) au ministre; b) aux autorités de la province d'exportation, si elles l'exigent.	Copie du document de mouvement
Authorized carriers	(4) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the export permit to the next authorized carrier or the foreign receiver, as the case may be, on delivery of the waste or material to that carrier or the foreign receiver.	(4) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis d'exportation, au transporteur agréé suivant ou au destinataire étranger, selon le cas, lors de la livraison.	Autres transporteurs agréés
Exporter	(5) The exporter must ensure that (a) every authorized carrier that transports the hazardous waste or hazardous recyclable material completes Part B of the movement document; and (b) the foreign receiver completes Part C of the movement document, unless the exporter is authorized to do so on the foreign receiver's behalf under the contract referred to in paragraph 9(f).	(5) L'exportateur veille à ce que : a) tous les transporteurs agréés ayant transporté les déchets ou les matières remplissent la partie B du document de mouvement; b) le destinataire étranger remplisse la partie C du document de mouvement, à moins que l'exportateur soit autorisé à signer au nom de celui-ci aux termes du contrat visé à l'alinéa 9f).	Exportateur
Copy of movement document	(6) Within three working days after the day on which the hazardous waste or hazardous recyclable material is delivered to the authorized facility, the exporter must send a copy of the completed movement document to (a) the Minister; (b) the authorities of the province of export, if they require it; and (c) every authorized carrier of the hazardous waste or hazardous recyclable material.	(6) Dans les trois jours ouvrables suivant la livraison des déchets ou des matières à l'installation agréée, l'exportateur envoie une copie du document de mouvement rempli : a) au ministre; b) aux autorités de la province d'exportation, si elles l'exigent; c) à tout transporteur agréé ayant transporté les déchets ou les matières.	Copie du document de mouvement
Rail consist	12. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.	12. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.	Feuille de train
Unit of measure	13. The exporter must ensure that the quantity of hazardous waste or hazardous recyclable material indicated in the movement document is in the same unit of measure as is used in the export permit.	13. L'exportateur veille à ce que les quantités de déchets dangereux ou de matières recyclables dangereuses indiquées dans le document de mouvement soient exprimées au moyen de la même unité	Unité de mesure

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

Retention of  
movement  
document

14. The exporter and every authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the day on which the hazardous waste or hazardous recyclable material is exported.

de mesure que celle utilisée dans le permis d'exportation.

14. L'exportateur et les transporteurs agréés conservent une copie du document de mouvement à leur principal établissement au Canada pour une période de trois ans suivant la date de l'exportation.

Conservation

### PART 3 IMPORT

#### Department of National Defence Exemption

Exemption

15. This Part does not apply to the Department of National Defence if the hazardous waste or hazardous recyclable material is

- (a) generated by that Department in the course of an operation conducted by it outside Canada;
- (b) transported from the site of operation to a defence establishment as defined in subsection 2(1) of the *National Defence Act*; and
- (c) transported under the sole direction or control of the Minister of National Defence as described in section 1.20 of the *Transportation of Dangerous Goods Regulations*, as though the hazardous waste or hazardous recyclable material is a dangerous good under those Regulations.

#### Conditions

Conditions of  
import

16. An importer may import hazardous waste or hazardous recyclable material if

- (a) at the time of the import
  - (i) the import is not prohibited under the laws of Canada,
  - (ii) the country of export is a party to the Convention, the Canada-USA Agreement or OECD Decision C(2001)107/Final, and
  - (iii) the country of transit does not prohibit the transit of the hazardous waste or hazardous recyclable material;
- (b) in the case of biomedical wastes set out in column 2 of Schedule 3 or anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*, the import is only for the purposes of disposal;
- (c) the importer is a resident of Canada or, in the case of a corporation, has a place of business in Canada;
- (d) the importer
  - (i) is the owner or operator of the authorized facility named in the import permit, or
  - (ii) buys and sells hazardous recyclable material for the purposes of recycling;
- (e) there is a signed, written contract or a series of contracts among the importer, the foreign exporter and the authorized facilities or, if any of

### PARTIE 3 IMPORTATIONS

#### Exemption visant le ministère de la Défense nationale

Exemption

15. La présente partie ne s'applique pas à l'importation par le ministère de la Défense nationale de déchets dangereux ou de matières recyclables dangereuses, si ceux-ci sont à la fois :

- a) produits par le ministère dans le cadre d'une opération menée par celui-ci à l'extérieur du Canada;
- b) transportés du lieu de l'opération à un établissement de défense au sens du paragraphe 2(1) de la *Loi sur la défense nationale*;
- c) transportés sous la seule responsabilité du ministre de la Défense nationale, selon l'article 1.20 du *Règlement sur le transport des marchandises dangereuses*, comme s'il s'agissait de marchandises dangereuses visées par ce règlement.

#### Conditions

16. L'importation de déchets dangereux ou de matières recyclables dangereuses est assujettie aux conditions suivantes :

- a) au moment de l'importation :
  - (i) les lois du Canada n'en interdisent pas l'importation,
  - (ii) le pays d'exportation est partie à la Convention, à l'accord Canada - États-Unis ou à la décision C(2001)107/Final de l'OCDE,
  - (iii) le pays de transit n'en interdit pas le transit;
- b) dans le cas d'un déchet biomédical figurant à la colonne 2 de l'annexe 3 ou de toute chose comprise dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*, le déchet ou la chose est importé pour être éliminé;
- c) l'importateur est un résident du Canada ou, s'il s'agit d'une personne morale, il a un établissement au Canada;
- d) l'importateur, selon le cas :
  - (i) est le propriétaire ou l'exploitant de l'installation agréée visée par le permis d'importation,
  - (ii) achète ou vend des matières à des fins de recyclage;
- e) il existe un contrat ou une série de contrats écrit et signé par l'importateur, l'expéditeur

those persons are the same legal entity, a written statement signed by that entity, that

- (i) describes the hazardous waste or hazardous recyclable material,
- (ii) sets out the quantity of hazardous waste or hazardous recyclable material to be imported,
- (iii) indicates that the hazardous waste will be disposed of, or the hazardous recyclable material will be recycled, in accordance with the import permit,
- (iv) describes the operation set out in Schedule 1 or 2 that will be used,
- (v) requires the foreign exporter to complete Part A of the movement document, or authorizes the importer to complete Part A on the foreign exporter's behalf if the waste or material is not considered or defined as hazardous under the legislation of the country of export, and to provide a copy of it and a copy of the import permit to the first authorized carrier prior to the shipment of the hazardous waste or hazardous recyclable material,
- (vi) requires the foreign exporter
  - (A) to send a copy of the movement document to the importer once Part A is completed by the foreign exporter, Part B is completed by the first authorized carrier and the hazardous waste or hazardous recyclable material has been shipped, and
  - (B) to take all practicable measures to assist the importer in fulfilling the terms of the importer's obligations under these Regulations if delivery is not accepted by the authorized facility named in the import permit, or if the authorized facility cannot, or refuses to, dispose of the hazardous waste or recycle the hazardous recyclable material in accordance with the import permit;
- (f) the importer and the authorized carrier if other than Her Majesty in right of Canada or of a province are insured in accordance with section 37;
- (g) the hazardous waste or hazardous recyclable material is transported by the authorized carriers named in the import permit;
- (h) the applicable safety mark is displayed on each shipment of hazardous waste or hazardous recyclable material in accordance with Part 4 of the *Transportation of Dangerous Goods Regulations*;
- (i) the hazardous waste or hazardous recyclable material is imported through the port of entry named in the import permit;
- (j) the quantity of hazardous waste or hazardous recyclable material imported does not exceed the quantity set out in the import permit;
- (k) a copy of the import permit and a copy of the movement document completed in accordance with sections 18 to 20
  - (i) accompanies the hazardous waste or hazardous recyclable material, and

étranger et l'installation agréée ou, dans le cas où deux ou trois de ces personnes sont la même entité juridique, il existe une déclaration écrite et signée par celle-ci :

- (i) décrivant les déchets ou les matières,
- (ii) indiquant la quantité de déchets ou de matières qui sera importée,
- (iii) portant que l'élimination ou le recyclage sera effectué conformément au permis d'importation,
- (iv) décrivant l'opération visée aux annexes 1 ou 2 qui sera utilisée,
- (v) stipulant que l'expéditeur étranger doit remplir la partie A du document de mouvement – ou, si les déchets ou les matières ne sont pas considérés ou définis comme dangereux selon les lois du pays d'exportation, autorisant l'importateur à remplir la partie A en son nom – et remettre une copie du document de mouvement et du permis d'importation au premier transporteur agréé avant l'expédition des déchets ou des matières,
- (vi) stipulant que l'expéditeur étranger doit :
  - (A) remettre une copie du document de mouvement à l'importateur une fois qu'il a rempli la partie A, que le premier transporteur agréé a rempli la partie B et que les déchets ou des matières ont été expédiés,
  - (B) prendre toutes les mesures possibles pour aider l'importateur à remplir ses obligations au titre du présent règlement si l'installation agréée indiquée dans le permis d'importation n'accepte pas les déchets ou les matières ou si elle est incapable ou refuse de les éliminer ou de les recycler conformément au permis d'importation;
- f) l'importateur et le transporteur agréé, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détiennent l'assurance responsabilité visée à l'article 37;
- g) le transport des déchets ou des matières est effectué par les transporteurs agréés nommés dans le permis d'importation;
- h) chaque envoi de déchets ou de matières porte une indication de danger conforme aux exigences de la partie 4 du *Règlement sur le transport des marchandises dangereuses*;
- i) l'importation se fait via le point d'entrée indiqué dans le permis d'importation;
- j) la quantité de déchets ou de matières importés n'excède pas celle prévue dans le permis d'importation;
- k) une copie du permis d'importation et une copie du document de mouvement rempli conformément aux articles 18 à 20 :
  - (i) accompagnent les déchets ou les matières,
  - (ii) sont déposées par l'importateur ou le transporteur agréé au bureau de douane où les déchets et les matières doivent être déclarés en vertu de l'article 12 de la *Loi sur les douanes*;

- (ii) is deposited by the importer or the authorized carrier at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under section 12 of the *Customs Act*;
- (l) the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at the authorized facility named in the import permit using the disposal or recycling operation set out in the import permit;
- (m) after operation D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2 is completed, the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at an authorized facility using an operation set out in Schedule 1 or 2, other than operation D13, D14 or D17 or R12, R13 or R16;
- (n) in the case of operations D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the laws of the jurisdiction in which the authorized facility is located requires shorter time periods, in which case those time periods apply; and
- (o) in the event that the hazardous waste or hazardous recyclable material is imported but is not accepted by the authorized facility named in the import permit, or if the authorized facility cannot, or refuses to, dispose of the waste or recycle the material in accordance with the permit, the importer
- (i) immediately notifies the Minister, the foreign exporter and the authorities of the country of export of the non-acceptance or refusal and the reason for it,
- (ii) if necessary, stores the hazardous waste or hazardous recyclable material at a facility authorized to store the waste or material by the authorities of the jurisdiction in which the facility is located,
- (iii) within 90 days after the day on which the Minister is notified,
- (A) makes arrangements to dispose of the hazardous waste or recycle the hazardous recyclable material in Canada at an authorized facility other than the one named in the import permit and advises the Minister of the name and address of the facility and the name of a contact person, or
- (B) makes arrangements to return the hazardous waste or hazardous recyclable material to the facility from which it was exported in accordance with section 35, and
- (iv) before shipping the hazardous waste or hazardous recyclable material to the authorized facility referred to in clause (iii)(A), receives confirmation from the Minister that the facility is an authorized facility.
- l) l'élimination ou le recyclage est effectué dans l'installation agréée indiquée dans le permis d'importation, selon l'opération qui y est indiquée;
- m) une fois les opérations D13, D14 ou D17 figurant à l'annexe 1 ou les opérations R12, R13 ou R16 figurant à l'annexe 2 achevées, l'élimination ou le recyclage est effectué dans une installation agréée, selon une opération prévue aux annexes 1 ou 2, autre que D13, D14 ou D17 ou R12, R13 ou R16;
- n) dans le cas de l'une ou l'autre des opérations D13, D14 ou D17 figurant à l'annexe 1 ou des opérations R12, R13 ou R16 figurant à l'annexe 2, elle est achevée dans les cent quatre-vingts jours suivant l'acceptation des déchets ou des matières par l'installation agréée ou, dans le cas d'une autre opération, elle est achevée dans l'année suivant cette acceptation, ou dans toute autre période plus courte prévue par une loi du territoire où est située l'installation agréée;
- o) si l'installation agréée indiquée dans le permis d'importation n'accepte pas les déchets ou les matières ou est incapable ou refuse de les éliminer ou de les recycler conformément au permis :
- (i) l'importateur en avise aussitôt le ministre, l'expéditeur étranger et les autorités du pays d'exportation, en précisant la raison du refus,
- (ii) il les entrepose, au besoin, dans une installation autorisée à ces fins par les autorités du territoire où l'installation est située,
- (iii) dans les quatre-vingt-dix jours suivant l'avis au ministre :
- (A) soit il prend des arrangements en vue de leur élimination ou recyclage au Canada, dans une installation agréée autre que celle indiquée dans le permis, et communique au ministre les nom et adresse de l'installation ainsi que le nom d'une personne-ressource de celle-ci,
- (B) soit il prend des arrangements en vue de leur renvoi à l'installation d'où ils ont été exportés, conformément à l'article 35,
- (iv) avant de transporter les déchets ou les matières à l'installation agréée visée à la division (iii)(A), l'importateur reçoit une confirmation du ministre indiquant qu'elle est une installation agréée.



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

	<i>Movement Document</i>	<i>Document de mouvement</i>	
Movement document reference number	17. The Minister shall provide a movement document reference number to an importer who requests one for the purpose of completing a movement document.	17. Le ministre attribue un numéro de référence à tout importateur qui en fait la demande pour un document de mouvement.	Numéro de référence
Importer – prior to import	18. (1) Prior to importing the hazardous waste or hazardous recyclable material, the importer shall provide the foreign exporter with a copy of the movement document indicating the movement document reference number and a copy of the import permit.	18. (1) Avant l'importation de déchets dangereux ou de matières recyclables dangereuses, l'importateur envoie à l'expéditeur étranger une copie du permis d'importation et un document de mouvement sur lequel il indique le numéro de référence attribué par le ministre.	Responsabilité de l'importateur avant l'importation
Importer – at time of import	(2) At the time of the import of the hazardous waste or hazardous recyclable material, the importer must ensure that (a) the foreign exporter has completed Part A of the movement document unless the importer is authorized to do so on the foreign exporter's behalf under the contract referred to in paragraph 16(e); (b) the foreign exporter has provided a copy of the movement document and a copy of the import permit to the first authorized carrier; and (c) the first authorized carrier has completed Part B of the movement document and has provided a copy to the foreign exporter.	(2) Au moment de l'importation de déchets dangereux ou de matières recyclables dangereuses, l'importateur s'assure que : a) l'expéditeur étranger a rempli la partie A du document de mouvement, à moins que l'importateur soit autorisé à la signer en son nom aux termes du contrat visé à l'alinéa 16e); b) l'expéditeur étranger a remis une copie du document de mouvement et du permis d'importation au premier transporteur agréé; c) le premier transporteur a rempli la partie B du document de mouvement et a remis celui-ci à l'expéditeur étranger.	Responsabilité de l'importateur au moment de l'importation
Copy of movement document	(3) Within three working days after the day on which the importer receives a copy of the movement document with Parts A and B completed in accordance with subsection (2), the importer must send a copy of it to (a) the Minister; and (b) the authorities of the province of import, if they require it.	(3) Dans les trois jours ouvrables après avoir reçu une copie du document de mouvement dont les parties A et B ont été remplies conformément au paragraphe (2), l'importateur en envoie une copie : a) au ministre; b) aux autorités de la province d'importation, si elles l'exigent.	Copie du document de mouvement
Authorized carriers	(4) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the import permit to the next authorized carrier or the importer, as the case may be, on delivery of the waste or material to that carrier or the importer.	(4) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis d'importation, au transporteur agréé suivant ou à l'importateur, selon le cas, lors de la livraison.	Transporteurs agréés
Importer	(5) The importer must ensure that every authorized carrier that transports the hazardous waste or hazardous recyclable material completes Part B of the movement document.	(5) L'importateur s'assure que tous les transporteurs agréés ayant transporté les déchets ou les matières ont rempli la partie B du document de mouvement.	Importateur
Copy of movement document	(6) Within three working days after the day on which the hazardous waste or hazardous recyclable material is delivered to the authorized facility, the importer must complete Part C of the movement document and must send a copy of the completed movement document to (a) the Minister; (b) the authorities of the province of import, if they require it; (c) the foreign exporter; and (d) every authorized carrier of the hazardous waste or hazardous recyclable material.	(6) Dans les trois jours ouvrables suivant la livraison des déchets ou des matières à l'installation agréée, l'importateur remplit la partie C du document de mouvement et envoie une copie de celui-ci : a) au ministre; b) aux autorités de la province d'importation, si elles l'exigent; c) à l'expéditeur étranger; d) à tout transporteur agréé ayant transporté les déchets ou les matières.	Copie du document de mouvement
Rail consist	19. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the	19. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu	Feuille de train

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

	movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.	qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.	
Unit of measure	20. The importer must ensure that the quantity of hazardous waste or hazardous recyclable material indicated in the movement document is in the same unit of measure as is used in the import permit.	20. L'importateur veille à ce que les quantités de déchets dangereux ou de matières recyclables dangereuses indiquées dans le document de mouvement soient exprimées au moyen de la même unité de mesure que celle utilisée dans le permis d'importation.	Unité de mesure
Retention of movement document	21. The importer and every authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the date of import.	21. L'importateur et les transporteurs agréés conservent une copie du document de mouvement à leur principal établissement au Canada pour une période de trois ans suivant la date de l'importation.	Conservation

PART 4  
TRANSIT  
Conditions

PARTIE 4  
TRANSIT  
Conditions

Conditions of transit	<p>22. A person may convey hazardous waste or hazardous recyclable material in transit if</p> <p>(a) at the time of transit, the export or import of the hazardous waste or hazardous recyclable material is not prohibited under the laws of Canada or the laws of the country of transit;</p> <p>(b) the hazardous waste or hazardous recyclable material is transported by the authorized carriers named in the transit permit;</p> <p>(c) the applicable safety mark is displayed on each shipment of hazardous waste or hazardous recyclable material in accordance with Part 4 of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(d) the hazardous waste or hazardous recyclable material is exported and imported through the port of entry and port of exit named in the transit permit;</p> <p>(e) the quantity of hazardous waste or hazardous recyclable material conveyed in transit does not exceed the quantity set out in the transit permit;</p> <p>(f) in the case of a transit through Canada, the authorized carrier if other than Her Majesty in right of Canada or of a province is insured in accordance with section 37;</p> <p>(g) in the case of a transit through a country other than Canada, the exporter and importer if other than Her Majesty in right of Canada or of a province are insured in accordance with section 37;</p> <p>(h) in the case of a transit through Canada, the country of export has provided the Minister with written confirmation that the country of import and any countries through which the hazardous waste or hazardous recyclable material will be transited after it has left Canada, has consented to the proposed import into or transit through that country; and</p> <p>(i) a copy of the transit permit and a copy of the movement document completed in accordance</p>	<p>22. Le transit de déchets dangereux ou de matières recyclables dangereuses est assujéti aux conditions suivantes :</p> <p>a) au moment du transit, les lois du Canada et celles du pays de transit n'en interdisent pas l'exportation ou l'importation;</p> <p>b) le transport des déchets ou des matières est effectué par les transporteurs agréés nommés dans le permis de transit;</p> <p>c) chaque envoi de déchets ou de matières porte une indication de danger conforme aux exigences de la partie 4 du <i>Règlement sur le transport des marchandises dangereuses</i>;</p> <p>d) l'importation et l'exportation se font via le point de sortie et le point d'entrée indiqués dans le permis de transit;</p> <p>e) la quantité de déchets ou de matières n'excède pas celle prévue dans le permis de transit;</p> <p>f) dans le cas d'un transit au Canada, le transporteur agréé, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détient l'assurance responsabilité visée à l'article 37;</p> <p>g) dans le cas d'un transit dans un pays autre que le Canada, l'exportateur et l'importateur, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détiennent l'assurance responsabilité visée à l'article 37;</p> <p>h) dans le cas d'un transit au Canada, le pays d'exportation a fourni au ministre une confirmation écrite portant que le pays d'importation ainsi que tout pays de transit où les déchets ou les matières doivent aller après leur sortie du Canada ont consenti à l'importation ou au transit;</p> <p>i) une copie du permis de transit et une copie du document de mouvement rempli conformément aux articles 25 et 26 ou 30 et 31, selon le cas :</p> <p>(i) accompagnent les déchets ou les matières,</p> <p>(ii) sont déposées par l'exportateur, l'importateur ou le transporteur agréé au bureau de</p>	Conditions
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2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

with sections 25 and 26, or 30 and 31, as the case may be,

- (i) accompanies the hazardous waste or hazardous recyclable material, and
- (ii) is deposited by the exporter, importer or authorized carrier at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under sections 12 and 95 of the *Customs Act*.

*Movement Document – Transits Through Canada*

Application	23. Sections 24 to 27 apply to the transit of hazardous waste and hazardous recyclable material through Canada.
Movement document reference number	24. The Minister shall provide a movement document reference number to any person who requests one for the purpose of completing a movement document.
Authorized carrier	25. (1) At the time the hazardous waste or hazardous recyclable material enters Canada, the authorized carrier must ensure that the foreign exporter has completed Part A of a movement document and that the movement document reference number provided by the Minister is indicated on the movement document.
Authorized carriers	(2) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the transit permit to the next authorized carrier on delivery of the waste or material to that carrier.
Copy of movement document	(3) Within three working days after the day on which the hazardous waste or hazardous recyclable material exits Canada, the authorized carrier that transports the waste or material out of Canada must send a copy of the movement document completed in accordance with subsections (1) and (2) to the Minister.
Rail consist	26. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.
Retention of movement document	27. If the authorized carrier has a place of business in Canada, the authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the day on which the hazardous waste or hazardous recyclable material exits Canada.

*Movement Document – Transits Through a Country Other than Canada*

Application	28. Sections 29 to 32 apply to the transit of hazardous waste and hazardous recyclable material where Canada is the country of origin and the country of destination.
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douane où les déchets et les matières doivent être déclarés en vertu des articles 12 ou 95 de la *Loi sur les douanes*.

*Document de mouvement pour les transits au Canada*

Application	23. Les articles 24 à 27 s'appliquent au transit de déchets dangereux et de matières recyclables dangereuses au Canada.	Application
	24. Le ministre attribue un numéro de référence à quiconque en fait la demande pour un document de mouvement.	Numéro de référence
	25. (1) Au moment de l'entrée des déchets dangereux ou des matières recyclables dangereuses au Canada, le transporteur agréé s'assure que l'expéditeur étranger a rempli la partie A d'un document de mouvement et que le numéro de référence attribué par le ministre y figure.	Transporteur agréé
	(2) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis de transit, au transporteur agréé suivant lors de la livraison.	Transporteur agréé
	(3) Dans les trois jours ouvrables suivant la sortie des déchets ou des matières du Canada, le transporteur agréé qui les a sortis du Canada envoie au ministre une copie du document de mouvement rempli conformément aux paragraphes (1) et (2).	Copie du document de mouvement
	26. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.	Feuille de train
	27. Si le transporteur agréé a un établissement au Canada, il y conserve une copie du document de mouvement pour une période de trois ans suivant la sortie des déchets ou des matières du Canada.	Conservation

*Document de mouvement pour les transits dans un pays autre que le Canada*

Application	28. Les articles 29 à 32 s'appliquent au transit de déchets dangereux et de matières recyclables dangereuses dans le cas où le pays d'origine et de destination est le Canada.	Application
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2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

Movement document reference number	29. The Minister shall provide a movement document reference number to any exporter who requests one for the purpose of completing a movement document.	29. Le ministre attribue un numéro de référence à tout exportateur qui en fait la demande pour un document de mouvement.	Numéro de référence
Exporter	30. (1) At the time the hazardous waste or hazardous recyclable material exits Canada, the exporter must complete Part A of a movement document, indicate the movement document reference number provided by the Minister and provide a copy of the movement document and a copy of the transit permit to the first authorized carrier.	30. (1) Au moment de la sortie des déchets dangereux ou des matières recyclables dangereuses du Canada, l'exportateur remplit la partie A d'un document de mouvement, en indiquant le numéro de référence attribué par le ministre, et remet une copie du document et du permis de transit au premier transporteur agréé.	Exportateur
First authorized carrier	(2) Immediately on receipt of the movement document, the first authorized carrier must complete Part B of the movement document and provide a copy to the exporter.	(2) Sur réception du document de mouvement, le premier transporteur agréé en remplit la partie B et remet sans délai une copie du document à l'exportateur.	Premier transporteur agréé
Copy of movement document	(3) Within three working days after the day on which the hazardous waste or hazardous recyclable material exits Canada, the exporter must send a copy of the movement document completed in accordance with subsections (1) and (2) to (a) the Minister; and (b) the authorities of the province of export, if they require it.	(3) Dans les trois jours ouvrables suivant la sortie des déchets ou des matières du Canada, l'exportateur envoie une copie du document de mouvement rempli conformément aux paragraphes (1) et (2) : a) au ministre; b) aux autorités de la province d'exportation, si elles l'exigent.	Copie du document de mouvement
Other authorized carriers	(4) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the transit permit on delivery of the waste or material to the next carrier or the importer, as the case may be.	(4) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis de transit, au transporteur agréé suivant ou à l'importateur, selon le cas, lors de la livraison.	Autres transporteurs agréés
Exporter	(5) The exporter must ensure that Part B of the movement document is completed by every authorized carrier that transports the hazardous waste or hazardous recyclable material.	(5) L'exportateur veille à ce que tous les transporteurs agréés ayant transporté les déchets ou les matières remplissent la partie B du document de mouvement.	Exportateur
Copy of movement document	(6) Within three working days after the day on which the hazardous waste or hazardous recyclable material is delivered to the authorized facility, the importer must complete Part C of the movement document and must send a copy of the completed movement document to (a) the Minister; (b) the authorities of the province of import, if they require it; (c) the exporter; and (d) every authorized carrier of the hazardous waste or hazardous recyclable material.	(6) Dans les trois jours ouvrables suivant la livraison des déchets ou des matières à l'installation agréée, l'importateur remplit la partie C du document de mouvement et envoie une copie de celui-ci : a) au ministre; b) aux autorités de la province d'importation, si elles l'exigent; c) à l'exportateur; d) à tout transporteur agréé ayant transporté les déchets ou les matières.	Copie du document de mouvement
Rail consist	31. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.	31. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.	Feuille de train
Retention of movement document	32. The exporter, the importer and every authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the day on which the hazardous waste or hazardous recyclable material is imported.	32. L'exportateur, l'importateur et les transporteurs agréés conservent une copie du document de mouvement à leur principal établissement au Canada pour une période de trois ans suivant la date de l'importation.	Conservation

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

PART 5  
RETURNS

*Application*

Returns 33. This Part applies to the return of hazardous waste or hazardous recyclable material to  
(a) Canada after it has been exported from Canada; and  
(b) the country of export after it has been imported into Canada.

*Returns to Canada*

Notice 34. (1) If the hazardous waste or hazardous recyclable material is returned to Canada, the exporter that exported the waste or material from Canada must submit a notice to the Minister in writing, containing the following information:

- (a) the name, civic, mailing and electronic addresses and telephone and facsimile numbers of, and the name of the contact person for, the exporter, the foreign receiver and any authorized carriers that were not named in the original export permit;
- (b) the name of each insurance company and the policy number for each insurance policy required under these Regulations;
- (c) the reason for the return;
- (d) the quantity of hazardous waste or hazardous recyclable material that will be returned using the same unit of measure as in the original export permit;
- (e) if the quantity of hazardous waste or hazardous recyclable material to be returned is less than the quantity of waste or material exported from Canada, the reason for the difference;
- (f) the port of entry through which the return will take place and the customs office at which the hazardous waste or hazardous recyclable material will be reported;
- (g) the notice reference number contained in the original export permit; and
- (h) the line item number contained in the original export permit for the hazardous waste or hazardous recyclable material that will be returned.

Exporter (2) After an import permit is issued, the exporter must

- (a) return the hazardous waste or hazardous recyclable material to the facility from which it was exported, using the authorized carriers and the port of entry named in the import permit;
- (b) ensure that a copy of the import permit and a copy of the movement document with Parts A and B completed, clearly indicating that the hazardous waste or hazardous recyclable material is being returned to Canada,
- (i) accompanies the hazardous waste or hazardous recyclable material, and

PARTIE 5  
RENVOIS

*Champ d'application*

33. La présente partie s'applique : Application

- a) au renvoi au Canada de déchets dangereux ou de matières recyclables dangereuses qui ont été exportés du Canada;
- b) au renvoi au pays d'exportation de déchets dangereux ou de matières recyclables dangereuses après leur importation au Canada.

*Renvoi au Canada*

34. (1) En cas de renvoi de déchets dangereux ou de matières recyclables dangereuses au Canada, l'exportateur qui les a exportés du Canada présente au ministre une notification écrite et fournit les renseignements suivants : Notification

- a) le nom, les adresses municipale, postale et électronique et les numéros de téléphone et de télécopieur de l'exportateur, du destinataire étranger et de tout transporteur agréé autre que ceux nommés dans le permis d'exportation original, ainsi que le nom de leur personne-ressource;
- b) le nom de l'assureur et le numéro de la police;
- c) les motifs du renvoi;
- d) la quantité de déchets ou de matières qui sera renvoyée, exprimée à l'aide de la même unité de mesure que celle utilisée dans le permis d'exportation original;
- e) si la quantité de déchets ou de matières renvoyée est inférieure à celle qui a été exportée du Canada, les raisons de cette différence;
- f) le point d'entrée prévu pour l'importation et le bureau de douane où les déchets ou les matières seront déclarés;
- g) le numéro de référence de la notification figurant au permis d'exportation original;
- h) le numéro de la ligne dans le permis d'exportation original où sont inscrits les déchets ou les matières qui seront renvoyés.

(2) Une fois le permis d'importation délivré, l'exportateur : Exportateur

- a) renvoie les déchets dangereux ou les matières recyclables dangereuses à l'installation d'où ils ont été exportés, en utilisant le point d'entrée indiqué dans le permis d'importation et en ayant recours aux transporteurs agréés qui y sont nommés;
- b) veille à ce qu'une copie du permis d'importation et une copie du document de mouvement dont les parties A et B sont remplies et qui indique clairement que les déchets ou les matières sont renvoyés au Canada :

- (ii) is deposited at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under section 12 of the *Customs Act*; and
- (c) submit a copy of the movement document referred to in paragraph (b) to the Minister, every authorized carrier and if they require it, to the authorities of the province of export.

#### Returns to the Country of Export

Notice –  
returns to  
country of  
export

35. (1) If the hazardous waste or hazardous recyclable material is returned to the country of export, the importer that imported the waste or material into Canada must submit a notice to the Minister in writing, containing the following information:

- (a) the name, civic, mailing and electronic addresses and telephone and facsimile numbers of, and the name of the contact person for, the importer, the foreign exporter and any authorized carriers that were not named in the original import permit;
- (b) the name of each insurance company and the policy number for each insurance policy required under these Regulations;
- (c) the reason for the return;
- (d) the quantity of hazardous waste or hazardous recyclable material that will be returned using the same unit of measure as in the original import permit;
- (e) if the quantity of hazardous waste or hazardous recyclable material to be returned is less than the quantity of waste or material imported into Canada, the reason for the difference;
- (f) the port of entry through which the return will take place and the customs office at which the hazardous waste or hazardous recyclable material will be reported;
- (g) the notice reference number contained in the original import permit for the import of the hazardous waste or hazardous recyclable material into Canada; and
- (h) the line item number contained in the original import permit for the hazardous waste or hazardous recyclable material that will be returned.

Importer's  
obligations

(2) After an export permit is issued, the importer must

- (a) return the hazardous waste or hazardous recyclable material to the facility from which it was imported, using the authorized carriers and the port of exit named in the export permit;
- (b) ensure that a copy of the export permit and a copy of the movement document with Parts B and C completed, clearly indicating that the hazardous waste or hazardous recyclable material is being returned to the country of export,
  - (i) accompanies the hazardous waste or hazardous recyclable material, and
  - (ii) is deposited at the customs office at which the hazardous waste or hazardous recyclable

- (i) accompagnent les déchets ou les matières,
- (ii) soient déposées au bureau de douane où les déchets ou les matières doivent être déclarés en vertu de l'article 12 de la *Loi sur les douanes*;
- c) envoie une copie du document de mouvement visé à l'alinéa b) au ministre, à chaque transporteur agréé et, si elles l'exigent, aux autorités de la province d'exportation.

#### Renvoi au pays d'exportation

Notification

35. (1) En cas de renvoi de déchets dangereux ou de matières recyclables dangereuses dans le pays d'exportation, l'importateur qui les a importés au Canada présente au ministre une notification écrite et fournit les renseignements suivants :

- a) le nom, les adresses municipale, postale et électronique et les numéros de téléphone et de télécopieur de l'importateur et de l'expéditeur étranger et de tout transporteur agréé, autre que ceux nommés dans le permis d'importation original, qui transporteront les déchets ou les matières, ainsi que le nom de leur personne-ressource;
- b) le nom de l'assureur et le numéro de la police;
- c) les motifs du renvoi;
- d) la quantité de déchets ou de matières renvoyée, exprimée à l'aide de la même unité de mesure que celle utilisée dans le permis d'importation original;
- e) si la quantité de déchets ou de matières renvoyée est inférieure à celle qui a été importée au Canada, les raisons de cette différence;
- f) le point de sortie prévu pour l'exportation et le bureau de douane où les déchets ou les matières seront déclarés;
- g) le numéro de référence figurant au permis d'importation original pour l'importation des déchets ou des matières au Canada;
- h) le numéro de la ligne dans le permis d'importation original où sont inscrits les déchets ou les matières qui seront renvoyés.

(2) Une fois le permis d'exportation délivré, l'importateur :

Obligations de  
l'importateur

- a) renvoie les déchets dangereux ou les matières recyclables dangereuses à l'installation d'où ils ont été importés, en utilisant le point de sortie indiqué dans le permis d'exportation et en ayant recours aux transporteurs agréés qui y sont nommés;
- b) veille à ce qu'une copie du permis d'exportation et une copie du document de mouvement dont les parties B et C sont remplies et qui indique clairement que les déchets ou les matières sont renvoyés dans le pays d'exportation :

material is to be reported under section 95 of the *Customs Act*; and  
(c) submit a copy of the movement document referred to in paragraph (b) to the Minister, every authorized carrier and if they require it, the authorities of the province of import.

(i) accompagnent les déchets ou les matières,  
(ii) soient déposées au bureau de douane où les déchets ou les matières doivent être déclarés en vertu de l'article 95 de la *Loi sur les douanes*;

c) envoie une copie du document de mouvement visé à l'alinéa b) au ministre, à chaque transporteur agréé et, si elles l'exigent, aux autorités de la province d'importation.

## PART 6

### MISCELLANEOUS MATTERS

#### Confirmation of Disposal or Recycling

Confirmation

36. (1) Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled

- (a) in accordance with the export or import permit;
- (b) in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and
- (c) within the period referred to in paragraph 9(o) or 16(n).

Mandatory reference

(2) The exporter or importer must include the movement document reference number and line item number for the applicable hazardous waste or hazardous recyclable material referred to in subsection (1) in the confirmation.

Retention of confirmation

(3) The exporter or importer must keep a copy of the confirmation at their principal place of business in Canada for a period of three years after the day on which it is submitted to the Minister.

#### Liability Insurance

Coverage

37. (1) The liability insurance required by these Regulations must be in respect of

- (a) any damages to third parties for which the exporter, importer or authorized carrier is responsible; and
- (b) any costs imposed by law on the exporter, importer or authorized carrier to clean up the environment in respect of any hazardous waste or hazardous recyclable material that is released.

Amount

(2) The amount of liability insurance required in respect of each export or import of hazardous waste or hazardous recyclable material is

- (a) for exporters or importers, at least \$5,000,000 for hazardous waste;
- (b) for exporters or importers, at least \$1,000,000 for hazardous recyclable material; and

## PARTIE 6

### DISPOSITIONS GÉNÉRALES

#### Déclaration d'élimination ou de recyclage

Déclaration

36. (1) Dans les trente jours suivant l'élimination des déchets dangereux ou le recyclage des matières recyclables dangereuses, l'exportateur ou l'importateur présente au ministre une déclaration écrite, signée et datée attestant que l'élimination ou le recyclage a été effectué :

- a) conformément au permis;
- b) d'une manière qui garantit la protection de l'environnement et de la santé humaine contre les effets nuisibles que les déchets ou les matières peuvent avoir;
- c) dans le délai visé aux alinéas 9(o) ou 16(n).

Mentions obligatoires

(2) L'exportateur ou l'importateur indique sur la déclaration le numéro de référence du document de mouvement et le numéro de la ligne dans le permis d'exportation ou d'importation où sont inscrits les déchets dangereux ou les matières recyclables dangereuses.

Conservation de la déclaration

(3) L'exportateur ou l'importateur conserve une copie de la déclaration à son principal établissement au Canada pendant la période de trois ans suivant la date de la présentation de la déclaration au ministre.

#### Assurance responsabilité

Couverture

37. (1) L'assurance responsabilité exigée par le présent règlement couvre :

- a) les dommages subis par des tiers dont l'exportateur, l'importateur ou le transporteur agréé est responsable;
- b) les frais qu'une règle de droit oblige l'exportateur, l'importateur ou le transporteur agréé à payer pour nettoyer l'environnement à la suite d'un rejet de déchets dangereux ou de matières recyclables dangereuses.

Montant

(2) Le montant de la protection pour chaque exportation ou importation est :

- a) dans le cas d'un exportateur ou d'un importateur de déchets, d'au moins 5 000 000 \$;
- b) dans le cas d'un exportateur ou d'un importateur de matières, d'au moins 1 000 000 \$;

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

Coverage period	<p>(c) for authorized carriers, the amount required by the laws of the jurisdiction in which the hazardous waste or hazardous recyclable material is transported.</p> <p>(3) The insurance must cover liability arising</p> <p>(a) in the case of an export from Canada, from the time the hazardous waste or hazardous recyclable material leaves the exporter's facility to the time an authorized facility, including an authorized facility in Canada if the waste or material is returned to Canada in accordance with section 34, accepts delivery of the waste for disposal or the material for recycling;</p> <p>(b) in the case of an import into Canada, from the time the hazardous waste or hazardous recyclable material enters Canada to the time an authorized facility in Canada accepts delivery of the waste or material, or to the time the waste or material leaves Canada for return to the country of export in accordance with section 35; or</p> <p>(c) if Canada is a country of transit, at any time during the transit through Canada.</p>	<p>c) dans le cas d'un transporteur agréé, le montant exigé par les lois du territoire sur lequel les déchets ou les matières sont transportés.</p>	Période
Content of plan	<p><i>Export Reduction Plans</i></p> <p>38. (1) The plan referred to in subsection 188(1) of the Act must contain</p> <p>(a) the following information with respect to the hazardous waste to which the plan applies, namely,</p> <p>(i) the International Waste Identification Code under OECD Decision C(94)152/Final, substituting the disposal code with the disposal code set out in column 1 of Schedule 1 to these Regulations for the applicable operation set out in column 2 of that Schedule and, if the hazardous waste is a gas, substituting the letter G for the letter L, P or S in the International Waste Identification Code,</p> <p>(ii) the applicable code set out in List A of Annex VIII to the Convention,</p> <p>(iii) the identification number set out in column 1 of Schedule 3, 4 or 7, and</p> <p>(iv) the following information set out in the applicable schedules to the <i>Transportation of Dangerous Goods Regulations</i>, namely,</p> <p>(A) the applicable UN number set out in column 1 of Schedule 1 or column 5 of Schedule 3,</p> <p>(B) the applicable class set out in column 3 of Schedule 1 or the primary class set out in column 4 of Schedule 3, and</p> <p>(C) the applicable packing group and risk group set out in column 4 of Schedule 1;</p> <p>(b) the name, quantity and concentration of any persistent organic pollutant set out in column 2 of Schedule 10 that is contained in the hazardous waste referred to in the plan;</p>	<p><i>Plans de réduction des exportations de déchets dangereux</i></p> <p>38. (1) Le plan visé au paragraphe 188(1) de la Loi comporte les renseignements suivants :</p> <p>a) relativement à chaque déchet dangereux qu'il vise :</p> <p>(i) le code international d'identification des déchets applicable selon la décision C(94)152/Final de l'OCDE, sauf que le code d'élimination est remplacé par celui prévu à la colonne 1 de l'annexe 1 du présent règlement pour l'opération applicable figurant à la colonne 2, et que les lettres « L », « P » ou « S » sont remplacées par la lettre « G » si le déchet est un gaz,</p> <p>(ii) le code applicable figurant à la liste A de l'annexe VIII de la Convention,</p> <p>(iii) le numéro d'identification prévu à la colonne 1 des annexes 3, 4 ou 7,</p> <p>(iv) les renseignements ci-après provenant des annexes applicables du <i>Règlement sur le transport des marchandises dangereuses</i> :</p> <p>(A) le numéro UN applicable prévu à la colonne 1 de l'annexe 1 ou à la colonne 5 de l'annexe 3,</p> <p>(B) la classe applicable prévue à la colonne 3 de l'annexe 1 ou la classe primaire applicable prévue à la colonne 4 de l'annexe 3,</p> <p>(C) le groupe d'emballage/groupe de risque applicable prévu à la colonne 4 de l'annexe 1;</p> <p>b) les nom, quantité et concentration de toute substance polluante organique persistante visée à la colonne 2 de l'annexe 10 qui se trouve dans les déchets visés par le plan;</p>	Contenu



- (c) if the exporter generates the hazardous waste referred to in the plan, the name and a description of the process that generated the waste and the activity in which that process is used;
- (d) the origin of the hazardous waste if the exporter does not generate the waste referred to in the plan;
- (e) the quantity of hazardous waste exported at the start of the implementation of the plan and the quantity of export reduction to be achieved at each stage of the plan;
- (f) a description of the manner in which the exporter will reduce or phase out exports of the hazardous waste referred to in the plan;
- (g) the options considered for reducing or phasing out the export of the hazardous waste referred to in the plan, including options for disposing or recycling it in Canada;
- (h) the stages of the plan and a schedule for implementing the plan; and
- (i) for each stage of the plan, an estimate of the quantity of goods produced that generates the hazardous waste to which the plan applies and a description of the impact of any changes to the quantity produced on the reduction or phasing out of exports of that waste.

Retention of  
plan

(2) A person who submits a plan to the Minister must keep a copy of the plan at their principal place of business in Canada for a period of five years after the day on which the plan is submitted.

#### Environmentally Sound Management

Refusal to issue  
permit

39. If the Minister is of the opinion that the hazardous waste or hazardous recyclable material will not be managed in a manner that will protect the environment and human health against the adverse effects that may result from that waste or material, the Minister may, in accordance with subsection 185(2) of the Act, refuse to issue a permit taking into account the following criteria:

- (a) the implementation of an environmental management system at the authorized facility that includes
  - (i) procedures for ensuring the protection of the environment and human health against the adverse effects that may result from the disposal of the hazardous waste or the recycling of the hazardous recyclable material including measures for monitoring the efficiency of the procedures and modifying them in the event that they do not protect the environment and human health,
  - (ii) measures to monitor and ensure compliance with applicable laws with respect to the protection of the environment and human health, and
  - (iii) a certification that the system includes those procedures and measures;
- (b) the implementation of a plan at the authorized facility to prevent, prepare for and respond to an

- c) si l'exportateur produit les déchets visés par le plan, le nom et une description du procédé de production des déchets et de l'activité dans laquelle ce procédé est utilisé;
- d) si l'exportateur ne produit pas les déchets visés par le plan, la provenance des déchets;
- e) la quantité de déchets exportée à la mise en œuvre du plan et la réduction visée à chaque étape du plan;
- f) la façon dont l'exportateur réduira ou supprimera l'exportation des déchets visés par le plan;
- g) les solutions qui ont été envisagées en vue de réduire ou de supprimer les exportations de déchets visés par le plan, y compris celles concernant le recyclage des déchets au Canada;
- h) les étapes du plan et l'échéancier;
- i) pour chaque étape du plan, la quantité estimative de biens dont la production génère les déchets visés par le plan, ainsi qu'une description de l'effet des variations de quantité sur la réduction ou la suppression des exportations de déchets.

(2) La personne qui remet le plan au ministre en conserve une copie à son principal établissement au Canada pour une période de cinq ans suivant la remise du plan.

Conservation

#### Gestion écologiquement rationnelle

39. Si le ministre estime que les déchets dangereux ou les matières recyclables dangereuses ne seront pas gérés d'une manière qui garantisse la protection de l'environnement et de la santé humaine contre les effets nuisibles qu'ils peuvent avoir, il peut refuser, en vertu du paragraphe 185(2) de la Loi, de délivrer le permis compte tenu des facteurs suivants :

Refus de  
délivrer un  
permis

- a) la mise en application d'un système de gestion environnementale à l'installation agréée, lequel comprend notamment :
  - (i) des modalités qui garantissent la protection de l'environnement et de la santé humaine contre les effets nuisibles que l'élimination des déchets ou le recyclage des matières pourrait entraîner ainsi que des mesures pour contrôler l'efficacité de ces modalités et les modifier si elles ne protègent pas l'environnement et la santé humaine,
  - (ii) des mesures pour assurer le respect des lois applicables concernant la protection de l'environnement et de la santé humaine,
  - (iii) une attestation du fait que le système comprend les modalités et les mesures;
- b) la mise en application, à l'installation agréée, d'un plan pour prévenir tout rejet non contrôlé, non planifié ou accidentel de déchets ou de matières et pour faire face à un tel rejet;

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

uncontrolled, unplanned or accidental release of hazardous waste or hazardous recyclable material; and

(c) the existence of prohibitions or conditions relating to the disposal of hazardous waste or the recycling of hazardous recyclable material in Canada or abroad.

c) l'existence d'interdictions ou de conditions concernant l'élimination des déchets ou le recyclage des matières au Canada ou à l'étranger.

#### CONSEQUENTIAL AMENDMENT

Consequential amendment

40. Paragraph 2(2)(b) of the *Export of Substances Under the Rotterdam Convention Regulations*<sup>1</sup> is replaced by the following:

(b) is, or is contained in, a hazardous waste or hazardous recyclable material regulated by the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*;

#### MODIFICATION CORRÉLATIVE

Modification corrélatrice

40. L'alinéa 2(2)b) du *Règlement sur l'exportation de substances aux termes de la Convention de Rotterdam*<sup>1</sup> est remplacé par ce qui suit :

b) la substance est un déchet dangereux ou une matière recyclable dangereuse — ou est contenue dans un tel déchet ou une telle matière — qui est régi par le *Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuses*;

#### REPEAL

Repeal

41. The *Export and Import of Hazardous Wastes Regulations*<sup>2</sup> are repealed.

#### ABROGATION

Abrogation

41. Le *Règlement sur l'exportation et l'importation des déchets dangereux*<sup>1</sup> est abrogé.

#### COMING INTO FORCE

Coming into Force

42. These Regulations come into force on November 1, 2005.

#### ENTRÉE EN VIGUEUR

Entrée en vigueur

42. Le présent règlement entre en vigueur le 1<sup>er</sup> novembre 2005.

<sup>1</sup> SOR/2002-317  
<sup>2</sup> SOR/92-637

<sup>1</sup> DORS/2002-317  
<sup>2</sup> DORS/92-637

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

#### SCHEDULE 1

(Subsection 1(1), section 4, subparagraphs 8(j)(i) and (viii) and 9(f)(iv), paragraphs 9(n) and (o), subparagraph 16(e)(iv), paragraphs 16(m) and (n) and subparagraph 38(1)(a)(i))

#### DISPOSAL OPERATIONS FOR HAZARDOUS WASTE

Column 1		Column 2
Item	Disposal Code	Operation
1.	D1	Release into or onto land, other than by any of operations D3 to D5 or D12.
2.	D2	Land treatment, such as biodegradation of liquids or sludges in soil.
3.	D3	Deep injection, such as injection into wells, salt domes, mines or naturally occurring repositories.
4.	D4	Surface impoundment, such as placing liquids or sludges into pits, ponds or lagoons.
5.	D5	Specially engineered landfilling, such as placement into separate lined cells that are isolated from each other and the environment.
6.	D6	Release into water, other than a sea or ocean, other than by operation D4.
7.	D7	Release into a sea or ocean, including sea-bed insertion, other than by operation D4.
8.	D8	Biological treatment, not otherwise set out in this Schedule.
9.	D9	Physical or chemical treatment, not otherwise referred to in this Schedule, such as calcination, neutralization or precipitation.
10.	D10	Incineration or thermal treatment on land.
11.	D11	Incineration or thermal treatment at sea.
12.	D12	Permanent storage.
13.	D13	Blending or mixing, prior to any of operations D1 to D12.
14.	D14	Repackaging, prior to any of operations D1 to D13.
15.	D15	Release, including the venting of compressed or liquified gases, or treatment, other than by any of operations D1 to D12.
16.	D16	Testing of a new technology to dispose of a hazardous waste.
17.	D17	Interim storage, prior to any of operations D1 to D12.

#### SCHEDULE 2

(Subsection 2(1), subparagraph 2(2)(e)(iii), section 4, subparagraphs 8(j)(i) and (viii) and 9(f)(iv), paragraphs 9(n) and (o), subparagraph 16(e)(iv) and paragraphs 16(m) and (n))

#### RECYCLING OPERATIONS FOR HAZARDOUS RECYCLABLE MATERIAL

Column 1		Column 2
Item	Recycling Code	Operation
1.	R1	Use as a fuel in an energy recovery system, where the net heating value of the material is at least 12 780 kJ/kg.
2.	R2	Recovery or regeneration of substances that have been used as solvents.
3.	R3	Recovery of organic substances that have not been used as solvents.
4.	R4	Recovery of metals and metal compounds.
5.	R5	Recovery of inorganic materials other than metals or metal compounds.
6.	R6	Regeneration of acids or bases.
7.	R7	Recovery of components used for pollution abatement.
8.	R8	Recovery of components from catalysts.
9.	R9	Re-refining or re-use of used oil, other than by operation R1.
10.	R10	Land treatment resulting in agricultural or ecological improvement.
11.	R11	Use of residual materials obtained by any of operations R1 to R10 or R14.
12.	R12	Exchange of a recyclable material for another recyclable material prior to recycling by any of operations R1 to R11 or R14.
13.	R13	Accumulation prior to recycling by any of operations R1 to R11 or R14.
14.	R14	Recovery or regeneration of a substance or use or re-use of a recyclable material, other than by any of operations R1 to R10.
15.	R15	Testing of a new technology to recycle a hazardous recyclable material.
16.	R16	Interim storage prior to any of operations R1 to R11 or R14.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

### SCHEDULE 3

(Paragraphs 1(1)(a) and 2(1)(a), subparagraph 8(j)(v), paragraphs 9(c) and 16(b) and subparagraph 38(1)(a)(iii))

#### HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS

	Column 1	Column 2																																		
Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material																																		
1.	HAZ1	<p>Biomedical waste – the following wastes, other than those generated from building maintenance, office administration or food preparation and consumption, that are generated by human or animal health care establishments, medical, health care or veterinary teaching or research establishments, clinical laboratories or facilities that test or produce vaccines and needle and syringe exchange programs:</p> <p>(a) human tissues, organs or body parts, excluding teeth, hair or nails;</p> <p>(b) human blood or blood products;</p> <p>(c) human bodily fluids that are contaminated with blood;</p> <p>(d) human bodily fluids removed in the course of autopsy, treatment, or surgery for diagnosis;</p> <p>(e) animal tissues, organs, body parts or carcasses, excluding teeth, nails, hair, bristles, feathers, horns and hooves, resulting from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraph 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(f) animal blood or blood products resulting from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraph 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(g) animal bodily fluids that are visibly contaminated with animal blood and that result from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraph 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(h) animal bodily fluids removed in the course of surgery, treatment or necropsy, and that result from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraphs 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(i) live or attenuated vaccines, human or animal cell cultures, microbiology laboratory cultures, stocks or specimens of microorganisms and any items that have come into contact with them;</p> <p>(j) any items that are saturated with the blood or bodily fluids referred to in paragraphs (b) to (d) or (f) to (h), including items that were saturated but that have dried; and</p> <p>(k) cytotoxic drugs and any items, including tissues, tubing, needles or gloves, that have come into contact with a cytotoxic drug.</p> <p>Biomedical waste does not include</p> <p>(a) urine or feces;</p> <p>(b) wastes that are controlled under the <i>Health of Animals Act</i>; or</p> <p>(c) wastes that result from the breeding or raising of animals.</p>																																		
2.	HAZ2	Used lubricating oils in quantities of 500 L or more, from internal combustion engines or gear boxes, transmissions, transformers, hydraulic systems or other equipment associated with such engines.																																		
3.	HAZ3	Used oil filters containing more than 6 % of oil by mass.																																		
4.	HAZ4	Cyanide, or substances containing cyanide, in a concentration equal to or greater than 100 mg/kg.																																		
5.	HAZ5	Wastes that contain more than 2 mg/kg of polychlorinated terphenyls or polybrominated biphenyls described in Schedule 1 to the Act.																																		
6.	HAZ6	<p>Wastes that contain, in a concentration of more than 100 ng/kg of 2,3,7,8-tetrachlorodibenzo-p-dioxin equivalent.</p> <p>(a) total polychlorinated dibenzofurans that have a molecular formula <math>C_{12}H_{14-n}Cl_nO</math> in which "n" is greater than 1; or</p> <p>(b) total polychlorinated dibenzo-p-dioxins that have a molecular formula <math>C_{12}H_{14-n}Cl_nO_2</math> in which "n" is greater than 1.</p> <p>The concentration is calculated in accordance with "International Toxicity Equivalency Factor (I-TEF) Method of Risk Assessment for Complex Mixtures of Dioxins and Related Compounds", <i>Pilot Study on International Information Exchange on Dioxins and Related Compounds</i>, Committee on the Challenges of Modern Society, North Atlantic Treaty Organization, Report Number 176, August 1988, as amended from time to time, using the following factors:</p> <table><tr><td>2,3,7,8-tetrachlorodibenzo-dioxin</td><td>1.001</td></tr><tr><td>1,2,3,7,8-pentachlorodibenzo-dioxin</td><td>0.5</td></tr><tr><td>1,2,3,4,7,8-hexachlorodibenzo-dioxin</td><td>0.1</td></tr><tr><td>1,2,3,7,8,9-hexachlorodibenzo-dioxin</td><td>0.1</td></tr><tr><td>1,2,3,6,7,8-hexachlorodibenzo-dioxin</td><td>0.1</td></tr><tr><td>1,2,3,4,6,7,8-heptachlorodibenzo-dioxin</td><td>0.01</td></tr><tr><td>octachlorodibenzo-dioxin</td><td>0.001</td></tr><tr><td>2,3,7,8-tetrachlorodibenzofuran</td><td>0.1</td></tr><tr><td>2,3,4,7,8-pentachlorodibenzofuran</td><td>0.5</td></tr><tr><td>1,2,3,7,8-pentachlorodibenzofuran</td><td>0.05</td></tr><tr><td>1,2,3,4,7,8-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>1,2,3,7,8,9-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>1,2,3,6,7,8-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>2,3,4,6,7,8-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>1,2,3,4,6,7,8-heptachlorodibenzofuran</td><td>0.01</td></tr><tr><td>1,2,3,4,7,8,9-heptachlorodibenzofuran</td><td>0.01</td></tr><tr><td>octachlorodibenzofuran</td><td>0.001</td></tr></table>	2,3,7,8-tetrachlorodibenzo-dioxin	1.001	1,2,3,7,8-pentachlorodibenzo-dioxin	0.5	1,2,3,4,7,8-hexachlorodibenzo-dioxin	0.1	1,2,3,7,8,9-hexachlorodibenzo-dioxin	0.1	1,2,3,6,7,8-hexachlorodibenzo-dioxin	0.1	1,2,3,4,6,7,8-heptachlorodibenzo-dioxin	0.01	octachlorodibenzo-dioxin	0.001	2,3,7,8-tetrachlorodibenzofuran	0.1	2,3,4,7,8-pentachlorodibenzofuran	0.5	1,2,3,7,8-pentachlorodibenzofuran	0.05	1,2,3,4,7,8-hexachlorodibenzofuran	0.1	1,2,3,7,8,9-hexachlorodibenzofuran	0.1	1,2,3,6,7,8-hexachlorodibenzofuran	0.1	2,3,4,6,7,8-hexachlorodibenzofuran	0.1	1,2,3,4,6,7,8-heptachlorodibenzofuran	0.01	1,2,3,4,7,8,9-heptachlorodibenzofuran	0.01	octachlorodibenzofuran	0.001
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2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4  
(Paragraphs 1(1)(c) and 2(1)(c) and subparagraphs 8(j)(v) and 38(1)(a)(iii))

PART 1

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM NON-SPECIFIC SOURCES

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
1.	F001	The following spent halogenated solvents used in degreasing: tetrachloroethylene, trichloroethylene, methylene chloride, 1,1,1-trichloroethane, carbon tetrachloride and chlorinated fluorocarbons; all spent solvent mixtures and blends used in degreasing containing, before use, a total of 10% or more (by volume) of one or more of the above halogenated solvents or those solvents listed as F002, F004 or F005; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
2.	F002	The following spent halogenated solvents: tetrachloroethylene, methylene chloride, trichloroethylene, 1,1,1-trichloroethane, chlorobenzene, 1,1,2-trichloro-1,2,2-trifluoroethane, ortho-dichlorobenzene, trichlorofluoromethane and 1,1,2-trichloroethane; all spent solvent mixtures and blends containing, before use, a total of 10% or more (by volume) of one or more of the above halogenated solvents or those listed as F001, F004 or F005; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
3.	F003	The following spent non-halogenated solvents: xylene, acetone, ethyl acetate, ethyl benzene, ethyl ether, methyl isobutyl ketone, n-butyl alcohol, cyclohexanone and methanol; all spent solvent mixtures and blends containing, before use, only the above spent non-halogenated solvents; and all spent solvent mixtures and blends containing, before use, one or more of the above spent non-halogenated solvents, and a total of 10% or more (by volume) of one or more of those solvents listed as F001, F002, F004 or F005; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
4.	F004	The following spent non-halogenated solvents: cresols, cresylic acid and nitrobenzene; all spent solvent mixtures and blends containing, before use, a total of 10% or more (by volume) of one or more of the above spent non-halogenated solvents or those solvents listed as F001, F002 or F005; and still bottoms from the recovery of these spent solvents and spent solvent mixtures.
5.	F005	The following spent non-halogenated solvents: toluene, methyl ethyl ketone, carbon disulphide, isobutanol, pyridine, benzene, 2-ethoxyethanol and 2-nitropropane; all spent solvent mixtures and blends containing, before use, a total of 10% or more (by volume) of one or more of the above spent non-halogenated solvents or those solvents listed as F001, F002 or F004; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
6.	F006	Wastewater treatment sludges from electroplating operations except for the following processes: (1) sulphuric acid anodizing of aluminum; (2) tin plating on carbon steel; (3) zinc plating (on a segregated basis) on carbon steel; (4) aluminum or aluminum-zinc plating on carbon steel; (5) cleaning or stripping associated with tin, zinc or aluminum plating on carbon steel; and (6) chemical etching and milling of aluminum.
7.	F007	Spent cyanide plating bath solutions from electroplating operations.
8.	F008	Plating bath sludge from the bottom of plating baths from electroplating operations where cyanides are used in the process.
9.	F009	Spent stripping and cleaning bath solutions from electroplating operations where cyanides are used in the process.
10.	F010	Quenching bath sludge from oil baths from metal heat treating operations where cyanides are used in the process.
11.	F011	Spent cyanide solutions from salt bath pot cleaning from metal heat treating operations.
12.	F012	Quenching wastewater treatment sludge from metal heat treating operations where cyanides are used in the process.
13.	F019	Wastewater treatment sludge from the chemical conversion coating of aluminum except from zirconium phosphating in aluminum can washing if such phosphating is an exclusive conversion coating process.
14.	F020	Wastes from the production or manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tri- or tetrachlorophenol or of intermediates used to produce their pesticide derivatives, excluding wastewater and spent carbon from hydrogen chloride purification and wastes from the production of hexachlorophene from highly purified 2,4,5-trichlorophenol.
15.	F021	Wastes from the production or manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of pentachlorophenol or of intermediates used to produce its derivatives, excluding wastewater and spent carbon from hydrogen chloride purification.
16.	F022	Wastes from the manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tetra-, penta- or hexachlorobenzenes under alkaline conditions, excluding wastewater and spent carbon from hydrogen chloride purification.
17.	F023	Wastes from the production of materials on equipment previously used for the production or manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tri- and tetrachlorophenols, excluding wastewater and spent carbon from hydrogen chloride purification and wastes from equipment used only for the production or use of hexachlorophene from highly purified 2,4,5-trichlorophenol.
18.	F024	Process wastes, including, but not limited to, distillation residues, heavy ends, tars and reactor clean-out wastes from the production of certain chlorinated aliphatic hydrocarbons by free radical catalyzed processes, those chlorinated aliphatic hydrocarbons being those having carbon chain lengths ranging from 1 to and including 5, with varying amounts and positions of chlorine substitution, and excluding wastewaters, wastewater treatment sludge, spent catalysts and wastes set out in Schedule 7.
19.	F025	Condensed light ends, spent filters and filter aids, and spent desiccant wastes from the production of certain chlorinated aliphatic hydrocarbons, by free radical catalyzed processes, those chlorinated aliphatic hydrocarbons being those having carbon chain lengths ranging from 1 to and including 5, with varying amounts and positions of chlorine substitution.
20.	F026	Wastes from the production of materials on equipment previously used for the manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tetra-, penta- or hexachlorobenzene under alkaline conditions, excluding wastewater and spent carbon from hydrogen chloride purification.
21.	F027	Discarded unused formulations containing tri-, tetra- or pentachlorophenol or discarded unused formulations containing compounds derived from those chlorophenols, excluding formulations containing hexachlorophene synthesized from prepurified 2,4,5-trichlorophenol as the sole component.
22.	F028	Residues resulting from incineration or treatment of soil contaminated with wastes listed as F020, F021, F022, F023, F026 or F027.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4 — Continued

PART 1 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM NON-SPECIFIC SOURCES — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
23.	F032	Wastewaters, spent formulations from wood preserving processes generated at plants that currently use or have previously used chlorophenolic formulations, process residuals and preservative drippage, except wastewaters that have not come into contact with process contaminants, spent formulations that potentially cross-contaminated wastes from wood preserving processes at plants that do not resume or initiate use of chlorophenolic preservatives, and bottom sediment sludge listed as K001.
24.	F034	Wastewaters, process residuals, preservative drippage and spent formulations from wood preserving processes generated at plants that use creosote formulations, excluding bottom sediment sludge listed as K001 and wastewaters that have not come into contact with process contaminants.
25.	F035	Wastewaters, process residuals, preservative drippage and spent formulations from wood preserving processes generated at plants that use inorganic preservatives containing arsenic or chromium, excluding bottom sediment sludge listed as K001 and wastewaters that have not come into contact with process contaminants.
26.	F037	Petroleum refinery primary oil, water and solids separation sludge; sludge generated from the gravitational separation of oil, water and solids during the storage or treatment of process wastewaters and oil cooling wastewaters from petroleum refineries, including, but not limited to, those generated in oil, water and solids separators, tanks and impoundments, ditches and other conveyances, sumps and stormwater units receiving dry weather flow; sludge generated in stormwater units that do not receive dry weather flow; sludge generated from non-contact once-through cooling waters segregated for treatment from other processes or oily cooling waters; sludge generated in biological treatment units that employ one of the following treatment methods: activated sludge, trickling filter, rotating biological contactor for the continuous accelerated biological oxidation of wastewaters, or high-rate aeration (including sludge generated in one or more additional units after wastewaters have been treated in biological treatment units). Wastes listed as K051 are excluded.
27.	F038	Petroleum refinery secondary (emulsified) oil, water and solids separation sludge; sludge or float generated from the physical or chemical separation of oil, water and solids in process wastewaters and oily cooling wastewaters from petroleum refineries, including, but not limited to, sludge and floats generated in induced air flotation (IAF) units, tanks and impoundments, and in dissolved air flotation (DAF) units; sludge generated in stormwater units that do not receive dry weather flow; sludge generated from non-contact once-through cooling waters segregated for treatment from other processes or oily cooling water; sludge and float generated in biological treatment units that employ one of the following treatment methods: activated sludge, trickling filter, rotating biological contactor for the continuous accelerated biological oxidation of wastewaters, or high-rate aeration (including sludge and float generated in one or more additional units after wastewaters have been treated in a biological treatment unit). Wastes listed as F037, K048 and K051 are excluded.
28.	F039	Leachate (liquids that percolated through land disposed wastes) resulting from the disposal of more than one waste classified as a hazardous waste by being included in this Schedule.

PART 2

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
<b>Wood Preservation</b>		
1.	K001	Bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote or pentachlorophenol or both.
<b>Inorganic Pigments</b>		
2.	K002	Wastewater treatment sludge from the production of chrome yellow and orange pigments.
3.	K003	Wastewater treatment sludge from the production of molybdate orange pigments.
4.	K004	Wastewater treatment sludge from the production of zinc yellow pigments.
5.	K005	Wastewater treatment sludge from the production of chrome green pigments.
6.	K006	Wastewater treatment sludge from the production of chromeoxide green pigments (anhydrous and hydrated).
7.	K007	Wastewater treatment sludge from the production of iron blue pigments.
8.	K008	Oven residue from the production of chromeoxide green pigments.
<b>Organic Chemicals</b>		
9.	K009	Distillation bottoms from the production of acetaldehyde from ethylene.
10.	K010	Distillation side cuts from the production of acetaldehyde from ethylene.
11.	K011	Bottom stream from the wastewater stripper in the production of acrylonitrile.
12.	K013	Bottom stream from the acetonitrile column in the production of acrylonitrile.
13.	K014	Bottoms from the acetonitrile purification column in the production of acrylonitrile.
14.	K015	Still bottoms from the distillation of benzylchloride.
15.	K016	Heavy ends or distillation residues from the production of carbon tetrachloride.
16.	K017	Heavy ends (still bottoms) from the purification column in the production of epichlorohydrin.
17.	K018	Heavy ends from the fractionation column in ethyl chloride production.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4 — Continued

PART 2 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
18.	K019	Heavy ends from the distillation of ethylene dichloride in ethylene dichloride production.
19.	K020	Heavy ends from the distillation of vinyl chloride in vinyl chloride monomer production.
20.	K021	Aqueous spent antimony catalyst waste from fluoromethanes production.
21.	K022	Distillation bottom tars from the production of phenol and acetone from cumene.
22.	K023	Distillation light ends from the production of phthalic anhydride from naphthalene.
23.	K024	Distillation bottoms from the production of phthalic anhydride from naphthalene.
24.	K025	Distillation bottoms from the production of nitrobenzene by the nitration of benzene.
25.	K026	Stripping still tails from the production of methyl ethyl pyridines.
26.	K027	Centrifuge and distillation residues from toluene diisocyanate production.
27.	K028	Spent catalyst from the hydrochlorinator reactor in the production of 1,1,1-trichloroethane.
28.	K029	Waste from the product stream stripper in the production of 1,1,1-trichloroethane.
29.	K030	Column bottoms or heavy ends from the combined production of trichloroethylene and perchloroethylene.
30.	K083	Distillation bottoms from aniline production.
31.	K085	Distillation or fractionating column bottoms from the production of chlorobenzenes.
32.	K093	Distillation light ends from the production of phthalic anhydride from o-xylene.
33.	K094	Distillation bottoms from the production of phthalic anhydride from o-xylene.
34.	K095	Distillation bottoms from the production of 1,1,1-trichloroethane.
35.	K096	Heavy ends from the heavy ends columns from the production of 1,1,1-trichloroethane.
36.	K103	Process residues from aniline extraction from the production of aniline.
37.	K104	Combined wastewater streams from nitrobenzene and aniline production.
38.	K105	Separated aqueous stream from the reactor product washing step in the production of chlorobenzene.
39.	K107	Column bottoms from product separation from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
40.	K108	Condensed column overheads from product separation and condensed reactor vent gases from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
41.	K109	Spent filter cartridges from product purification from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
42.	K110	Condensed column overheads from intermediate separation from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
43.	K111	Product washwaters from the production of dinitrotoluene via nitration of toluene.
44.	K112	Reaction by-product water from the drying column in the production of toluenediamine via hydrogenation of dinitrotoluene.
45.	K113	Condensed liquid light ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.
46.	K114	Vicinals from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.
47.	K115	Heavy ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.
48.	K116	Organic condensate from the solvent recovery column in the production of toluene diisocyanate via phosgenation of toluenediamine.
49.	K117	Wastewater from the reactor vent gas scrubber in the production of ethylene dibromide via bromination of ethene.
50.	K118	Spent adsorbent solids from the purification of ethylene dibromide in the production of ethylene dibromide via bromination of ethene.
51.	K136	Still bottoms from the purification of ethylene dibromide in the production of ethylene dibromide via bromination of ethene.
52.	K140	Floor sweepings, off-specification product and spent filter media from the production of 2,4,6-tribromophenol.
53.	K149	Distillation bottoms from the production of alpha- (or methyl-) chlorinated toluenes, ring- chlorinated toluenes, benzoyl chlorides and compounds with mixtures of those functional groups, excluding still bottoms from the distillation of benzyl chloride.
54.	K150	Organic residuals, excluding spent carbon adsorbent, from the spent chlorine gas and hydrochloric acid recovery processes associated with the production of alpha- (or methyl-) chlorinated toluenes, ring-chlorinated toluenes, benzoyl chlorides and compounds with mixtures of those functional groups.
55.	K151	Wastewater treatment sludge generated during the treatment of wastewaters from the production of alpha- (or methyl-) chlorinated toluenes, ring-chlorinated toluenes, benzoyl chlorides and compounds with mixtures of those functional groups, excluding neutralization and biological sludge.
56.	K156	Organic waste (including heavy ends, still bottoms, light ends, spent solvents, filtrates and decantates) from the production of carbamates and carbamoyl oximes, excluding waste generated from the manufacture of 3-iodo-2-propynyl n-butylcarbamate.
57.	K157	Wastewaters (including scrubber waters, condenser waters, washwaters and separation waters) from the production of carbamates and carbamoyl oximes, excluding wastes generated from the manufacture of 3-iodo-2-propynyl n-butylcarbamate.
58.	K158	Bag house dusts and filter or separation solids from the production of carbamates and carbamoyl oximes, excluding wastes generated from the manufacture of 3-iodo-2-propynyl n-butylcarbamate.
59.	K159	Organics from the treatment of thiocarbamate wastes.
60.	K161	Purification solids (including filtration, evaporation and centrifugation solids), bag house dust and floor sweepings from the production of dithiocarbamate acids and their salts, excluding substances listed as K125 or K126.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4 — Continued

PART 2 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES — Continued

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material
<b>Inorganic chemicals</b>		
61.	K071	Brine purification sludge from the mercury cell process in chlorine production if separately prepurified brine is not used.
62.	K073	Chlorinated hydrocarbon wastes from the purification step of the diaphragm cell process using graphite anodes in chlorine production.
63.	K106	Wastewater treatment sludge from the mercury cell process in chlorine production.
<b>Pesticides</b>		
64.	K031	By-product salts generated in the production of monosodium acid methanearsonate (MSMA) and cacodylic acid.
65.	K032	Wastewater treatment sludge from the production of chlordane.
66.	K033	Wastewater and scrub water from the chlorination of cyclopentadiene in the production of chlordane.
67.	K034	Filter solids from the filtration of hexachlorocyclopentadiene in the production of chlordane.
68.	K035	Wastewater treatment sludge from the production of creosote.
69.	K036	Still bottoms from toluene reclamation distillation in the production of disulfoton.
70.	K037	Wastewater treatment sludge from the production of disulfoton.
71.	K038	Wastewater from the washing and stripping of phorate production.
72.	K039	Filter cake from the filtration of diethylphosphorodithioic acid in the production of phorate.
73.	K040	Wastewater treatment sludge from the production of phorate.
74.	K041	Wastewater treatment sludge from the production of toxaphene.
75.	K042	Heavy ends or distillation residues from the distillation of tetrachlorobenzene in the production of 2,4,5-T.
76.	K043	2,6-Dichlorophenol waste from the production of 2,4-D.
77.	K097	Vacuum stripper discharge from the chlordane chlorinator in the production of chlordane.
78.	K098	Untreated process wastewater from the production of toxaphene.
79.	K099	Untreated wastewater from the production of 2,4-D.
80.	K123	Process wastewater, including supernates, filtrates and washwaters, from the production of ethylenebisdithiocarbamic acid and its salts.
81.	K124	Reactor vent scrubber water from the production of ethylenebisdithiocarbamic acid and its salts.
82.	K125	Filtration, evaporation and centrifugation solids from the production of ethylenebisdithiocarbamic acid and its salts.
83.	K126	Baghouse dust and floor sweepings in milling and packaging operations from the production or formulation of ethylenebisdithiocarbamic acid and its salts.
84.	K131	Wastewater from the reactor and spent sulfuric acid from the acid dryer from the production of methyl bromide.
85.	K132	Spent absorbent and wastewater separator solids from the production of methyl bromide.
<b>Explosives</b>		
86.	K044	Wastewater treatment sludge from the manufacturing and processing of explosives.
87.	K045	Spent carbon from the treatment of wastewater containing explosives.
88.	K046	Wastewater treatment sludge from the manufacturing, formulation and loading of lead-based initiating compounds.
89.	K047	Pink and red water from the production of TNT.
<b>Petroleum refining</b>		
90.	K048	Dissolved air flotation (DAF) float from the petroleum refining industry.
91.	K049	Slop oil emulsion solids from the petroleum refining industry.
92.	K050	Heat exchanger bundle cleaning sludge from the petroleum refining industry.
93.	K051	American Petroleum Institute (API) separator sludge from the petroleum refining industry.
94.	K052	Tanks bottoms (lead) from the petroleum refining industry.
95.	K169	Crude oil storage tank sediment from refining petroleum.
96.	K170	Clarified slurry oil tank sediment and in-line filter or separation solids from refining petroleum.
97.	K171	Spent hydrotreating catalyst from refining petroleum, including guard beds used to desulfurize feeds to other catalytic reactors, excluding inert support media.
98.	K172	Spent hydrorefining catalyst from refining petroleum, including guard beds used to desulfurize feeds to other catalytic reactors, excluding inert support media.
<b>Iron and steel</b>		
99.	K061	Emission control dust and sludge from the primary production of steel in electric furnaces.
100.	K062	Spent pickle liquor from steel finishing operations of facilities within the iron and steel industry at steel works, blast furnaces (including coke ovens), rolling mills, iron and steel foundries, gray and ductile iron foundries, malleable iron foundries, steel investment foundries or other miscellaneous steel foundries, or at facilities in the electrometallurgical products (except steel) industry, steel wiredrawing and steel nails and spikes industry, coldrolled steel sheet, strip and bars industry or steel pipes and tubes industry.
<b>Primary copper</b>		
101.	K064	Acid plant blowdown slurry and sludge resulting from the thickening of blowdown slurry from primary copper production.



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4 — Continued

PART 2 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES — Continued

Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material
<b>Primary lead</b>		
102.	K065	Surface impoundment solids contained in and dredged from surface impoundments at primary lead smelting facilities.
<b>Primary zinc</b>		
103.	K066	Sludge from treatment of process wastewater and acid plant blowdown from primary zinc production.
<b>Primary aluminum</b>		
104.	K088	Spent potliners from primary aluminum reduction.
<b>Ferroalloys</b>		
105.	K090	Emission control dust or sludge from ferrochromiumsilicon production.
106.	K091	Emission control dust or sludge from ferrochromium production.
<b>Secondary lead</b>		
107.	K069	Emission control dust and sludge from secondary lead smelting.
108.	K100	Waste leaching solution from acid leaching of emission control dust and sludge from secondary lead smelting.
<b>Veterinary pharmaceuticals</b>		
109.	K084	Wastewater treatment sludge from the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.
110.	K101	Distillation tar residues from the distillation of aniline-based compounds in the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.
111.	K102	Residue from the use of activated carbon for decolourization in the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.
<b>Ink formulation</b>		
112.	K086	Solvent washes and sludge, caustic washes and sludge or water washes and sludge from cleaning tubs and equipment used in the formulation of ink from pigments, driers, soaps and stabilizers containing chromium and lead.
<b>Coking</b>		
113.	K060	Ammonia still lime sludge from coking operations.
114.	K087	Decanter tank tar sludge from coking operations.
115.	K141	Process residues from the recovery of coal tar, including, but not limited to, collecting sump residues from the production of coke from coal and the recovery of coke by-products produced from coal, excluding those wastes listed as K087.
116.	K142	Tar storage tank residues from the production of coke from coal or from the recovery of coke by-products produced from coal.
117.	K143	Process residues from the recovery of light oil, including, but not limited to, those generated in stills, decanters and wash oil recovery units from the recovery of coke by-products produced from coal.
118.	K144	Wastewater sump residues from light oil refining, including, but not limited to, intercepting or contamination sump sludge from the recovery of coke by-products produced from coal.
119.	K145	Residues from naphthalene collection and recovery operations from the recovery of coke by-products produced from coal.
120.	K147	Tar storage tank residues from coal tar refining.
121.	K148	Residues from coal tar distillation, including, but not limited to, still bottoms.

SCHEDULE 5

(Paragraphs 1(1)(d) and 2(1)(d))

ENVIRONMENTALLY HAZARDOUS SUBSTANCES

Item	Substance	Concentration by Mass (mg/kg)
1.	Acetaldehyde	100.0
2.	Acetaldehyde ammonia	100.0
3.	Acetic acid	100.0
4.	Acetic anhydride	100.0
5.	Acetone cyanohydrin	100.0
6.	Acetyl bromide	100.0
7.	Acetyl chloride	100.0
8.	Acrolein, stabilized	100.0
9.	Acrylonitrile, stabilized	100.0
10.	Adipic acid	100.0

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 5 — Continued

ENVIRONMENTALLY HAZARDOUS SUBSTANCES — Continued

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
11.	Allethrin	100.0
12.	Allyl alcohol	100.0
13.	Allyl chloride	100.0
14.	Aluminum sulphate	100.0
15.	N-Aminopropylmorpholine	100.0
16.	Ammonia	100.0
17.	Ammonia solutions	100.0
18.	Ammonium acetate	100.0
19.	Ammonium benzoate	100.0
20.	Ammonium bicarbonate	100.0
21.	Ammonium bisulphite	100.0
22.	Ammonium carbamate	100.0
23.	Ammonium carbonate	100.0
24.	Ammonium chloride	100.0
25.	Ammonium citrate, dibasic	100.0
26.	Ammonium oxalate	100.0
27.	Ammonium sulphamate	100.0
28.	Ammonium sulphide	100.0
29.	Ammonium tartrate	100.0
30.	Ammonium thiocyanate	100.0
31.	Ammonium thiosulphate	100.0
32.	Amyl acetates	100.0
33.	Aniline	100.0
34.	Antimony pentachloride	100.0
35.	Antimony potassium tartrate	100.0
36.	Antimony tribromide	100.0
37.	Antimony trichloride	100.0
38.	Antimony trioxide	100.0
39.	Benzidine	100.0
40.	Benzoic acid	100.0
41.	Benzonitrile	100.0
42.	Benzoyl chloride	100.0
43.	Benzyl chloride	100.0
44.	Beryllium chloride	100.0
45.	Butyl acetates	100.0
46.	n-Butylamine	100.0
47.	n-Butyl phthalate	100.0
48.	Calcium hypochlorite	100.0
49.	Captan	100.0
50.	Carbon disulphide	100.0
51.	Chlordecone	100.0
52.	2-Chlorophenol	100.0
53.	Chlorosulphonic acid (with or without sulphur trioxide)	100.0
54.	Cobaltous bromide	100.0
55.	Cobaltous formate	100.0
56.	Cobaltous sulphamate	100.0
57.	Copper-based pesticides (all forms)	100.0
58.	Copper chloride	100.0
59.	Coumaphos	100.0
60.	Creosote	100.0
61.	Crotonaldehyde	100.0
62.	Cupric acetate	100.0
63.	Cupric oxalate	100.0
64.	Cupric sulphate	100.0
65.	Cupric sulphate, ammoniated	100.0
66.	Cupric tartrate	100.0
67.	Cyclohexane	100.0

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 5 — Continued  
ENVIRONMENTALLY HAZARDOUS SUBSTANCES — Continued

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
68.	Dichlobenil	100.0
69.	Dichlone	100.0
70.	1,1-Dichloro-2,2-di-(p-chlorophenyl) ethane	100.0
71.	Dichlorodiphenyltrichloroethane	100.0
72.	2,2-Dichloroethyl ether	100.0
73.	Dichloropropene	100.0
74.	2,2-Dichloropropionic acid	100.0
75.	Dichlorvos	100.0
76.	Dicofol	100.0
77.	Diethylamine	100.0
78.	Dimethylamine	100.0
79.	Dinitrobenzenes	100.0
80.	Dinitrophenol	100.0
81.	Dinitrotoluenes (excluding 2,4-dinitrotoluene)	100.0
82.	Disulfoton	100.0
83.	Endosulfan	100.0
84.	Epichlorohydrin	100.0
85.	Ethion	100.0
86.	Ethylbenzene	100.0
87.	Ethylenediamine	100.0
88.	Ethylenediaminetetraacetic acid	100.0
89.	Ethylene dibromide	100.0
90.	Ethylene dichloride	100.0
91.	Ferric ammonium citrate	100.0
92.	Ferric ammonium oxalate	100.0
93.	Ferric chloride	100.0
94.	Ferric nitrate	100.0
95.	Ferric sulphate	100.0
96.	Ferrous ammonium sulphate	100.0
97.	Ferrous chloride	100.0
98.	Ferrous sulphate	100.0
99.	Formaldehyde	100.0
100.	Formic acid	100.0
101.	Fumaric acid	100.0
102.	Furfural	100.0
103.	Hexachlorocyclopentadiene	100.0
104.	Isobutyl acetate	100.0
105.	Isobutylamine	100.0
106.	Isobutyric acid	100.0
107.	Isoprene	100.0
108.	Kelthane	100.0
109.	Mercaptodimethur	100.0
110.	Methyl bromide and ethylene dibromide mixtures	100.0
111.	Methyl methacrylate	100.0
112.	Methylamine	100.0
113.	Mevinphos	100.0
114.	Mexacarbate	100.0
115.	Naled	100.0
116.	Naphthalene	100.0
117.	Naphtheneic acid	100.0
118.	Nickel ammonium sulphate	100.0
119.	Nickel chloride	100.0
120.	Nickel hydroxide	100.0
121.	Nickel sulphate	100.0
122.	Nitrophenols (o-, m-, p-)	100.0
123.	Nitrotoluenes (o-, m-, p-)	100.0
124.	Organotin compounds (all forms)	100.0

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SORDORS/2005-149

SCHEDULE 5 — Continued

ENVIRONMENTALLY HAZARDOUS SUBSTANCES — Continued

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
125.	Organotin Pesticides (all forms)	100.0
126.	Oxalates, water soluble	100.0
127.	Paraformaldehyde	100.0
128.	Phencapton	100.0
129.	Phenol	100.0
130.	Phosphorus	100.0
131.	Phosphorus oxychloride	100.0
132.	Phosphorus pentasulphide	100.0
133.	Phosphorus trichloride	100.0
134.	Polychlorinated biphenyls	50.0
135.	Potassium permanganate	100.0
136.	Propargite	100.0
137.	Propionic acid	100.0
138.	Propionic anhydride	100.0
139.	Propylene dichloride	100.0
140.	Propylene oxide	100.0
141.	Pyrethrins	100.0
142.	Quinoline	100.0
143.	Resorcinol	100.0
144.	Silver nitrate	100.0
145.	Sodium bisulphite	100.0
146.	Sodium dodecylbenzene sulphonate (branched chain)	100.0
147.	Sodium hydrogen sulphite	100.0
148.	Sodium hydrosulphide	100.0
149.	Sodium methylate	100.0
150.	Sodium phosphate, dibasic	100.0
151.	Sodium phosphate, tribasic	100.0
152.	Strychnine or Strychnine mixtures	100.0
153.	Strychnine salts or Strychnine salt mixtures	100.0
154.	Styrene	100.0
155.	Sulphur monochloride	100.0
156.	Tetrachloroethane	100.0
157.	Tetraethyl Pyrophosphate	100.0
158.	Thallium sulphate	100.0
159.	Thiram	100.0
160.	Titanium sulphate	100.0
161.	Toluene	100.0
162.	Triazine Pesticides	100.0
163.	Trichlorphon	100.0
164.	Triethylamine	100.0
165.	Trimethylamine	100.0
166.	Vanadium pentoxide, non-fused form	100.0
167.	Vanadyl sulphate	100.0
168.	Vinyl acetate	100.0
169.	Xylenes	100.0
170.	Xylenols	100.0
171.	Zinc acetate	100.0
172.	Zinc ammonium chloride	100.0
173.	Zinc carbonate	100.0
174.	Zinc chloride	100.0
175.	Zinc formate	100.0
176.	Zinc phenolsulphonate	100.0
177.	Zinc phosphide	100.0
178.	Zinc sulphate	100.0
179.	Zirconium sulphate	100.0

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 6  
(Paragraphs 1(1)(e) and 2(1)(e) and subparagraphs 2(2)(e)(ii) and 8(j)(v))

HAZARDOUS CONSTITUENTS CONTROLLED UNDER LEACHATE TEST AND REGULATED LIMITS

Column 1		Column 2	Column 3
Item	Hazardous Constituent Code No.	Hazardous Constituents (synonyms and descriptors)	Concentration (mg/L)
1.	L32	Aldicarb	0.900
2.	L3	Aldrin + Dieldrin	0.070
3.	L4	Arsenic	2.500
4.	L33	Atrazine + N-dealkylated metabolites	0.500
5.	L34	Azinphos-methyl	2.000
6.	L5	Barium	100.000
7.	L35	Bendiocarb	4.000
8.	L36	Benzene	0.500
9.	L37	Benzo(a)pyrene	0.001
10.	L6	Boron	500.000
11.	L38	Bromoxynil	0.500
12.	L7	Cadmium	0.500
13.	L8	Carbaryl/Sevin/1-Naphthyl-N methyl carbamate	9.000
14.	L39	Carbofuran	9.000
15.	L40	Carbon tetrachloride (Tetrachloromethane)	0.500
16.	L41	Chloramines	300.000
17.	L9	Chlordane	0.700
18.	L42	Chlorobenzene (Monochlorobenzene)	8.000
19.	L43	Chloroform	10.000
20.	L44	Chlorpyrifos	9.000
21.	L10	Chromium	5.000
22.	L45	Cresol (Mixture — total of all isomers, when isomers cannot be differentiated)	200.000
23.	L46	m-Cresol	200.000
24.	L47	o-Cresol	200.000
25.	L48	p-Cresol	200.000
26.	L49	Cyanazine	1.000
27.	L11	Cyanide	20.000
28.	L2	2,4-D / (2,4-Dichlorophenoxy)acetic acid	10.000
29.	L50	2,4-DCP / (2,4-Dichlorophenol)	90.000
30.	L12	DDT (total isomers)	3.000
31.	L13	Diazinon/Phosphordithioic acid, o,o-diethyl o-(2-isopropyl 6-methyl-4-pyrimidinyl) ester	2.000
32.	L51	Dicamba	12.000
33.	L52	1,2-Dichlorobenzene (o-Dichlorobenzene)	20.00
34.	L53	1,4-Dichlorobenzene (p-Dichlorobenzene)	0.50
35.	L54	1,2-Dichloroethane (Ethylene dichloride)	5.0
36.	L55	1,1-Dichloroethylene (Vinylidene chloride)	1.40
37.	L56	Dichloromethane (also see — methylene chloride)	5.00
38.	L57	Diclofop-methyl	0.90
39.	L58	Dimethoate	2.00
40.	L59	2,4-Dinitrotoluene	0.13
41.	L60	Dinoseb	1.00
42.	L70	Diquat	7.00
43.	L71	Diuron	15.00
44.	L14	Endrin	0.02
45.	L15	Fluoride	150.00
46.	L72	Glyphosate	28.00
47.	L16	Heptachlor + Heptachlor epoxide	0.30
48.	L73	Hexachlorobenzene	0.13
49.	L74	Hexachlorobutadiene	0.50
50.	L75	Hexachloroethane	3.00
51.	L17	Lead	5.00
52.	L18	Lindane	0.40
53.	L76	Malathion	19.00
54.	L19	Mercury	0.10
55.	L20	Methoxychlor/1,1,1-Trichloro-2,2-bis(p-methoxyphenyl) ethane	90.00

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 6 — Continued

HAZARDOUS CONSTITUENTS CONTROLLED UNDER LEACHATE TEST AND REGULATED LIMITS — Continued

Item	Column 1 Hazardous Constituent Code No.	Column 2 Hazardous Constituents (synonyms and descriptors)	Column 3 Concentration (mg/L)
56.	L77	Methyl ethyl ketone / Ethyl methyl ketone	200.00
57.	L21	Methyl Parathion	0.70
58.	L78	Methylene chloride / Dichloromethane	5.00
59.	L79	Metolachlor	5.00
60.	L80	Metribuzin	8.00
61.	L81	Nitrate	4500.00
62.	L22	Nitrate + Nitrite	1000.00
63.	L23	Nitrotriacetic acid (NTA)	40.00
64.	L24	Nitrite	320.00
65.	L82	Nitrobenzene	2.00
66.	L83	Paraquat	1.00
67.	L26	Parathion	5.00
68.	L84	Pentachlorophenol	6.00
69.	L85	Phorate	0.20
70.	L86	Picloram	19.00
71.	L100	Polychlorinated dibenzo dioxins and furans	0.0000015 TEQ
72.	L87	Pyridine	5.00
73.	L27	Selenium	1.00
74.	L88	Simazine	1.00
75.	L89	2,4,5-T (2,4,5-Trichlorophenoxyacetic acid)	28.00
76.	L1	2,4,5-TP/ Silvex/ 2-(2,4,5-Trichlorophenoxy)propionic acid	1.00
77.	L90	Terbufos	28.00
78.	L91	Terbufos	0.10
79.	L92	Tetrachloroethylene	3.00
80.	L93	2,3,4,6-Tetrachlorophenol / (2,3,4,6-TeCP)	10.00
81.	L29	Toxaphene	0.50
82.	L94	Triallate	23.00
83.	L95	Trichloroethylene	5.00
84.	L96	2,4,5-Trichlorophenol / (2,4,5-TCP)	400.00
85.	L97	2,4,6-Trichlorophenol / (2,4,6-TCP)	0.50
86.	L98	Trifluralin	4.50
87.	L30	Trihalomethanes — Total (also see — Chloroform)	10.00
88.	L31	Uranium	10.00
89.	L99	Vinyl chloride	0.20

SCHEDULE 7

(Paragraphs 1(1)(f) and 2(1)(f), subparagraphs 8(j)(v) and 38(1)(a)(iii) and Schedule 4)

PART 1

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
1.	P026	1-(o-Chlorophenyl)thiourea
2.	P081	1,2,3-Propanetriol, trinitrate
3.	P042	1,2-Benzenediol, 4-[1-hydroxy-2-(methylamino)ethyl]-
4.	P067	1,2-Propylenimine
5.	P185	1,3-Dithiolane-2-carboxaldehyde, 2,4-dimethyl-, O-[(methylamino)-carbonyl]oxime
6.	P004	1,4,5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexa-chloro-1,4,4a,5,8,8a-hexahydro-, (1alpha,4alpha,4abeta,5alpha,8alpha,8abeta)
7.	P060	1,4,5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexa-chloro-1,4,4a,5,8,8a-hexahydro-, (1alpha,4alpha,4abeta,5beta,8beta,8abeta)-
8.	P002	1-Acetyl-2-thiourea
9.	P048	2,4-Dinitrophenol

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
10.	P051	2,7:3,6-Dimethanonaphth [2,3-b]oxirene, 3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a,7,7a-octahydro-, (1aalpha,2beta,2beta,3alpha,6alpha,6 alpha,7beta,7aalpha)-, and metabolites
11.	P037	2,7:3,6-Dimethanonaphth [2,3-b]oxirene, 3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a,7,7a-octahydro-, (1aalpha,2beta,2beta,3alpha,6alpha,6beta,6alpha,7beta,7aalpha)-[b]oxirene, 3,4,5,6,9,9-hexachloro-
12.	P045	2-Butanone, 3,3-dimethyl-1-methylthio-, O-(methylamino)carbonyl]oxime
13.	P034	2-Cyclohexyl-4,6-dinitrophenol
14.	P001	2H-1-Benzopyran-2-one, 4-hydroxy-3-(3-oxo-1-phenylbutyl)-, and salts, when present at concentrations greater than 0.3%
15.	P069	2-Methylacetonitrile
16.	P017	2-Propanone, 1-bromo-
17.	P005	2-Propen-1-ol
18.	P003	2-Propenal
19.	P102	2-Propyn-1-ol
20.	P007	3(2H)-Isoxazolone, 5-(aminomethyl)-
21.	P027	3-Chloropropionitrile
22.	P202	3-Isopropylphenyl N-methylcarbamate
23.	P047	4,6-Dinitro-o-cresol, and salts
24.	P059	4,7-Methano-1H-indene, 1,4,5,6,7,8,8-heptachloro-3a,4,7,7a-tetrahydro-
25.	P008	4-Aminopyridine
26.	P008	4-Pyridinamine
27.	P007	5-(Aminomethyl)-3-isoxazolol
28.	P050	6,9-Methano-2,4,3-benzodioxathiepin, 6,7,8,9,10,10-hexachloro-1,5,5a,6,9,9a-hexahydro-, 3-oxide
29.	P127	7-Benzofuranol, 2,3-dihydro-2,2-dimethyl-, methylcarbamate
30.	P088	7-Oxabicyclo[2.2.1]heptane-2,3-dicarboxylic acid
31.	P023	Acetaldehyde, chloro-
32.	P057	Acetamide, 2-fluoro-
33.	P002	Acetamide, N-(aminothioxomethyl)-
34.	P058	Acetic acid, fluoro-, sodium salt
35.	P003	Acrolein
36.	P070	Aldicarb
37.	P203	Aldicarb sulfone
38.	P004	Aldrin
39.	P005	Allyl alcohol
40.	P046	alpha,a-Dimethylphenethylamine
41.	P072	alpha-Naphthylthiourea
42.	P006	Aluminum phosphide
43.	P009	Ammonium picrate
44.	P119	Ammonium vanadate
45.	P099	Argentate(1-), bis(cyano-C)-, potassium
46.	P010	Arsenic acid H <sub>3</sub> AsO <sub>4</sub>
47.	P012	Arsenic oxide As <sub>2</sub> O <sub>3</sub>
48.	P011	Arsenic oxide As <sub>2</sub> O <sub>5</sub>
49.	P011	Arsenic pentoxide
50.	P012	Arsenic trioxide
51.	P038	Arsine, diethyl-
52.	P036	Arsonous dichloride, phenyl-
53.	P054	Aziridine
54.	P067	Aziridine, 2-methyl-
55.	P013	Barium cyanide

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
56.	P024	Benzenamine, 4-chloro-
57.	P077	Benzenamine, 4-nitro-
58.	P028	Benzene, (chloromethyl)-
59.	P046	Benzeneethanamine, alpha, alpha-dimethyl-
60.	P014	Benzenethiol
61.	P188	Benzoic acid, 2-hydroxy-, compd with (3a <i>S</i> - <i>cis</i> )-1,2,3,3a,8,8a-hexahydro-1,3a,8-trimethylpyrrolo[2,3- <i>b</i> ]indol-5-yl methylcarbamate ester (1:1)
62.	P028	Benzyl chloride
63.	P015	Beryllium powder
64.	P017	Bromoacetone
65.	P018	Brucine
66.	P021	Calcium cyanide
67.	P021	Calcium cyanide $\text{Ca}(\text{CN})_2$
68.	P189	Carbamic acid, [(dibutylamino)-thio]methyl-, 2,3-dihydro-2,2-dimethyl-7-benzofuranyl ester
69.	P191	Carbamic acid, dimethyl-, 1-[(dimethyl-amino)carbonyl]-5-methyl-1 <i>H</i> -pyrazol-3-yl ester
70.	P190	Carbamic acid, methyl-, 3-methylphenyl ester
71.	P192	Carbamic acid, dimethyl-, 3-methyl-1-(1-methylethyl)-1 <i>H</i> -pyrazol-5-yl ester
72.	P127	Carbofuran
73.	P022	Carbon disulfide
74.	P095	Carbonic dichloride
75.	P189	Carbosulfan
76.	P023	Chloroacetaldehyde
77.	P029	Copper cyanide
78.	P029	Copper cyanide $\text{Cu}(\text{CN})$
79.	P030	Cyanides (soluble cyanide salts), not otherwise specified
80.	P031	Cyanogen
81.	P033	Cyanogen chloride
82.	P033	Cyanogen chloride $(\text{CN})\text{Cl}$
83.	P016	Dichloromethyl ether
84.	P036	Dichlorophenylarsine
85.	P037	Dieldrin
86.	P038	Diethylarsine
87.	P041	Diethyl- <i>p</i> -nitrophenyl phosphate
88.	P043	Diisopropylfluorophosphate (DFP)
89.	P044	Dimethoate
90.	P191	Dimetilan
91.	P020	Dinoseb
92.	P085	Diphosphoramidate, octamethyl-
93.	P111	Diphosphoric acid, tetraethyl ester
94.	P039	Disulfoton
95.	P049	Dithiobiuret
96.	P050	Endosulfan
97.	P088	Endothall
98.	P051	Endrin
99.	P051	Endrin, and metabolites
100.	P042	Epinephrine
101.	P031	Ethanedinitrile



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
102.	P194	Ethanimidothioic acid, 2-(dimethylamino)-N-[[[(methylamino)carbonyl]oxy]-2-oxo-, methyl ester
103.	P066	Ethanimidothioic acid, N-[[[(methylamino)carbonyl]oxy]-, methyl ester
104.	P101	Ethyl cyanide
105.	P054	Ethyleneimine
106.	P097	Famphur
107.	P056	Fluorine
108.	P057	Fluoroacetamide
109.	P058	Fluoroacetic acid, sodium salt
110.	P198	Formetanate hydrochloride
111.	P197	Formparanate
112.	P065	Fulminic acid, mercury(2+) salt
113.	P059	Heptachlor
114.	P062	Hexaethyl tetraphosphate
115.	P068	Hydrazine, methyl-
116.	P116	Hydrazinecarbothioamide
117.	P063	Hydrocyanic acid
118.	P063	Hydrogen cyanide
119.	P096	Hydrogen phosphide
120.	P060	Isodrin
121.	P192	Isolan
122.	P196	Manganese, bis(dimethylcarbamoithioato-S,S')
123.	P196	Manganese dimethyl dithiocarbamate
124.	P202	M-Cumenyl methylcarbamate
125.	P065	Mercury fulminate
126.	P092	Mercury, (acetato-O)phenyl-
127.	P082	Methanamine, N-methyl-N-nitroso-
128.	P064	Methane, isocyanato-
129.	P016	Methane, oxybis(chloro-
130.	P112	Methane, tetramino-
131.	P118	Methanethiol, trichloro-
132.	P197	Methanimidamide, N,N-dimethyl-N'-[2-methyl-4-[[[(methylamino)carbonyl]oxy]phenyl]-
133.	P198	Methanimidamide, N,N-dimethyl-N'-[3-[[[(methylamino)carbonyl]oxy]phenyl]-, monohydrochloride
134.	P199	Methiocarb
135.	P066	Methomyl
136.	P068	Methyl hydrazine
137.	P064	Methyl isocyanate
138.	P071	Methyl parathion
139.	P190	Metolcarb
140.	P128	Mexacarbate
141.	P073	Nickel carbonyl
142.	P073	Nickel carbonyl Ni(CO) <sub>4</sub> , (T-4)-
143.	P074	Nickel cyanide
144.	P074	Nickel cyanide Ni(CN) <sub>2</sub>
145.	P075	Nicotine, and salts
146.	P076	Nitric oxide
147.	P078	Nitrogen dioxide
148.	P076	Nitrogen oxide NO

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
149.	P078	Nitrogen oxide NO <sub>2</sub>
150.	P081	Nitroglycerine
151.	P082	N-Nitrosodimethylamine
152.	P084	N-Nitrosomethylvinylamine
153.	P040	O,O-Diethyl O-pyrazinyl phosphorothioate
154.	P085	Octamethylpyrophosphoramide
155.	P087	Osmium oxide OsO <sub>4</sub> (T-4)-
156.	P087	Osmium tetroxide
157.	P194	Oxamyl
158.	P089	Parathion
159.	P024	p-Chloroaniline
160.	P020	Phenol, 2-(1-methylpropyl)-4,6-dinitro-
161.	P009	Phenol, 2,4,6-trinitro-, ammonium salt
162.	P048	Phenol, 2,4-dinitro-
163.	P034	Phenol, 2-cyclohexyl-4,6-dinitro-
164.	P047	Phenol, 2-methyl-4,6-dinitro-, and salts
165.	P202	Phenol, 3-(1-methylethyl)-, methylcarbamate
166.	P201	Phenol, 3-methyl-5-(1-methylethyl)-, methylcarbamate
167.	P199	Phenol, (3,5-dimethyl-4-(methylthio)-, methylcarbamate
168.	P128	Phenol, 4-(dimethylamino)-3,5-dimethyl-, methylcarbamate (ester)
169.	P092	Phenylmercury acetate
170.	P093	Phenylthiourea
171.	P094	Phorate
172.	P095	Phosgene
173.	P096	Phosphine
174.	P041	Phosphoric acid, diethyl 4-nitrophenyl ester
175.	P094	Phosphorodithioic acid, O,O-diethyl S-(ethylthio)methyl ester
176.	P039	Phosphorodithioic acid, O,O-diethyl S-(2-(ethylthio)ethyl) ester
177.	P044	Phosphorodithioic acid, O,O-dimethyl S-[2-(methylamino)-2-oxoethyl] ester
178.	P043	Phosphorofluoric acid, bis(1-methylethyl) ester
179.	P071	Phosphorothioic acid, O,O-dimethyl O-(4-nitrophenyl) ester
180.	P089	Phosphorothioic acid, O,O-diethyl O-(4-nitrophenyl) ester
181.	P040	Phosphorothioic acid, O,O-diethyl O-pyrazinyl ester
182.	P097	Phosphorothioic acid, O-[4-[(dimethylamino)sulfonyl]phenyl] O,O-r dimethyl ester
183.	P188	Physostigmine salicylate
184.	P204	Physostigmine
185.	P110	Plumbane, tetraethyl-
186.	P077	p-Nitroaniline
187.	P098	Potassium cyanide
188.	P098	Potassium cyanide K(CN)
189.	P099	Potassium silver cyanide
190.	P201	Promecarb
191.	P203	Propanal, 2-methyl-2-(methylsulfonyl)-, O-[(methylamino)carbonyl]oxime
192.	P070	Propanal, 2-methyl-2-(methylthio)-, O-[(methylamino)carbonyl]oxime
193.	P101	Propanenitrile
194.	P069	Propanenitrile, 2-hydroxy-2-methyl-
195.	P027	Propanenitrile, 3-chloro-
196.	P102	Propargyl alcohol
197.	P075	Pyridine, 3-(1-methyl-2-pyrrolidinyl)-, (S)-, and salts
198.	P204	Pyrolo[2,3-b]indol-5-ol, 1,2,3,3a,8,8a-hexahydro-1,3a,8-trimethyl-, methylcarbamate (ester), (3aS-cis)-
199.	P114	Selenious acid, diethallium(1+) salt
200.	P103	Scienourea

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
201.	P104	Silver cyanide
202.	P104	Silver cyanide Ag(CN)
203.	P105	Sodium azide
204.	P106	Sodium cyanide
205.	P106	Sodium cyanide Na(CN)
206.	P108	Strychnidin-10-one, and salts
207.	P018	Strychnidin-10-one, 2,3-dimethoxy-
208.	P108	Strychnine, and salts
209.	P115	Sulfuric acid, diethallium(1+) salt
210.	P110	Tetraethyl lead
211.	P111	Tetraethyl pyrophosphate
212.	P109	Tetraethyldithiopyrophosphate
213.	P112	Tetranitromethane
214.	P062	Tetraphosphoric acid, hexaethyl ester
215.	P113	Thallic oxide
216.	P113	Thallium oxide Tl <sub>2</sub> O <sub>3</sub>
217.	P114	Thallium(I) selenite
218.	P115	Thallium(I) sulfate
219.	P109	Thiodiphosphoric acid, tetraethyl ester
220.	P045	Thiofanox
221.	P049	Thioimidodicarbonic diamide [(H <sub>2</sub> N)C(S)] <sub>2</sub> NH
222.	P014	Thiophenol
223.	P116	Thiosemicarbazide
224.	P026	Thiourea, (2-chlorophenyl)-
225.	P072	Thiourea, 1-naphthalenyl-
226.	P093	Thiourea, phenyl-
227.	P185	Tirpate
228.	P123	Toxaphene
229.	P118	Trichloromethanethiol
230.	P119	Vanadic acid, ammonium salt
231.	P120	Vanadium oxide V <sub>2</sub> O <sub>5</sub>
232.	P120	Vanadium pentoxide
233.	P084	Vinylamine, N-methyl-N-nitroso-
234.	P001	Warfarin, and salts, when present at concentrations greater than 0.3%
235.	P121	Zinc cyanide
236.	P121	Zinc cyanide Zn(CN) <sub>2</sub>
237.	P122	Zinc phosphide Zn <sub>3</sub> P <sub>2</sub> , when present at concentrations greater than 10%
238.	P205	Zinc, bis(dimethylcarbamodithioato-S,S')-
239.	P205	Ziram

PART 2

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
1.	U021	[1,1'-Biphenyl]-4,4'-diamine
2.	U073	[1,1'-Biphenyl]-4,4'-diamine, 3,3'-dichloro-
3.	U091	[1,1'-Biphenyl]-4,4'-diamine, 3,3'-dimethoxy-
4.	U095	[1,1'-Biphenyl]-4,4'-diamine, 3,3'-dimethyl-
5.	U208	1,1,1,2-Tetrachloroethane
6.	U209	1,1,2,2-Tetrachloroethane

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
7.	U227	1,1,2-Trichloroethane
8.	U078	1,1-Dichloroethylene
9.	U098	1,1-Dimethylhydrazine
10.	U207	1,2,4,5-Tetrachlorobenzene
11.	U085	1,2:3,4-Diepoxybutane
12.	U069	1,2-Benzenedicarboxylic acid, dibutyl ester
13.	U088	1,2-Benzenedicarboxylic acid, diethyl ester
14.	U102	1,2-Benzenedicarboxylic acid, dimethyl ester
15.	U107	1,2-Benzenedicarboxylic acid, dioctyl ester
16.	U028	1,2-Benzenedicarboxylic acid, bis(2-ethylhexyl) ester
17.	U202	1,2-Benzisothiazol-3(2H)-one, 1,1-dioxide, and salts
18.	U066	1,2-Dibromo-3-chloropropane
19.	U079	1,2-Dichloroethylene
20.	U099	1,2-Dimethylhydrazine
21.	U109	1,2-Diphenylhydrazine
22.	U155	1,2-Ethanediamine, N,N-dimethyl-N'-2-pyridinyl-N'-(2-thienylmethyl)-
23.	U193	1,2-Oxathiolane, 2,2-dioxide
24.	U142	1,3,4-Metheno-2H-cyclobuta[cd]pentalen-2-one, 1,1a,3,3a,4,5,5,5a,5b,6-decachlorooctahydro-
25.	U234	1,3,5-Trinitrobenzene
26.	U182	1,3,5-Trioxane, 2,4,6-trimethyl-
27.	U201	1,3-Benzenediol
28.	U364	1,3-Benzodioxol-4-ol, 2,2-dimethyl-
29.	U278	1,3-Benzodioxol-4-ol, 2,2-dimethyl-, methyl carbamate
30.	U141	1,3-Benzodioxole, 5-(1-propenyl)-
31.	U203	1,3-Benzodioxole, 5-(2-propenyl)-
32.	U090	1,3-Benzodioxole, 5-propyl-
33.	U128	1,3-Butadiene, 1,1,2,3,4,4-hexachloro-
34.	U130	1,3-Cyclopentadiene, 1,2,3,4,5,5-hexachloro-
35.	U084	1,3-Dichloropropene
36.	U190	1,3-Isobenzofurandione
37.	U186	1,3-Pentadiene
38.	U193	1,3-Propane sultone
39.	U074	1,4-Dichloro-2-butene
40.	U108	1,4-Dichloroethylene
41.	U108	1,4-Dioxane
42.	U166	1,4-Naphthalenedione
43.	U166	1,4-Naphthoquinone
44.	U172	1-Butanamine, N-butyl-N-nitroso-
45.	U031	1-Butanol
46.	U011	1H-1,2,4-Triazol-3-amine
47.	U186	1-Methylbutadiene
48.	U167	1-Naphthalenamine
49.	U279	1-Naphthalenol, methylcarbamate
50.	U194	1-Propanamine
51.	U111	1-Propanamine, N-nitroso-N-propyl-
52.	U110	1-Propanamine, N-propyl-
53.	U235	1-Propanol, 2,3-dibromo-, phosphate (3:1)
54.	U140	1-Propanol, 2-methyl-
55.	U243	1-Propene, 1,1,2,3,3,3-hexachloro-
56.	U084	1-Propene, 1,3-dichloro-
57.	U085	2,2-Bioxirane
58.	T140	2,3,4,6-Tetrachlorophenol
59.	U237	2,4-(1H,3H)-Pyrimidinedione, 5-[bis(2-chloroethyl)amino]-
60.	T140	2,4,5-T

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
61.	T140	2,4,5-Trichlorophenol
62.	U408	2,4,6-Tribromophenol
63.	T140	2,4,6-Trichlorophenol
64.	U240	2,4-D, salts and esters
65.	U081	2,4-Dichlorophenol
66.	U101	2,4-Dimethylphenol
67.	U105	2,4-Dinitrotoluene
68.	U197	2,5-Cyclohexadiene-1,4-dione
69.	U147	2,5-Furandione
70.	U082	2,6-Dichlorophenol
71.	U106	2,6-Dinitrotoluene
72.	U236	2,7-Naphthalenedisulfonic acid, 3,3'-[(3,3'-dimethyl[1,1'-biphenyl]-4,4'-diyl)bis(azo)bis[5-amino-4-hydroxy]-, tetrasodium salt
73.	U005	2-Acetylaminofluorene
74.	U159	2-Butanone
75.	U160	2-Butanone, peroxide
76.	U053	2-Butenal
77.	U074	2-Butene, 1,4-dichloro-
78.	U143	2-Butenoic acid, 2-methyl-, 7-[(2,3-dihydroxy-2-(1-methoxyethyl)-3-methyl-1-oxobutoxy)methyl]-2,3,5,7a-tetrahydro-1H-pyrrolizin-1-yl ester, [1S-[1alpha(Z), 7(2S*,3R*), 7aalpha]]-
79.	U042	2-Chloroethyl vinyl ether
80.	U125	2-Furancarboxaldehyde
81.	U058	2H-1,3,2-Oxazaphosphorin-2-amine, N,N-bis(2-chloroethyl)tetrahydro-, 2-oxide
82.	U248	2H-1-Benzopyran-2-one, 4-hydroxy-3-(3-oxo-1-phenyl-butyl)-, and salts, when present at concentrations of 0.3% or less
83.	U116	2-Imidazolidinethione
84.	U168	2-Naphthalenamine
85.	U171	2-Nitropropane
86.	U191	2-Picoline
87.	U002	2-Propanone
88.	U007	2-Propenamide
89.	U009	2-Propenenitrile
90.	U152	2-Propenenitrile, 2-methyl-
91.	U008	2-Propenoic acid
92.	U118	2-Propenoic acid, 2-methyl-, ethyl ester
93.	U162	2-Propenoic acid, 2-methyl-, methyl ester
94.	U113	2-Propenoic acid, ethyl ester
95.	U073	3,3'-Dichlorobenzidine
96.	U091	3,3'-Dimethoxybenzidine
97.	U095	3,3'-Dimethylbenzidine
98.	U148	3,6-Pyridazinedione, 1,2-dihydro-
99.	U157	3-Methylcholanthrene
100.	U164	4(1H)-Pyrimidinone, 2,3-dihydro-6-methyl-2-thio-
101.	U158	4,4'-Methylenebis(2-chloroaniline)
102.	U036	4,7-Methano-1H-indene, 1,2,4,5,6,7,8,8-octachloro-2,3,3a,4,7,7a-hexahydro-
103.	U030	4-Bromophenyl phenyl ether
104.	U049	4-Chloro-o-toluidine, hydrochloride
105.	U161	4-Methyl-2-pentanone
106.	U059	5,12-Naphthacenedione, 8-acetyl-10-[(3-amino-2,3,6-trideoxy)-alpha-L-lyxo-hexopyranosyl]oxy]-7,8,9,10-tetrahydro-6,8,11-trihydroxy-1-methoxy-, (8S-cis)-
107.	U181	5-Nitro-o-toluidine
108.	U094	7,12-Dimethylbenz[a]anthracene
109.	U367	7-Benzofuranol, 2,3-dihydro-2,2-dimethyl-
110.	U394	A2213
111.	U001	Acetaldehyde
112.	U034	Acetaldehyde, trichloro-

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
113.	U187	Acetamide, N-(4-ethoxyphenyl)-
114.	U005	Acetamide, N-9H-fluoren-2-yl-
115.	U112	Acetic acid ethyl ester
116.	T140	Acetic acid, (2,4,5-trichlorophenoxy)-
117.	U240	Acetic acid, (2,4-dichlorophenoxy)-, salts and esters
118.	U144	Acetic acid, lead(2+) salt
119.	U214	Acetic acid, thallium(1+) salt
120.	U002	Acetone
121.	U003	Acetonitrile
122.	U004	Acetophenone
123.	U006	Acetyl chloride
124.	U007	Acrylamide
125.	U008	Acrylic acid
126.	U009	Acrylonitrile
127.	U096	alpha, alpha-Dimethylbenzylhydroperoxide
128.	U167	alpha-Naphthylamine
129.	U011	Amitrole
130.	U012	Aniline
131.	U136	Arsinic acid, dimethyl-
132.	U014	Auramine
133.	U015	Azaserine
134.	U010	Azirino[2,3,3,4]pyrrolo[1,2-a]indole-4,7-dione, 6-amino-8-[[[aminocarbonyloxy]methyl]-1,1a,2,8,8a,8b-hexahydro-8a-methoxy-5-methyl-, [1aS-(1alpha,8beta,8aalpha,8balpha)]]-
135.	U280	Barban
136.	U278	Bendiocarb
137.	U364	Bendiocarb phenol
138.	U271	Benomyl
139.	U018	Benz[a]anthracene
140.	U094	Benz[a]anthracene, 7,12-dimethyl-
141.	U016	Benz[c]acridine
142.	U157	Benz[j]aceanthrylene, 1,2-dihydro-3-methyl-
143.	U017	Benzal chloride
144.	U192	Benzamide, 3,5-dichloro-N-(1,1-dimethyl-2-propynyl)-
145.	U012	Benzenamine
146.	U328	Benzenamine, 2-methyl-
147.	U222	Benzenamine, 2-methyl-, hydrochloride
148.	U181	Benzenamine, 2-methyl-5-nitro-
149.	U014	Benzenamine, 4,4-carbonimidoylbis[N,N-dimethyl-
150.	U158	Benzenamine, 4,4-methylenebis[2-chloro-
151.	U049	Benzenamine, 4-chloro-2-methyl-, hydrochloride
152.	U353	Benzenamine, 4-methyl-
153.	U093	Benzenamine, N,N-dimethyl-4-(phenylazo)-
154.	U019	Benzene
155.	U055	Benzene, (1-methylethyl)-
156.	U017	Benzene, (dichloromethyl)-
157.	U023	Benzene, (trichloromethyl)-
158.	U247	Benzene, 1,1-(2,2,2-trichloroethylidene)bis[4-methoxy-
159.	U207	Benzene, 1,2,4,5-tetrachloro-
160.	U070	Benzene, 1,2-dichloro-
161.	U234	Benzene, 1,3,5-trinitro-
162.	U071	Benzene, 1,3-dichloro-
163.	U223	Benzene, 1,3-diisocyanatomethyl-
164.	U072	Benzene, 1,4-dichloro-
165.	U030	Benzene, 1-bromo-4-phenoxy-

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
166.	U105	Benzene, 1-methyl-2,4-dinitro-
167.	U106	Benzene, 2-methyl-1,3-dinitro-
168.	U037	Benzene, chloro-
169.	U239	Benzene, dimethyl-
170.	U127	Benzene, hexachloro-
171.	U056	Benzene, hexahydro-
172.	U220	Benzene, methyl-
173.	U169	Benzene, nitro-
174.	U183	Benzene, pentachloro-
175.	U185	Benzene, pentachloronitro-
176.	U061	Benzene, 1,1-(2,2,2-trichloroethylidene)bis[4-chloro-
177.	U060	Benzene, 1,1-(2,2-dichloroethylidene)bis[4-chloro-
178.	U038	Benzeneacetic acid, 4-chloro-alpha-(4-chlorophenyl)-alpha-hydroxy-, ethyl ester
179.	U035	Benzenebutanoic acid, 4-[bis(2-chloroethyl)amino]-
180.	U221	Benzenediamine, ar-methyl-
181.	U020	Benzenesulfonic acid chloride
182.	U020	Benzenesulfonyl chloride
183.	U021	Benidine
184.	U022	Benzo[a]pyrene
185.	U064	Benzo[rs]pentaphene
186.	U023	Benzotrichloride
187.	U047	beta-Chloronaphthalene
188.	U168	beta-Naphthylamine
189.	U225	Bromoform
190.	U136	Cacodylic acid
191.	U032	Calcium chromate
192.	U280	Carbamic acid, (3-chlorophenyl)-, 4-chloro-2-butynyl ester
193.	U409	Carbamic acid, [1,2-phenylenebis (iminocarbonothioyl)]bis-, dimethyl ester
194.	U271	Carbamic acid, [1-[(butylamino)carbonyl]-1H-benzimidazol-2-yl]-, methyl ester
195.	U372	Carbamic acid, 1H-benzimidazol-2-yl,methyl ester
196.	U238	Carbamic acid, ethyl ester
197.	U178	Carbamic acid, methylnitroso-, ethyl ester
198.	U373	Carbamic acid, phenyl-, 1-methylethyl ester
199.	U097	Carbamic chloride, dimethyl-
200.	U114	Carbamodithioic acid, 1,2-ethanediy[bis-, salts and esters
201.	U389	Carbamothioic acid, bis(1-methylethyl)-, S-(2,3,3-trichloro-2-propenyl)ester
202.	U062	Carbamothioic acid, bis(1-methylethyl)-S-(2,3-dichloro-2-propenyl) ester
203.	U387	Carbamothioic acid, dipropyl-, S-(phenylmethyl) ester
204.	U279	Carbaryl
205.	U372	Carbendazim
206.	U367	Carbofuran phenol
207.	U033	Carbon oxyfluoride
208.	U211	Carbon tetrachloride
209.	U215	Carbonic acid, dithallium(1+) salt
210.	U033	Carbonic difluoride
211.	U156	Carbonochloridic acid, methyl ester
212.	U034	Chloral
213.	U035	Chlorambucil
214.	U036	Chlordane, alpha and gamma isomers
215.	U026	Chlomaphazin
216.	U037	Chlorobenzene
217.	U038	Chlorobenzilate
218.	U044	Chloroform
219.	U046	Chloromethyl methyl ether

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
220.	U032	Chromic acid $H_2CrO_4$ , calcium salt
221.	U050	Chrysene
222.	U051	Creosote
223.	U052	Cresol (cresylic acid)
224.	U053	Crotonaldehyde
225.	U055	Cumene
226.	U246	Cyanogen bromide (CN)Br
227.	U056	Cyclohexane
228.	U129	Cyclohexane, 1,2,3,4,5,6-hexachloro-, (1 $\alpha$ pha,2 $\alpha$ pha,3beta,4 $\alpha$ pha,5 $\alpha$ pha,6beta)-
229.	U057	Cyclohexanone
230.	U058	Cyclophosphamide
231.	U059	Daunomycin
232.	U060	DDD
233.	U061	DDT
234.	U206	D-Glucose, 2-deoxy-2-[[[(methylnitrosoamino)-carbonyl]amino]-
235.	U062	Diallyl
236.	U063	Dibenz[a,h]anthracene
237.	U064	Dibenzo[a,i]pyrene
238.	U069	Dibutyl phthalate
239.	U075	Dichlorodifluoromethane
240.	U025	Dichloroethyl ether
241.	U027	Dichloroisopropyl ether
242.	U024	Dichloromethoxy ethane
243.	U088	Diethyl phthalate
244.	U395	Diethylene glycol, dicarbamate
245.	U028	Diethylhexyl phthalate
246.	U089	Diethylstilbestrol
247.	U090	Dihydrosafrole
248.	U102	Dimethyl phthalate
249.	U103	Dimethyl sulfate
250.	U092	Dimethylamine
251.	U097	Dimethylcarbamoyl chloride
252.	U107	Di-n-octyl phthalate
253.	U111	Di-n-propylnitrosamine
254.	U110	Dipropylamine
255.	U041	Epichlorohydrin
256.	U001	Ethanal
257.	U404	Ethanamine, N,N-diethyl-
258.	U174	Ethanamine, N-ethyl-N-nitroso-
259.	U208	Ethane, 1,1,1,2-tetrachloro-
260.	U226	Ethane, 1,1,1-trichloro-
261.	U209	Ethane, 1,1,2,2-tetrachloro-
262.	U227	Ethane, 1,1,2-trichloro-
263.	U024	Ethane, 1,1'-[methylenebis(oxy)]bis[2-chloro-
264.	U076	Ethane, 1,1-dichloro-
265.	U117	Ethane, 1,1'-oxybis-
266.	U025	Ethane, 1,1'-oxybis[2-chloro-
267.	U067	Ethane, 1,2-dibromo-
268.	U077	Ethane, 1,2-dichloro-
269.	U131	Ethane, hexachloro-
270.	U184	Ethane, pentachloro-
271.	U218	Ethanethioamide
272.	U394	Ethanimidothioic acid, 2-(dimethylamino)-N-hydroxy-2-oxo-, methyl ester
273.	U410	Ethanimidothioic acid, N,N'-[thiobis[(methylimino)carbonyloxy]]bis-, dimethyl ester



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
274.	U173	Ethanol, 2,2'-(nitrosoimino)bis-
275.	U395	Ethanol, 2,2'-oxybis-, dicarbamate
276.	U359	Ethanol, 2-ethoxy-
277.	U004	Ethanone, 1-phenyl-
278.	U042	Ethene, (2-chloroethoxy)-
279.	U078	Ethene, 1,1-dichloro-
280.	U079	Ethene, 1,2-dichloro-, (E)-
281.	U043	Ethene, chloro-
282.	U210	Ethene, tetrachloro-
283.	U228	Ethene, trichloro-
284.	U112	Ethyl acetate
285.	U113	Ethyl acrylate
286.	U238	Ethyl carbamate (urethane)
287.	U117	Ethyl ether
288.	U118	Ethyl methacrylate
289.	U119	Ethyl methanesulfonate
290.	U067	Ethylene dibromide
291.	U077	Ethylene dichloride
292.	U359	Ethylene glycol monoethyl ether
293.	U115	Ethylene oxide
294.	U114	Ethylenedisithiocarbamic acid, salts and esters
295.	U116	Ethylenethiourea
296.	U076	Ethylidene dichloride
297.	U120	Fluoranthene
298.	U122	Formaldehyde
299.	U123	Formic acid
300.	U124	Furan
301.	U213	Furan, tetrahydro-
302.	U125	Furfural
303.	U124	Furfuran
304.	U206	Glucopyranose, 2-deoxy-2-(3-methyl-3-nitrosoureido)-, D-
305.	U126	Glycidylaldehyde
306.	U163	Guanidine, N-methyl-N'-nitro-N-nitroso-
307.	U127	Hexachlorobenzene
308.	U128	Hexachlorobutadiene
309.	U130	Hexachlorocyclopentadiene
310.	U131	Hexachloroethane
311.	U132	Hexachlorophene
312.	U243	Hexachloropropene
313.	U133	Hydrazine
314.	U098	Hydrazine, 1,1-dimethyl-
315.	U086	Hydrazine, 1,2-diethyl-
316.	U099	Hydrazine, 1,2-dimethyl-
317.	U109	Hydrazine, 1,2-diphenyl-
318.	U134	Hydrofluoric acid
319.	U134	Hydrogen fluoride
320.	U135	Hydrogen sulfide
321.	U135	Hydrogen sulfide H <sub>2</sub> S
322.	U096	Hydroperoxide, 1-methyl-1-phenylethyl-
323.	U137	Indeno[1,2,3-cd]pyrene
324.	U140	Isobutyl alcohol
325.	U141	Isosafrole
326.	U142	Kepone
327.	U143	Lasiocarpine

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
328.	U144	Lead acetate
329.	U145	Lead phosphate
330.	U146	Lead subacetate
331.	U146	Lead, bis(acetato-O)tetrahydroxytri-
332.	U129	Lindane
333.	U150	L-Phenylalanine, 4-[bis(2-chloroethyl)amino]-
334.	U015	L-Serine, diazoacetate (ester)
335.	U147	Maleic anhydride
336.	U148	Maleic hydrazide
337.	U149	Malononitrile
338.	U071	m-Dichlorobenzene
339.	U150	Melphalan
340.	U151	Mercury
341.	U152	Methacrylonitrile
342.	U092	Methanamine, N-methyl-
343.	U029	Methane, bromo-
344.	U045	Methane, chloro-
345.	U046	Methane, chloromethoxy-
346.	U068	Methane, dibromo-
347.	U080	Methane, dichloro-
348.	U075	Methane, dichlorodifluoro-
349.	U138	Methane, iodo-
350.	U211	Methane, tetrachloro-
351.	U225	Methane, tribromo-
352.	U044	Methane, trichloro-
353.	U121	Methane, trichlorofluoro-
354.	U119	Methanesulfonic acid, ethyl ester
355.	U153	Methanethiol
356.	U154	Methanol
357.	U155	Methapyrilene
358.	U247	Methoxychlor
359.	U154	Methyl alcohol
360.	U029	Methyl bromide
361.	U045	Methyl chloride
362.	U156	Methyl chlorocarbonate
363.	U226	Methyl chloroform
364.	U159	Methyl ethyl ketone (MEK)
365.	U160	Methyl ethyl ketone peroxide
366.	U138	Methyl iodide
367.	U161	Methyl isobutyl ketone
368.	U162	Methyl methacrylate
369.	U068	Methylene bromide
370.	U080	Methylene chloride
371.	U164	Methylthiouracil
372.	U010	Mitomycin C
373.	U163	MNNG
374.	U086	N,N'-Diethylhydrazine
375.	U026	Naphthalenamine, N,N'-bis(2-chloroethyl)-
376.	U165	Naphthalene
377.	U047	Naphthalene, 2-chloro-
378.	U031	n-Butyl alcohol
379.	U217	Nitric acid, thallium(1+) salt
380.	U169	Nitrobenzene
381.	U173	N-Nitrosodiethanolamine

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
382.	U174	N-Nitrosodiethylamine
383.	U172	N-Nitrosodi-n-butylamine
384.	U176	N-Nitroso-N-ethylurea
385.	U177	N-Nitroso-N-methylurea
386.	U178	N-Nitroso-N-methylurethane
387.	U179	N-Nitrosopiperidine
388.	U180	N-Nitrosopyrrolidine
389.	U194	n-Propylamine
390.	U087	O,O-Diethyl S-methyl dithiophosphate
391.	U048	o-Chlorophenol
392.	U070	o-Dichlorobenzene
393.	U328	o-Toluidine
394.	U222	o-Toluidine hydrochloride
395.	U115	Oxirane
396.	U041	Oxirane, (chloromethyl)-
397.	U126	Oxiranecarboxaldehyde
398.	U182	Paraldehyde
399.	U197	p-Benzquinone
400.	U039	p-Chloro-m-cresol
401.	U072	p-Dichlorobenzene
402.	U093	p-Dimethylaminoazobenzene
403.	U183	Pentachlorobenzene
404.	U184	Pentachloroethane
405.	U185	Pentachloronitrobenzene (PCNB)
406.	T140	Pentachlorophenol
407.	U161	Pentanol, 4-methyl-
408.	U187	Phenacetin
409.	U188	Phenol
410.	U411	Phenol, 2-(1-methylethoxy)-, methylcarbamate
411.	T140	Phenol, 2,3,4,6-tetrachloro-
412.	T140	Phenol, 2,4,5-trichloro-
413.	T140	Phenol, 2,4,6-trichloro-
414.	U081	Phenol, 2,4-dichloro-
415.	U101	Phenol, 2,4-dimethyl-
416.	U082	Phenol, 2,6-dichloro-
417.	U048	Phenol, 2-chloro-
418.	U089	Phenol, 4,4'-(1,2-dichloro-1,2-ethenediyl)bis-, (E)-
419.	U039	Phenol, 4-chloro-3-methyl-
420.	U170	Phenol, 4-nitro-
421.	U052	Phenol, methyl-
422.	T140	Phenol, pentachloro-
423.	U132	Phenol, 2,2'-methylenebis[3,4,6-trichloro-
424.	U145	Phosphoric acid, lead(2+) salt (2:3)
425.	U087	Phosphorodithioic acid, O,O-diethyl S-methyl ester
426.	U189	Phosphorus sulfide
427.	U190	Phthalic anhydride
428.	U179	Piperidine, 1-nitroso-
429.	U170	p-Nitrophenol
430.	U192	Pronamide
431.	U066	Propane, 1,2-dibromo-3-chloro-
432.	U083	Propane, 1,2-dichloro-
433.	U027	Propane, 2,2'-oxybis[2-chloro-
434.	U171	Propane, 2-nitro-
435.	U149	Propanedinitrile

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
436.	T140	Propanoic acid, 2-(2,4,5-trichlorophenoxy)-
437.	U373	Propam
438.	U411	Propoxur
439.	U083	Propylene dichloride
440.	U387	Prosulfocarb
441.	U353	p-Toluidine
442.	U196	Pyridine
443.	U191	Pyridine, 2-methyl-
444.	U180	Pyrrolidine, 1-nitroso-
445.	U200	Reserpine
446.	U201	Resorcinol
447.	U202	Saccharin, and salts
448.	U203	Safrole
449.	U204	Selenious acid
450.	U204	Selenium dioxide
451.	U205	Selenium sulfide
452.	U205	Selenium sulfide SeS <sub>2</sub>
453.	T140	Silvex (2,4,5-TP)
454.	U206	Streptozotocin
455.	U189	Sulfur phosphide
456.	U103	Sulfuric acid, dimethyl ester
457.	U210	Tetrachloroethylene
458.	U213	Tetrahydrofuran
459.	U216	Thallium chloride TlCl
460.	U214	Thallium(I) acetate
461.	U215	Thallium(I) carbonate
462.	U216	Thallium(I) chloride
463.	U217	Thallium(I) nitrate
464.	U218	Thioacetamide
465.	U410	Thiodicarb
466.	U153	Thiomethanol
467.	U244	Thioperoxydicarbonic diamide[(H <sub>2</sub> N)C(S)] <sub>2</sub> S <sub>2</sub> , tetramethyl-
468.	U409	Thiophanate-methyl
469.	U219	Thiourea
470.	U244	Thiram
471.	U220	Toluene
472.	U223	Toluene diisocyanate
473.	U221	Toluenediamine
474.	U389	Triallate
475.	U228	Trichloroethylene
476.	U121	Trichloromonofluoromethane
477.	U404	Triethylamine
478.	U235	Tris(2,3-dibromopropyl) phosphate
479.	U236	Trypan blue
480.	U237	Uracil mustard
481.	U176	Urea, N-ethyl-N-nitroso-
482.	U177	Urea, N-methyl-N-nitroso-
483.	U043	Vinyl chloride
484.	U248	Warfarin, and salts, when present at concentrations of 0.3% or less
485.	U239	Xylene
486.	U200	Yohimban-16-carboxylic acid, 11,17-dimethoxy-18-[(3,4,5-trimethoxybenzoyl)oxy]-, methyl ester, (3beta,16beta,17alpha,18beta,20alpha)-
487.	U249	Zinc phosphide Zn <sub>3</sub> P <sub>2</sub> , when present at concentrations of 10% or less

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

SCHEDULE 8  
(Subparagraph 2(2)(e)(i))

EXCLUDED MATERIALS

Item	Description
1.	Slags, skimmings and dross containing precious metals, copper or zinc for further refining
2.	Platinum group metal (PGM) automobile catalysts
3.	Electronic scrap such as circuit boards, electronic components and wires that are suitable for base or precious metal recovery
4.	Brass in the form of turnings, borings and choppings

SCHEDULE 9  
(Section 4)  
MOVEMENT DOCUMENT

MOVEMENT DOCUMENT  
DOCUMENT DE MOUVEMENT

<b>A Exporter / foreign exporter</b> Exportateur / expéditeur étranger		<b>B Carrier</b> Transporteur		<b>C Importer / foreign receiver</b> Importateur / destinataire étranger	
Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial		Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial		Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial	
Company name / Nom de l'entreprise		Company name / Nom de l'entreprise		Company name / Nom de l'entreprise	
Mailing address / Adresse postale City / Ville Province Postal code / Code postal		Mailing address / Adresse postale City / Ville Province Postal code / Code postal		Mailing address / Adresse postale City / Ville Province Postal code / Code postal	
E-mail / Courriel électronique Tel. No. / N° de tél.		E-mail / Courriel électronique Tel. No. / N° de tél.		E-mail / Courriel électronique Tel. No. / N° de tél.	
Shipping site address / Adresse du lieu de l'expédition City / Ville Province Postal code / Code postal		Vehicle / Véhicule Trailer - Pull car No. 1 Trailer - Pull car No. 2 Remarks - remarques		Receiving site address / Adresse du lieu de destination City / Ville Province Postal code / Code postal	
Import / foreign receiver certification (certify that the information contained in Part A is correct and complete)		Port of entry / Point d'entrée Port of exit / Point de sortie		If waste or recyclable material is to be transferred, specify intended company name / Si les déchets ou matières recyclables doivent être transférés, précisez le nom du destinataire	
Mailing address / Adresse postale City / Ville Province Postal code / Code postal		Name of authorized person (signature) Nom de l'agent autorisé (caractères d'impression)		Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial	
E-mail / Courriel électronique Tel. No. / N° de tél.		Year / Année Month / Mois Day / Jour Signature		If waste or recyclable material is to be transferred, specify intended company name / Si les déchets ou matières recyclables doivent être transférés, précisez le nom du destinataire	
Receiving site address / Adresse du lieu de destination City / Ville Province Postal code / Code postal				Quantity received / Quantité reçue	
				Unit / L or / en kg	
				Commodity / Marchandise	
				Handling Code / Code de manipulation	
				Shipment / Envoi	
				Accepted / Refused	
				Pack / Unpack	
				Weight / Poids	
				Volume / Volume	
				If handling code "Other" (specify) Si code de manipulation "autre" (spécifier)	
				Import / foreign receiver certification (certify that the information contained in Part C is correct and complete)	
				Name of authorized person (signature) Nom de l'agent autorisé (caractères d'impression)	
				Signature Tel. No. / N° de tél.	
				Special handling / Manipulation spéciale	
				Attached / D-d part / As follows / D-carbis	
				Date shipped / Date d'expédition Year / Année Month / Mois Day / Jour Time / Heure AM PM	
				Scheduled arrival date / Date d'arrivée prévue Year / Année Month / Mois Day / Jour	
Export / foreign exporter certification (certify that the information contained in Part A is correct and complete)		Name of authorized person (signature) Nom de l'agent autorisé (caractères d'impression)		Signature Tel. No. / N° de tél.	
Admission de l'exportateur / expéditeur étranger : J'atteste que tous les renseignements à la partie A sont exacts et complets.					

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SORDORS/2005

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

**SCHEDULE 10**  
**(Paragraphs 8(k) and 38(1)(b))**

**PERSISTENT ORGANIC POLLUTANTS**

Item	Column 1 Identification No.	Column 2 Persistent Organic Pollutant	Column 3 Concentration
1.	POP1	Aldrin	50 mg/kg
2.	POP2	Chlordane	50 mg/kg
3.	POP3	Dieldrin	50 mg/kg
4.	POP4	Endrin	50 mg/kg
5.	POP5	Heptachlor	50 mg/kg
6.	POP6	Hexachlorobenzene	50 mg/kg
7.	POP7	Mirex	50 mg/kg
8.	POP8	Toxaphene	50 mg/kg
9.	POP9	Polychlorinated Biphenyls (PCB)	50 mg/kg
10.	POP10	DDT (1,1,1-Trichloro-2,2-bis (4-chlorophenyl)ethane)	50 mg/kg
11.	POP11	Polychlorinated dibenzo-p-dioxins (PCDD)	15 µg TEQ/kg
12.	POP12	Polychlorinated dibenzofurans (PCDF)	15 µg TEQ/kg

**ANNEXE 10**  
**(alinéas 8(k) et 38(1)b))**

**SUBSTANCES POLLUANTES ORGANIQUES PERSISTANTES**

Article	Colonne 1 Numéro d'identification	Colonne 2 Substances polluantes organiques persistantes	Colonne 3 Concentration
1.	POP1	Aldrine	50 mg/kg
2.	POP2	Chlordane	50 mg/kg
3.	POP3	Dieldrine	50 mg/kg
4.	POP4	Endrine	50 mg/kg
5.	POP5	Heptachlore	50 mg/kg
6.	POP6	Hexachlorobenzène	50 mg/kg
7.	POP7	Mirex	50 mg/kg
8.	POP8	Toxaphène	50 mg/kg
9.	POP9	Biphényles polychlorés (BPC)	50 mg/kg
10.	POP10	DDT (1,1,1-Trichloro-2,2-bis (4-chlorophényl)éthane)	50 mg/kg
11.	POP11	Polychlorodibenzo-p-dioxines (PCDD)	15 µg TEQ/kg
12.	POP12	Polychlorodibenzofuranes (PCDF)	15 µg TEQ/kg

**B**



This is Exhibit B referred to in the Affidavit  
of Anthony Bratschkovich  
sworn before me on this 24<sup>th</sup> day

of January, 2011

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

Environment  
CanadaEnvironnement  
Canada

Canada

[Home](#) > [International Agreements](#) > [Can-USA Agreement](#) > Can-USA Agreement Text

## Canada - U.S.A. Agreement

### Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste (consolidated text)

**In case of discrepancy between this webpage and the printed Agreement, the Agreement will prevail.**

The Government of Canada (Canada), and the Government of the United States of America (the United States), hereinafter called "The Parties":

**Recognizing** that severe health and environmental damage may result from the improper treatment, storage, and disposal of hazardous waste and other waste;

**Seeking** to ensure that the treatment, storage, and disposal of hazardous waste and other waste are conducted so as to reduce the risks to public health, property and environmental quality;

**Recognizing** that the close trading relationship and the long common border between the United States and Canada engender opportunities for a generator of hazardous waste and other waste to benefit from using the nearest appropriate disposal facility, which may involve the transboundary shipment of hazardous waste and other waste;

**Believing** that a bilateral agreement is needed to facilitate the control of transboundary shipments of hazardous waste and other waste between the United States and Canada;

**Reaffirming** Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm, which asserts that states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction;

**Taking** into account Organization for Economic Co-operation and Development (OECD) Council Decisions and Recommendations on transfrontier movements of hazardous wastes, the United Nations Environment Program Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Waste, and resolutions of the London Dumping Convention,

Have agreed as follows:

#### Article 1 - Definitions

For the purposes of this Agreement:

##### **Designated Authority**

means, in the case of the US Environmental Protection Agency (US EPA) and, in the case of Canada, the Department of the Environment.

##### **Hazardous Waste**

means with respect to Canada, hazardous waste, and with respect to the United States, hazardous waste subject to a manifest requirement in the United States, as defined by their respective national legislations and implementing regulations.

##### **Country of Export**

means the country from which the shipment of hazardous waste originated.

##### **Country of Import**

means the country to which hazardous waste and other waste is sent for the purpose of treatment, storage (with the exception of short-term storage incidental to transportation) or disposal.

**Country of Transit**

means the country which is neither the country of export nor the country of import, through whose land territory or internal waters hazardous waste and other waste is transported, or in whose ports such waste is unloaded for further transportation.

**Consignee**

means the treatment, storage (with the exception of short-term storage incidental to transportation) or disposal facility in the country of import and the name of the person operating the facility.

**Exporter**

means, in the case of the United States, the person defined as exporter, and in the case of Canada, the person defined as consignor, under their respective national laws and regulations governing hazardous waste and other waste.

**Other Waste**

means Municipal Solid Waste (MSW) that is sent for final disposal or for incineration with energy recovery, and residues arising from the incineration of such waste, as defined by the Parties' respective national legislation and implementing regulations, but excluding waste covered under paragraph (b) of this Article.

**Article 2 - General Obligation**

The parties shall permit the export, import, and transit of hazardous waste and other waste across their common border for treatment, storage, or disposal pursuant to the terms of their domestic laws, regulations and administrative practices, and the provisions of this Agreement.

**Article 3 - Notification to the Importing Country**

1. The designated authority of the country of export shall notify the designated authority of the country of import of proposed transboundary shipments of hazardous waste and other waste.
2. The notice referred to in paragraph (a) of this article may cover an individual shipment or a series of shipments extending over a twelve month or lesser period and shall contain the following information:
  1. The exporter's name, address and telephone number, and if required in the country of export, the identification number.
  2. for each hazardous waste and other waste type and for each consignee:
    1. A description of the hazardous waste and other waste to be exported, as identified by the waste identification number, the classification and the shipping name as required on the manifest in the country of export;
    2. The estimated frequency or rate at which such waste is to be exported and the period of time over which such waste is to be exported;
    3. The estimated total quantity of the hazardous waste and other waste in units as specified by the manifest required in the country of export;
    4. The point of entry into the country of import;
    5. The name and address of the transporter(s) and the means of transportation, such as the mode of transportation (air, highway, rail, water, etc.) and type(s) of container (drums, boxes, tanks, etc.);
    6. A description of the manner in which the waste will be treated, stored or disposed of in the importing country;
    7. The name and site address of the consignee;
    8. An approximate date of the first shipment to each consignee, if available.
3. The designated authority of the country of import shall have 30 days from the date of receipt of the notice provided pursuant to the date of receipt of the notice provided pursuant to paragraphs (a) and (b) of this article to respond to such notice, indicating its

consent (conditional or not) or its objection to the export. Such response will be transmitted to the designated authority of the country of export. The date of receipt of the notice will be identified in an acknowledgement of receipt made immediately by the designated authority of the country of import to the country of export.

4. If no response is received by the designated authority of the country of export within the 30 day period referred to in paragraph (c) of this article, the country of import shall be considered as having no objection to the export of hazardous waste and other waste described in the notice and the export may take place conditional upon the persons importing the hazardous waste and other waste complying with all the applicable laws of the country of import.
5. The country of import shall have the right to amend the terms of the proposed shipment(s) as described in the notice.
6. The consent of the country of import, whether express, tacit, or conditional, provided pursuant to paragraphs (c) and (d) of this article, may be withdrawn or modified for good cause. The Parties will withdraw or modify such consent insofar as possible at the most appropriate time for the persons concerned.
7. For the purposes of this Article and Article 5, manifest-related requirements may, with respect to other waste, be substituted by alternative tracking requirements.

#### **Article 4 - Notification to the Transit Country**

1. The designated authority of the country of export shall notify the designated authority of the country of transit of the proposed shipment of hazardous waste and other waste at least 7 days prior to the date of the shipment. The notice shall include the information specified in paragraph (b) of Article 3, with the following exceptions:
  1. The points of entry into and departure from the country of transit shall be provided in lieu of the entry point(s) into the country of import; and
  2. A description of the approximate length of time the hazardous waste and other waste will remain in the country of transit and the nature of its handling while there shall be submitted instead of a description of the treatment, storage, or disposal of the waste in the country of import.

#### **Article 5 - Cooperative Efforts**

1. The Parties will cooperate to ensure, to the extent possible, that all transboundary shipments of hazardous waste and other waste comply with the manifest requirements of both countries.
2. The Parties will cooperate in monitoring and spot-checking transboundary shipments of hazardous waste and other waste to ensure, to the extent possible, that such shipments conform to the requirements of the applicable legislation and of this Agreement.
3. To the extent any implementing laws and regulations are necessary to comply with this Agreement, the Parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the Parties will make best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The Parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such laws and regulations.

#### **Article 6 - Readmission of Exports**

The country of export shall readmit any shipment of hazardous waste and other waste that may be returned by the country of import or transit.

#### **Article 7 - Enforcement**

The Parties shall ensure, to the extent possible, that within their respective jurisdictions, their domestic laws and regulations are enforced with respect to the transportation, storage, treatment and disposal of transboundary shipments of hazardous waste and other waste.

## **Article 8 - Protection of Confidential Information**

If the provision of technical information pursuant to articles 3 and 4 would require the disclosure of information covered by agreement(s) of confidentiality between a Party and an exporter, the country of export shall make every effort to obtain the consent of the concerned person for the purpose of conveying any such information to the country of import or transit. The country of import or transit shall make every effort to protect the confidentiality of such information conveyed.

## **Article 9 - Insurance**

The Parties may require, as a condition of entry, that any transboundary movement of hazardous waste and other waste be covered by insurance or other financial guarantee in respect to damage to third parties caused during the entire movement of hazardous waste and other waste, including loading and unloading.

## **Article 10 - Effects on International Agreements**

Nothing in this Agreement shall be deemed to diminish the obligations of the Parties with respect to disposal of hazardous waste and other waste at sea contained in the 1972 London Dumping Convention.

## **Article 11 - Domestic Law**

The provisions of this Agreement shall be subject to the applicable laws and regulations of the Parties.

## **Article 12 - Amendment**

This Agreement may be amended by mutual written consent of the Parties or their authorized representatives.

## **Article 13 - Entry into Force**

This Agreement shall enter into force on November 8, 1986 and continue in force for five years. It will automatically be renewed for additional five year periods unless either Party gives written notice of termination to the other at least three months prior to the expiration of any five year period. In any five year period, this Agreement may be terminated upon one year written notice given by one Party to the other.

**In witness where of**, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

**Done** at Ottawa, in duplicate, this 28th day of October, 1986, in the English and French languages, both texts being equally authentic.

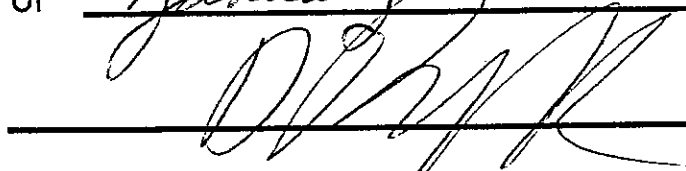
Creation date: 2010-01-12  
Last updated : 2010-07-25  
Last reviewed: 2010-07-25

**URL of this page:** <http://www.ec.gc.ca/gdd-mw/default.asp?lang=En&n=C59BCC26-1&printerversion=true>

C

This is Exhibit C referred to in the Affidavit  
of Anthony Butchutich  
sworn before me on this 24<sup>th</sup> day

of January, 20 11

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.



ENVIRONMENTAL ENFORCEMENT  
APPLICATION DE LA LOI  
EN ENVIRONNEMENT

## Investigation Files and Relevant Legislation

### > 3007-2007-12-19-014

#### > *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*

- > **Section 36(1):** Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled
  - > (a): in accordance with the export or import permit;
  - > (b): in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and
  - > (c): within the period referred to in paragraph 9(o) and 16(n)

Environment Canada  
Environnement Canada

Canada

000212



**D**

This is Exhibit D referred to in the Affidavit  
of Anthony Bratichuk  
sworn before me on this 24<sup>th</sup> day

of January, 20 11

[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

under-CEPA/

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## Environmental Law and Litigation

News and analysis (not advice) by a top Ontario environmental lawyer



# ABSOLUTE DISCHARGE UNDER CEPA

by Dianne Saxe on February 7, 2009



Hello there! If you are new here, you might want to [subscribe to the RSS feed](#) for updates on this topic.

x

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On Thursday, an Ontario company received an absolute discharge for unwittingly breaching Section 36 of the *Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations*, under the *Canadian Environmental Protection Act 1999*.

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This section requires those exporting hazardous waste from Canada to submit confirmation of destruction, within 30 days after the foreign receiver disposes of the waste. No specific format is prescribed. Like many others, RPR Environmental believed that Environment Canada was content to accept Copy 3 of the completed manifest as adequate proof of destruction, especially where the receiver promptly disposed of the waste.

For reasons best known to Environment Canada, they did not communicate their dissatisfaction with this interpretation to the waste industry. Environment Canada could, and should, have written to each of the (highly regulated) professional waste brokers, requesting separate confirmations of destruction. At a minimum, they could have clearly communicated this through industry associations or newsletters.

Instead, they acted like bullies. RPR's first indication of any problem was the arrival of 17 officers in flack jackets with a search warrant. Investigators ransacked their offices (twice), seized hundreds of documents, copied computer disks, terrified employees, left files in a shambles, laid three different sets of charges, and caused years of upheaval. And what the matter ultimately came down to was legitimate confusion about the interpretation of s.36. After all the drama, and much wasted expense

(public and private), the company made a \$5,000 donation to a local charity, conducted a training course, and received an absolute discharge with no fine.



This is another sad example of cruel and inappropriate enforcement by Environment Canada. As in *Gemtec*, a small, hardworking company had an honest and reasonable understanding of a complex law. It turned out that Environment Canada disagreed with its interpretation. But instead of giving an explanation, or a warning, Environment Canada responded with a sledgehammer. This is like beating a child for breaking an unspoken rule; it's unfair, it's counterproductive, and it's bad public policy. No question, we need environmental enforcement. But we need it to be fair, and proportional to the real fault involved. Environment Canada urgently needs to re-examine its approach to compliance and enforcement. Fundamentally, serious punishment should be reserved for those who had some reason to know that what they were doing was wrong. In areas of disputed interpretation of the law, Environment Canada should explain what it means and give people an opportunity to comply, before it throws the book at them.

Tagged as: [bad public policy](#), [inappropriate enforcement](#)

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**E**

This is Exhibit E referred to in the Affidavit  
of Anthony Bratichuk  
sworn before me on this 24<sup>th</sup> day

of January, 2011

[Signature]  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.



Environment  
Canada

Environnement  
Canada

Canada

[Home](#) > [Enforcement Notifications](#) > Notification - 2009-05-15 > [Notification - 2009-08-04](#)

## Violation of Reporting Requirements Results in Contribution to Conservation Authority

February 5, 2009

**HAMILTON, Ont.** -- RPR Environmental Inc. of Stoney Creek, Ontario pleaded guilty in the Ontario Court of Justice to one count of violating the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*. The Regulations were made under the *Canadian Environmental Protection Act, 1999*. The court approved an agreement between Environment Canada and RPR Environmental Inc. that the company would pay a sum of \$5,000 to the Hamilton Conservation Authority and that company would then receive an absolute discharge.

In addition to the payment, the agreement requires that RPR Environmental Inc., would develop a training program and offer it to company staff, with Environment Canada officials in attendance.

**Printer-friendly version**  
**Full Web Page Print**

Date Modified: 2009-08-11

**F**



This is Exhibit F referred to in the Affidavit  
of Anthony Bratukovich

sworn before me on this 24<sup>th</sup> day

of January, 2011

[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

00229-A0079577 p.1-5

### Canadian Manifesting Mechanism Will Say

The Government of Canada is committed to protect human health and the environment and enforce environmental and conservation laws with tough standards and regulations concerning the import into and export out of Canada of hazardous wastes and hazardous recyclable materials.

Canada is a signatory to a number of international agreements which include:

1. the United Nations, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;
2. the OECD (Organization for Cooperation and Economic Development) Council Decision concerning the control of transfrontier movements of wastes destined for recovery operations; and
3. the Canada - USA Agreement on the Transboundary Movement of Hazardous Waste.

On August 28, 1992, Canada ratified the Basel Convention. The Basel Convention controls the transboundary movements of hazardous wastes and hazardous recyclable materials, and promotes their environmentally sound management. The Convention also restricts transboundary movements to take place between Basel Party countries only.

Since March 1992, the transboundary movements of hazardous wastes destined for recycling operations between Member countries of the Organization for Economic Cooperation and Development (OECD) have been supervised and controlled according to OECD Council Decision C(92)39/FINAL. The OECD Decision provides a framework to control transboundary movement of hazardous recyclable materials within the OECD area, in an environmentally sound and economically efficient manner. This Decision was subsequently revised and incorporated into the new OECD Council Decision C(2001)107/FINAL, which was adopted and came into force for OECD member countries in May 2001.

The Canada-U.S.A. Agreement, which came into effect in November 1986 and was later amended in 1992, is intended to ensure that hazardous waste and municipal solid waste destined for final disposal crossing the Canada-U.S. border comply with each country's domestic law and the provisions of the Agreement. It confirms basic principles recognized by both countries for the proper control of transboundary movements of hazardous wastes and other wastes, including a prior informed consent regime.

It should be noted that both the OECD Council Decision and the Canada-USA Agreement are recognized under Article 11 of the Basel Convention as multi-lateral and bilateral agreements which provide an equivalent level of control as required under the Convention itself. This is an important point, since the USA although signing the Convention has never ratified it and implemented the

requirements through its domestic legislation. Therefore, the USA is not a Party to the Convention. However, due to the recognition of the OECD Decision and the Canada-USA Agreement as Article 11 agreements has allowed the border to remain open to the transboundary movement of hazardous waste and hazardous recyclable materials with the United States.

In 1992, the Federal Canadian Government of Canada complied with its international obligations through the implementation of domestic legislation. The *Export and Import of Hazardous Wastes Regulations* (EIHWR)<sup>1</sup> pursuant to the Canadian Environmental Protection Act (CEPA 1988) were the means by which the conditions and articles set out in the international agreements to which Canada is a party were implemented domestically. These Regulations strictly controlled the international movement of hazardous waste and hazardous recyclable material into and out of Canada, including transits through Canadian territory.

The keystone of the EIHWR and the new *Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations* (EIHWHRMR) is the prior informed consent (PIC) mechanism which is also an essential component of all three of the international agreements to which Canada is a party.

The PIC provisions in the EIHWR require the Canadian importer to submit a notice for intended imports of hazardous waste or hazardous recyclable material destined for disposal or recycling/recovery operations respectively, before any movements can take place. The notice allows Environment Canada to determine who the parties are in the proposed transaction (generator/foreign exporter, carriers and importer/receiver), identify the hazardous waste(s)/hazardous recyclable(s) and ensure that the appropriate documentation is in place to cover the proposed shipments, such as contracts between the parties and evidence of sufficient insurance coverage in the event of an accident or mishap.

In Canada, the management of hazardous waste and hazardous recyclable materials is a shared responsibility. The Government of Canada regulates international movements of hazardous wastes and hazardous recyclable materials, while the provincial and territorial governments control generators, waste management/recycling facilities and transportation within their jurisdictions. The provinces and territories also have regulations that set out requirements for the licensing and the issuance of operating permits for waste management and recycling facilities.

---

<sup>1</sup> The *Export and Import of Hazardous Wastes Regulations* (EIHWR) were in force from November 26, 1992 until November 1, 2005, at which time they were revoked and replaced by the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* (EIHWHRMR). Consequently, the text is written in the past tense with respect to the EIHWR, although the controls remain in force through the new Regulations.

In the case of imports, the PIC mechanism allows the provinces to review the import notice information and provide consent based on the strict controls that they have placed on the operational permits for the facility before the transportation of the hazardous wastes/recyclables. The provinces/territories also provide confirmation of the authorization of the carriers involved in the transaction within their jurisdictions. The entire review and consent process takes place before an import permit can be issued under CEPA 1999 and any movement can take place.

Exports of hazardous waste or hazardous recyclable materials out of Canada to a foreign country, including the United States are subject to the notification and permit conditions set out in CEPA 1999, and the Regulations.

The PIC provisions also apply to exports. Under the Act and Regulations, a Canadian export notice needs to be completed by the exporter and submitted to Environment Canada. Once the notice has been reviewed, as well as meeting the contract and insurance requirements, the notice is forwarded to the foreign competent authority for their consent. No permit will be issued until the authorities of the country of destination have authorized the movement and have confirmed that the final disposal or recycling of the hazardous waste or hazardous recyclable material is authorized.

The second keystone of the EIHWR and the EIHWRMR is the manifest movement tracking provisions. Both the Basel Convention and the OECD Council Decision require Parties to track the transboundary movements through a movement document which is signed by each person who takes charge of the hazardous waste or hazardous recyclable material upon receipt or delivery. The OECD Decision has set timelines for the distribution of the movement document. The Decision requires that the completed and signed movement document be returned by the importer to the competent authorities concerned and the exporter within three days of receipt of the hazardous recyclables by the authorized receiving facility.

In Canada, the EIHWR required the importer to ensure that a copy of the manifest, with Part A completed by the person who exported the hazardous waste from the country of export and Part B completed by the first authorized carrier, was sent, within three days after the manifest was provided to the first authorized carrier, to

- (a) the Minister; and
- (b) the authorities of the province of import.

In addition, the EIHWR required the importer, within three days after receiving the hazardous waste at the authorized facility, to complete and sign Part C of the manifest and send copies of the completed manifest to

- (a) the Minister;
- (b) the authorities of the province of import;

- (c) the person who exports the hazardous waste from the country of export; and
- (d) every carrier of the hazardous waste.

In the case of exports, the same responsibilities and timelines were placed on the Canadian exporter, in order to track the movements of hazardous waste or hazardous recyclable material out of Canada.

The notice and prior informed mechanism work in conjunction with the manifest/movement document tracking system. The notice is a means by which all affected competent authorities are provided the opportunity to review the proposed transactions and provide consent, before any movements take place. All of the review and confirmations are done up front through the notice. This affords the provinces and foreign competent authorities as proposed importing destinations to ensure that the receiving facilities are authorized to perform the disposal or recycling operations set out in the notice. The competent authorities can also ensure that the hazardous waste and hazardous recyclable materials can be disposed of, treated, or recovered and will be managed in a manner that is environmentally sound which protects human health and the environment. While the manifest/movement document is the check in the entire regime to ensure that the transaction actually has taken place as proposed and allowed in the permit.

Hazardous waste and hazardous recyclable material exhibit hazardous properties or contain hazardous constituents which can pose an immediate and acute hazard to the environment or human health. Other hazardous contaminants or constituents in the waste or recyclable may only be released into the environment or effect human health over a long period of time. In any case, if the hazardous waste or hazardous recyclable material is mismanaged or the disposal/recycling operations take place at a facility which is not authorized to perform those functions or does not have adequate environmental or emission controls in place, this could result in the release of the hazardous substances into the environment with a detrimental impact on human health and the natural environment.

The manifest tracking system does not eliminate nor remove the hazard characteristics of the waste or recyclable material. The manifest is a means of controlling the risk posed by the movement of the hazardous waste and hazardous recyclable material. In addition, the manifest/movement document is a means by which Environment Canada can take steps to ensure and verify that the hazardous waste or hazardous recyclable material was received at the authorized facility as was approved in the permit issued by the Minister.

The failure to return the manifest in the required time set out in the Regulations allows for a critical period of time to elapse during which the mismanagement of a hazardous waste or hazardous recyclable material can take place. During this


period of time, the impact to the environment or human health may occur and be acute.

Prolonged mismanagement, including improper storage, would allow for the introduction of the hazardous constituents into the environment, which may require increased clean-up costs to mitigate the damage depending on the length of time taken before the release can be halted. In the case, of chronic effects on human health, these effects may not manifest themselves for many years into the future. At that time, these chronic effects will put greater pressures on the healthcare system and will impact on the quality of life of Canadians.

In addition to the potential impacts on human health and the environment, failure to comply promptly with the manifest requirements will affect Canada's ability to comply with its international obligations.

Prepared by:  
Joachim Wittwer, BSc., CChem.  
Head, Operations Section  
Waste Management Division  
(formerly Transboundary Movement Branch)  
Environment Canada

Note: Other international companies do submit copies of the movement documents as required under the international instruments, such as the OECD Council Decision. For example, ENUSA Industrias Avandas, S.A. located in Salamanca, Spain forwarded copy 1 of OECD movement document to Environment Canada as an international shipment prepared to leave (E005965) for Canada. Although the OECD movement document is not a Canadian regulatory requirement, it is clear that companies can and do meet the submission requirements for the tracking of the hazardous waste or hazardous recyclable material movements internationally.

 18/07/07

Ethier, JoAnne [NCR]

31230-7-3

**From:** Sims, Michael [Michael.Sims@justice.gc.ca]  
**Sent:** February 28, 2011 2:45 PM  
**To:** Jessome, Kimberley [NCR]  
**Subject:** Bratschitsch, et al. v. AGC, et al.; T-2176-10

**Attachments:**

s.23

Regards,

Michael

Michael J. Sims

Counsel | Avocat

Regulatory Law | La loi du droit réglementaire Department of Justice Canada | Ministère  
de la Justice Canada Ontario Regional Office | Bureau régional de l'Ontario 130 King  
Street West | 130, rue King ouest Suite 3400 | pièce 3400 Toronto, Ontario M5X 1K6  
Tel. / Tél.: (416) 952-7116 Fax / Téléc.: (416) 973-4323 E-mail / courriel.:  
michael.sims@justice.gc.ca

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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

31230-7-3

Ethier, JoAnne [NCR]

---

**From:** Martineau, Diane [NCR]  
**Sent:** August 22, 2011 9:48 AM  
**To:** PVM-6/Leg.Ser.Jur.-Lawyers/Avocats  
**Subject:** FW: Bratshitsch v. Canada (Attorney General) - RPR file

**Attachments:** Bratshitsch\_v.\_Canada\_(Attorney\_General),\_2.DOC



Bratshitsch\_v.\_C  
anada\_(Attorne...

Le dossier de Kim Jessome.

-----Original Message-----

**From:** LexisNexis Quicklaw [mailto:lexisnexis@prod.lexisnexis.com]  
**Sent:** Monday, August 22, 2011 9:42 AM  
**To:** Martineau, Diane [NCR]  
**Subject:** Bratshitsch v. Canada (Attorney General) - RPR file

*Case Name:*  
**Bratshitsch v. Canada (Attorney General)**

**Between**  
**Anthony Bratshitsch, Applicant, and**  
**The Attorney General of Canada and the Chief Enforcement**  
**Officer, Environmental Enforcement, Environment Canada,**  
**Respondents**

[2011] F.C.J. No. 1200

Docket T-2112-10

Federal Court  
Toronto, Ontario

**Aalto, Prothonotary**

April 28, 2011.

(15 paras.)

---

**ORDER**

**1 AALTO, PROTHONOTARY:-- UPON MOTION** dated the 25th day of March, 2011, on behalf of the Respondents for:

- (a) an Order striking out the Notice of Application, without leave to amend; or
- (b) in the alternative, granting an extension of time to file responding affidavits; and
- (c) the costs of this motion.

**2 AND UPON** reading the Motion Record of the Respondents and of the Applicant and upon hearing the submissions of the parties;

**3 AND UPON** reading the Motion Record of the Applicant moving to strike the Respondents' motion to strike, the Respondents' Motion Record and the Applicant's Reply and upon hearing the submissions of the parties; and upon considering the matter;

4 The Respondents served and filed a motion to strike the application dated February 18, 2011 returnable at the General Sittings initially on March 28, 2011 which was then moved to April 4, 2011. The Applicant filed a Rule 369 motion on March 28, 2011 to strike the Respondents' motion to strike the application. Both motions were before the Court at the General Sittings on April 4, 2011. Because of my disposition of the motion of the Respondents there is no need to consider the motion of the Applicant.

5 In this application, the Applicant seeks to strike down s. 36 of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations, SOR/2005-149 (the Regulations) which regulations were promulgated under the **Canadian Environmental Protection Act, 1999**; 1999, c.33 (CEPA). s. 36 of the Regulations requires that an importer or exporter of hazardous waste or recyclable materials provide the Minister of the Environment with written confirmation that the waste has been disposed of or recycled within 30 days of such disposal or recycling. Thus, for example, a certificate should be obtained from a U.S. company which disposes of waste that is shipped to the U.S. by a Canadian company for disposal or recycling. A contravention of s. 36 is a criminal offence.

6 Briefly, by way of background, the Applicant is a consultant in the waste disposal industry. The Applicant did consulting work for a company which was charged under s. 36. The Applicant was not charged. The Applicant seeks to strike down the legislation so that he will not be charged nor will others. The Applicant challenges the validity of s. 36 on three grounds:

- (a) s. 36 breaches the guarantee of liberty enshrined in s. 7 of the Charter of Rights and Freedoms (the Charter);
- (b) s. 36 does not comply with various international agreements on the trans-boundary movement of hazardous waste; and,
- (c) s. 36 violates the expectations of "fair justice" by unfairly placing an inference of guilt on a person in some cases.

7 The Respondent seeks to strike the application on four basic grounds:

- (a) there is no "decision" which is the subject matter of the application;
- (b) the Applicant does not have public interest standing;
- (c) the Applicant does not have direct standing; and,
- (d) the Court cannot grant the relief requested.

8 Notwithstanding that the Applicant is both passionate and articulate in his submissions in support of his application and his response to the grounds of the Respondent, it is my view that the application must be struck. The test to be applied on a motion to strike is whether the application is bereft of any chance of success (see *David Bull Laboratories v. Pharmacia Inc.*, [1994] F.C.J. No. 1629).

9 On the facts of this case, the Applicant is a concerned citizen who happens to also be a consultant in the hazardous waste disposal industry. He is not subject to criminal prosecution currently. As noted during argument the time to raise the Charter issues is during a prosecution not in the context of a hypothetical claim.

10 Section 18.1 (1) of the Federal Courts Act, R.S.C. 1985 c. F-7, as amended, requires that the Applicant be "directly affected" by the matter which is the subject matter of the application. Here,

the Applicant is not directly affected in the sense that it is used in s 18.1 (1). His legal rights and legal obligations are not affected. He, personally, has not been subjected to prosecution. His s. 7 Charter rights have not been violated. He is not an importer or exporter of hazardous waste. He does argue that he might be held to be an agent and therefore subject to prosecution. His strongly held concern is for those in the waste disposal industry, including himself, who may be subject to prosecution. He believes he could be "strongly impacted" by a risk of prosecution which would destroy his reputation. In his notice of application he claims: "Since at least one Canadian and at least one entity have already faced such prospects, which occurred without precedence, the applicant is applying to the court for remedies." In effect, he is asking the Court to rewrite the legislation or force a change in the legislation.

**11** While the concerns of the Applicant are sincere, the prospect of prosecution is insufficient to give the Applicant the necessary direct standing. As was noted in *R. v. Ciarniello*, 2006 BCSC 1671 at par. 62:

A theoretical possibility of imprisonment under a penal statute is not, by itself, sufficient to establish private interest standing to challenge its constitutional validity. Everyone in Canada faces a theoretical possibility of imprisonment under the various charging sections of the Criminal Code if they do any of the things that those sections proscribe. If such a theoretical possibility of imprisonment were sufficient, then everyone would have private interest standing.

**12** Neither does the Applicant have public interest standing. He does not meet the tests set out in *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236. The tests can be summarized as follows:

- (a) Is there a serious issue raised concerning the invalidity of the legislation?
- (b) Is the party directly affected, and if not, does the party have a genuine interest in the issue? and,
- (c) Is there another more reasonable and effective way to raise the issue?

**13** The Applicant describes himself as a citizen who is oppressed or possibly oppressed by the "actions or the potential actions" of the government relying upon *Amnesty International v. Canada (Canadian Forces)* 2007 FC 1147. However, the facts of *Amnesty International* are very different than what is raised here. In that case a public interest group sought a remedy in circumstances where no other avenue for relief existed. Quite apart from the "potential actions" the Applicant is concerned, about the real issue that is the validity of s. 36 of the Regulations which can be determined in the context of proceeding under that Regulation. The Applicant argues that he is an "agent" and is therefore directly affected by s. 36. He is not directly affected unless he is charged under the section. Further, the Applicant argues that the threat of charges and possible imprisonment is not fair and that waiting to be charged is an inefficient and ineffective way to determine the issue. However, as noted by Cory, J. in *Canadian Council of Churches*:

The whole purpose of granting status is to prevent the immunization of legislation or public act from any challenge. The granting of public interest standing is not required when on a balance of probabilities, it can be shown that the measure will be subject to an attack from a private litigant.

14 Given that there is no "decision" of a federal board, commission or other tribunal in issue; that the relief requested is not within the scope of remedies the Court can grant; and, that he lacks both direct and public interest standing, the application must be struck. Given the legal conclusions reached herein for striking the application, it should be struck without leave to amend.

15 **THIS COURT ORDERS that:**

1. The Notice of Application is struck without leave to amend.
2. The Respondent is entitled to costs, if demanded.

AALTO, PROTHONOTARY

qp/s/qlaim/qlvxw

----- End of Request -----

Email Request: Current Document: 1

Time Of Request: Monday, August 22, 2011 09:41:59

**Pages 1358 to / à 1817**  
**are not relevant**  
**sont non pertinentes**



**Pages 1818 to / à 1891  
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**23**

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**Pages 1892 to / à 1913**  
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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

Lemieux,Dianne [NCR]

---

From: Fox, Joanne [jfox@JUSTICE.GC.CA]  
Sent: Tuesday, July 10, 2001 2:35 PM  
To: Keller, Joseph (EC); Meaney, John; EC: Bell, Michael; EC: Pascoe, Dave; EC: May, Bradley  
Cc: Scarcella, Gina  
Subject: [REDACTED]

[REDACTED]

Joanne Fox  
Counsel, Regulatory Section  
Dept. of Justice, Ontario Regional Office  
Tel: (416) 973-8859  
Fax: (416) 973-5004  
E-mail: joanne.fox@justice.gc.ca

s.23

**Pages 1923 to / à 1933  
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Keller, Joseph [NCR]

From: Bell, Michael [Ontario]  
Sent: July 13, 2001 1:41 PM  
To: Meaney, John [Ontario]; Fox, Joanne: JUSTICE  
Cc: Keller, Joseph [NCR]; Pascoe, Dave [Ontario]; May, Bradley [Ontario]; Young, Lorraine [Ontario]  
Subject: RE: [REDACTED]  
Importance: High

*Michael Bell*

Director  
Environment Canada  
Emergencies and Enforcement Division  
Ontario Region  
(416) 739-5905

s.21(1)(a)

s.23

-----Original Message-----

From: Meaney, John [Ontario]  
Sent: July 13, 2001 1:00 PM  
To: Fox, Joanne: JUSTICE  
Cc: Keller, Joseph [NCR]; Pascoe, Dave [Ontario]; May, Bradley [Ontario]; Bell, Michael [Ontario]; Young, Lorraine [Ontario]  
Subject: [REDACTED]

I met with EC staff this morning. Here are their comments and mine, combined.

John Meaney  
Counsel, Department of Justice  
Environment Canada  
Emergencies & Enforcement Division (EED)  
4905 Dufferin Street  
Downsview, ON  
M3H 5T4

s.19(1)

Tel: (416) 739-4815  
Fax: (416) 739-4903  
email: John.Meaney@ec.gc.ca

<< File: [REDACTED] doc >>

**Pages 1935 to / à 1948  
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**23**

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## Keller, Joseph [NCR]

---

**From:** Meaney, John [Ontario]  
**Sent:** May 31, 2001 3:24 PM  
**To:** Keller, Joseph [NCR]  
**Cc:** 'Gina Scarcella'; Fox, Joanne: JUSTICE; May, Bradley [Ontario]; Bell, Michael [Ontario]; Young, Lorraine [Ontario]  
**Subject:** [REDACTED]



s.23



**Pages 1950 to / à 1959  
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**Pages 1960 to / à 1974**

**are not relevant**

**sont non pertinentes**

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**23**

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**Pages 1994 to / à 1997**  
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Department of Justice  
Canada

130 King Street West  
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M5X 1K6

Ministère de la Justice  
Canada

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Tel: (416) 954-5481  
Fax: (416) 973-4323  
Email: askrishn@justice.gc.ca

Our File: 2-596385  
Notre dossier:

Your File:  
Votre dossier:

August 12, 2011

**VIA FACSIMILE (416-954-5068)**

Registry of the Federal Court  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

Dear Sir/Madam:

**Re: WHITTY, Patrick v. The Chief Enforcement Officer, Environment  
Enforcement, Environment Canada and Attorney General of Canada  
Court File No.: T-1295-11**

---

Please file the enclosed Notice of Appearance and Affidavit of Service, pursuant to the  
*Federal Court Rules*.

Yours very truly,

Asvini Krishnamoorthy  
Legal Assistant  
Regulatory Law Division

Enclosures.

Canada

**Page 1999**  
**is not relevant**  
**est non pertinente**



Department of Justice  
Canada

130 King Street West  
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Bureau régional de l'Ontario  
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Fax: (416) 973-4323  
Email: askrishn@justice.gc.ca

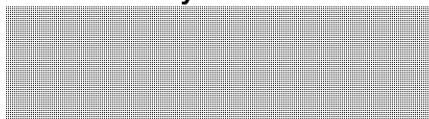
Our File: 2-596385  
Notre dossier:

Your File:  
Votre dossier:

August 12, 2011

**VIA FACSIMILE (905-662-3828)**

Patrick Whitty



s.19(1)

Dear Mr. Whitty

**Re: WHITTY, Patrick v. The Chief Enforcement Officer, Environment  
Enforcement, Environment Canada and Attorney General of Canada  
Court File No.: T-1295-11**

---

Enclosed please find the Notice of Appearance of the Respondents, which is served upon you pursuant to the *Federal Court Rules*.

Yours very truly,

Asvini Krishnamoorthy  
Legal Assistant  
Regulatory Law Division

Enclosure.

**Page 2001**  
**is not relevant**  
**est non pertinente**





Department of Justice  
Canada

Ontario, Regional Office  
130 King Street West  
Suite 3400, Box 36  
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M5X 1K6

Ministère de la Justice  
Canada

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M5X 1K6

Tel: (416) 952-7114  
Fax: (416) 973-4323  
Email: Diane.Dyke@justice.gc.ca

August 25, 2011

**VIA FACSIMILE**

Kelly  
Ontario Court of Justice  
Hamilton Ontario

Dear Kelly:

**Re: RPR Environmental Inc. matter**  
**Court File No.: 08-1636**

---

Pursuant to our telephone conversation I am requesting a copy of the record relating to the absolute discharge in the above-referenced file. Please contact me if you have any questions. Thank you.

Yours truly,

Diane Dyke  
Legal Assistant for  
Michael J. Sims  
Counsel  
Regulatory Law Division

**Pages 2003 to / à 2005**  
**are not relevant**  
**sont non pertinentes**



Department of Justice  
Canada

Ministère de la Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 26  
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Tel: (416) 952-7114  
Fax: (416) 973-4323  
Email: [Diane.Dyke@justice.gc.ca](mailto:Diane.Dyke@justice.gc.ca)

August 25, 2011

VIA FACSIMILE

Kelly  
Ontario Court of Justice  
Hamilton Ontario

Dear Kelly:

Re: RPR Environmental Inc. matter  
Court File No.: 08-1636

Pursuant to our telephone conversation I am requesting a copy of the record relating to the absolute discharge in the above-referenced file. Please contact me if you have any questions. Thank you.


Yours truly,

Diane Dyke  
Legal Assistant for  
Michael J. Sims  
Counsel  
Regulatory Law Division

Canada

TOTAL P.002

**Page 2007**  
**is not relevant**  
**est non pertinente**

 **Department of Justice  
Canada**  
130 King Street West  
Toronto, Ontario  
M5X 1K6

**Ministère de la Justice  
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Bureau régional de l'Ontario  
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*Tel:* (416) 952-7116  
*Fax:* (416) 973-4323  
*Email:* michael.sims@justice.gc.ca

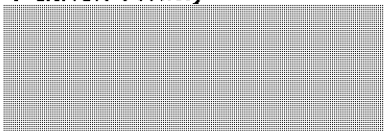
*Our File:* 2-596385  
*Notre dossier:*

*Your File:*  
*Votre dossier:*

September 12, 2011

**VIA FACSIMILE (905-662-3828)**

Patrick Whitty



s.19(1)

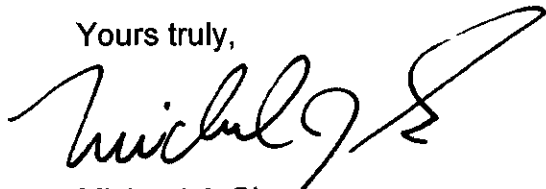
Dear Mr. Whitty

**Re: WHITTY, Patrick v. The Chief Enforcement Officer, Environment  
Enforcement, Environment Canada and Attorney General of Canada  
Court File No.: T-1295-11**

---

Enclosed please find the Notice of Motion of the Respondents, served upon you in  
accordance with the *Federal Courts Rules*.

Yours truly,

A handwritten signature in black ink, appearing to read "Michael J. Sims".

Michael J. Sims  
Counsel  
Regulatory Law Division

Encl.



Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
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Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: Michael.Sims@justice.gc.ca

Our File: 2-596385  
Notre dossier:

Your File:  
Votre dossier:

September 12, 2011

**VIA FACSIMILE**

Registry of the Federal Court  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

Dear Sir/Madam:

**Re: WHITTY, Patrick v. The Chief Enforcement Officer, Environment  
Enforcement, Environment Canada and Attorney General of Canada  
Court File No.: T-1295-11**

---

Please file the enclosed Notice of Motion of the Respondents and Affidavit of Service,  
pursuant to *Federal Courts Rules*.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Enclosures

Canada

**Pages 2010 to / à 2011**  
**are not relevant**  
**sont non pertinentes**

September 6, 2011

**Via Priority Mail**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

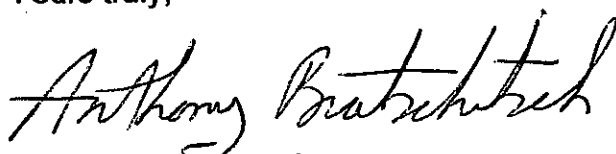
Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-596385  
Patrick Whitty v. Attorney General of Canada et al  
Federal Court File No.: T-1295-11  
Your letter of March 30, 2011

Dear Mr. Sims,

On behalf of Patrick Whitty, I am forwarding his Affidavit and Exhibits as per *The Federal Court Rules*.

Yours truly,



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel: (289) 260-1153



# Canada Post - Track - Result Detail Print



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- WHITTY v AGC -  
Affidavit from Applicant -  
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Name: MICHAEL SIMS

1 of 1

Suite: 3400

09/15/2011 09:11

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BUILDING: 130 KING STREET

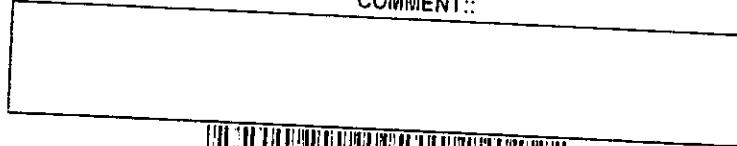
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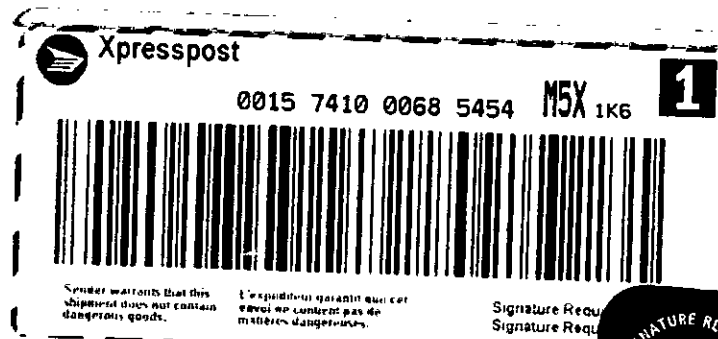
TYPE DOC:

COMMENT:



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Mr. Michael J. Sims  
Counsel, Regulatory Law Dir  
Department of Justice Can  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6



**Pages 2015 to / à 2021**  
**are not relevant**  
**sont non pertinentes**



Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
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Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: Michael.Sims@justice.gc.ca

Our File: 2-596385  
Notre dossier:

Your File:  
Votre dossier:

September 15, 2011

**VIA FACSIMILE**

Vilko Zbogar  
ZBOGAR ADVOCATE  
51 Crossovers Street  
Toronto, Ontario  
M4E 3X2

Dear Sir/Madam:

**Re: WHITTY, Patrick v. The Chief Enforcement Officer, Environment  
Enforcement, Environment Canada and Attorney General of Canada  
Court File No.: T-1295-11**

---

Please find attached the Confirmation of Motion, filed with the Court this morning and served upon you pursuant to *Federal Courts Rules*.

Yours truly,

*pp Mare Nyke*

Michael J. Sims  
Counsel  
Regulatory Law Division

Enclosure

Canada

**Federal Court - Cour fédérale**

**CONFIRMATION OF MOTION**

This Confirmation of Motion was sent to the Federal Court on: 15-Sep-2011 10:51 AM EDT

Court Number: T-1295-11  
Style of Cause: PATRICK WHITTY v. THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENT  
CANADA ET AL.  
Location of Hearing: Toronto

---

I, Michael J. Sims / (416) 952-7116 , representing the moving party, Respondent (application) , confirm that I have conferred with the other parties and confirm that the motion to be heard on 26-Sep-2011 will proceed on the following basis:  
For an adjournment on consent to 28-Nov-2011


---

*A copy of the moving party's confirmation of motion communicated to the Registry must be sent to all other parties forthwith.*

*If the confirmation information communicated to the Registry changes, the moving party shall advise the Registry immediately by submitting a subsequent confirmation of motion and sending a copy to the other parties.*

---

**Page 2024**  
**is not relevant**  
**est non pertinente**

 <b>Department of Justice Canada</b> 130 King Street West Toronto, Ontario M5X 1K6	<b>Ministère de la Justice Canada</b> Bureau régional de l'Ontario la tour Exchange 130 rue King ouest Pièce 3400, CP 36 Toronto (Ontario) M5X 1K6	<b>Tel:</b> (416) 952-7116 <b>Fax:</b> (416) 973-4323 <b>Email:</b> michael.sims@justice.gc.ca  <b>Our File:</b> 2-596385 <b>Notre dossier:</b>
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**Your File:**  
**Votre dossier:**

September 16, 2011

**VIA FACSIMILE (416-954-5068)**

Registry of the Federal Court  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

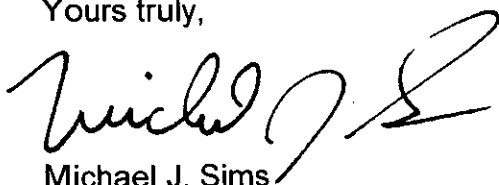
Dear Sir/Madam:

**Re: WHITTY, Patrick v. The Chief Enforcement Officer, Environment  
Enforcement, Environment Canada and Attorney General of Canada  
Court File No.: T-1295-11**

---

Further to the confirmation of motion form submitted electronically yesterday, I confirm that the parties have adjourned the respondents' motion to strike the application on consent to the general sitting of the Court on November 28, 2011.

Yours truly,



Michael J. Sims  
Counsel  
Regulatory Law Division

cc. Vilko Zbogor, counsel for the applicant (by fax)

Canada

**Pages 2026 to / à 2027**  
**are not relevant**  
**sont non pertinentes**



**Pages 2028 to / à 2029**  
**are duplicates**  
**sont des duplicatas**



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Tel: (416) 952-7116  
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Email: Michael.Sims@justice.gc.ca

Our File: 2-596385  
Notre dossier:

Your File:  
Votre dossier:

October 17, 2011

**VIA FACSIMILE**

Vilko Zbogar  
Zbogar Advocate  
51 Crossovers Street  
Toronto, Ontario  
M4E 3X2

Dear Mr. Zbogar:

**Re: Patrick Whitty v. Attorney General of Canada, et al.**  
**Court File No.: T-1295-11**

---

I have returned to the office this morning to find a Notice of Constitutional Question, served upon the Attorney General of Canada in Mr. Whitty's name. It would appear that he drafted the NCQ himself.

In your letter to me of September 13, 2011, confirming my consent to adjourn the respondents' motion to strike the application as a professional courtesy to you, you indicated that you had been retained to represent Mr. Whitty in this matter. To my knowledge, you have not served me with a Notice of Change of Solicitor. Instead, I have further pleadings in Mr. Whitty's name.

Please inform me without delay whether you are, in fact, representing Mr. Whitty on the application and, if so, serve me with proper Notice in accordance with the *Federal Courts Rules*.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Canada

**Pages 2031 to / à 2038**  
**are not relevant**  
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Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
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M5X 1K6

Ministère de la Justice  
Canada

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Pièce 3400, CP 36  
Toronto (Ontario)  
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Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: Michael.Sims@justice.gc.ca

Our File: 2-596385  
Notre dossier:

Your File:  
Votre dossier:

November 21, 2011

**VIA FACSIMILE**

Vilko Zbogar  
ZBOGAR ADVOCATE  
51 Crossovers Street  
Toronto, Ontario  
M4E 3X2

Dear Mr. Zbogar:

**Re: WHITTY, Patrick v. Attorney General of Canada, et al.**  
**Court File No.: T-1295-11**

---

Further to our recent conversations, I confirm our agreement that Mr. Whitty will file a Notice of Discontinuance in this matter, and that the respondents will not seek their costs of responding to the application.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Canada

**Page 2040**  
**is not relevant**  
**est non pertinente**



Department of Justice  
Canada

130 King Street West  
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M5X 1K6

Ministère de la Justice  
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Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-596385  
Notre dossier:

Your File:  
Votre dossier:

November 24, 2011

**VIA FACSIMILE (416-954-5068)**

Registry of the Federal Court  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

Dear Sir/Madam:

**Re: WHITTY, Patrick v. The Chief Enforcement Officer, Environment  
Enforcement, Environment Canada and Attorney General of Canada  
Court File No.: T-1295-11**

---

The applicant has served the respondents with a notice of discontinuance of his application. Accordingly, the respondents withdraw their motion returnable at the general sittings of the Court on November 28, 2011.

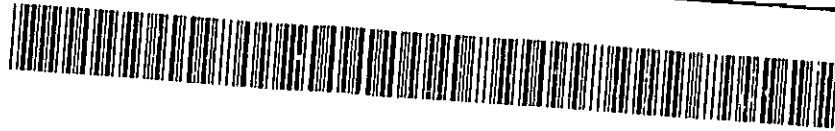
Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

cc. Vilko Zbogor, counsel for the applicant (by fax)

Canada

**Pages 2042 to / à 2045**  
**are not relevant**  
**sont non pertinentes**



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2011-08-12

Box 77  
SK, 2  
2013-PSD-2

CIVIL LAW  
WHITTY, Patrick v. The Chief Enforcement Officer, Environment  
Enforcement, Environment Canada and Attorney General of Canada

COURT FILE NUMBER

T-1295-11



**POCKET LIST**

***WHITTY, Patrick v. The Chief Enforcement Officer, Environment  
Enforcement, Environment Canada and Attorney General of Canada***

Court File No.: T-1295-11 ORO File No.: 2-596385

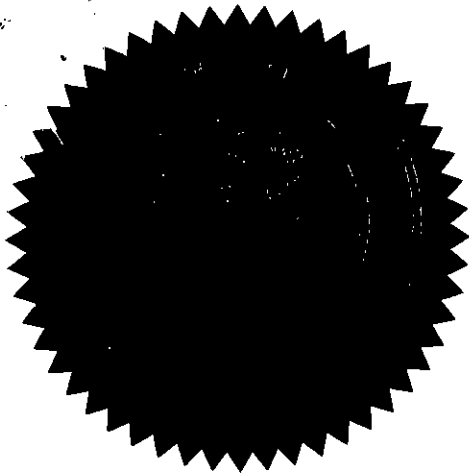
**Correspondence:** from August 12 2011 to January 26, 2012

**Pleadings/court documents**

Notice of Application for JR	Served August 11, 2011
Notice of Appearance with affidavit of service	Served/ filed August 12, 2011
Notice of Motion of the AGC for general sitting on September 26, 2011	Served/ filed September 12, 2011
Affidavit of Patrick Whitty	Received in mail on September 15, 2011
Notice of Libel	Dated September 27, 2011
Notice of Constitutional Question	Dated September 27, 2011
Notice of Discontinuance	Dated November 23, 2011

**Clients Documents**

T-1295-11



FORM 301- Rule 301

## NOTICE OF APPLICATION

Federal Court of Canada

Between:

Patrick Whitty

Applicant

And

The Chief Enforcement Officer, Environmental Enforcement, Environment  
Canada and The Attorney General of Canada

Respondents

### NOTICE OF APPLICATION

#### TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on pages 6 and 7.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto; Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

2

AOUT  
AUG 10 2011

Date: \_\_\_\_\_

**SHIRLEY ACIRO**  
**REGISTRY OFFICER**  
**AGENT DU GREFFE**

Issued by: \_\_\_\_\_

(Registry Officer)

Address of local office: **180 Queen Street West** **180, rue Queen Ouest**  
**Suite 200** **bureau 200**  
**Toronto, Ontario** **Toronto, Ontario**  
**M5V 3L6** **M5V 3L6**

TO:

The Chief Enforcement Officer  
Environmental Enforcement  
National Enforcement Headquarters  
Environment Canada  
200 Sacré-Coeur Blvd., 13th Floor  
Gatineau, Quebec  
K1A 0H3

The Attorney General of Canada  
Department of Justice  
284 Wellington St.  
Ottawa, ON  
K1A 0H8

## APPLICATION

This is an application for judicial review in respect of:

Environmental Enforcement, Environment Canada

The applicant, Patrick Whitty, requests the judicial review of the validity of Section 36 (herein after referred to as the "Section 36") of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations (herein after referred to as the "EIHWHRMR") under the Canadian Environmental Protection Act, 1999 (herein after referred to as the "CEPA 1999").

This is a matter that consists of the prospect of persons in Canada facing the possibilities of imprisonment due to circumstances beyond their control and occurring outside Canada.

This matter also applies to Canadian entities, i.e. commercial, institutional, etc. (herein after referred to as the "entity"), facing other forms of punishment under the same circumstances.

Since the applicant has already faced such prospects, which occurred without precedence, the applicant is applying to the court for remedies.

The applicant is a Canadian citizen who co-owns and manages three corporations involved in the movement of hazardous and non-hazardous wastes.

The applicant makes reference to *R v. RPR ENVIRONMENTAL INC. AND PATRICK WHITTY* (Ontario Court of Justice) in which the Enforcement Branch of Environment Canada (herein after referred to as the "ECE") laid 63 counts of charges in 2008 involving summary conviction against the Canadian exporter of hazardous wastes and the applicant, a company director.

The ECE charges were based on that the RPR ENVIRONMENTAL INC. (herein referred to as the "Company") did not obtain "confirmations", i.e. "Certificates of Destruction" (herein referred to as the "Certificates"), within the time period prescribed by provisions of Section 36.

All of the Certificates described in the charges were to be drawn from authorized disposal facilities in the United States.

However, there are circumstances in the United States, such as facility closures, inefficiencies or apathy that may restrict or prevent the issuance or release of the Certificates.

American law or regulations or any relevant international agreement between Canada and the USA does not require the Certificates.

In this case, the applicant, residing within Canada, did suffer from the threat of the loss of liberty during a twelve-month period by the actions of a Canadian government body, ECE.

As well, the Company faced punitive penalties.

The applicant does not know if this occurrence has since been repeated elsewhere in Canada because a search in Environment Canada's registry did not reveal similar cases and also because requests for information through the Access to Information Act are still in process.

The below items are relevant to this matter:

1. Section 36. (1) of "EIHWHRMR" states:  
*"Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled*
  - (a) in accordance with the export or import permit;*
  - (b) in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and*
  - (c) Within the period referred to in paragraph 9(o) or 16(n)."*

(Note: the word "confirmation" in the fifth line of above Item 1 has been described in this document as a "Certificate of Destruction".)

2. Section 9. (o) of "EIHWHRMR" states:  
*"In the case of operation D13, D14, or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the authorities of the jurisdiction in which the authorized facility is located require shorter time periods, in which case those time periods apply"*

3. Section 185(1) of "CEPA 1999" states:  
*"No person shall import, export or convey in transit a hazardous waste or hazardous recyclable material, or prescribed non-hazardous waste for final disposal, except*
  - (a) after notifying the Minister and paying the prescribed fee;*
  - (b) after receiving from the Minister which-ever one of the following permits is applicable:*
    - i. an import or export permit that, except in a case of a permit issued under subsection (4), states that the authorities of the country of destination and, if applicable, of the country of transit have authorized the movement, and that the authorities of the jurisdiction of destination have authorized the final disposal or recycling of the waste or material, or*
    - ii. a transit permit that states the Minister has authorized the movement; and*
    - iii. In accordance with the prescribed conditions."*
4. Section 272. (1) of "CEPA 1999" states:  
*"Every person commits an offence who contravenes*
  - (a) a provision of the Act or the regulations*
  - (b) an obligation or a prohibition arising from the Act or the regulations"*
5. Section 272. (2) of "CEPA 1999" states:  
*"Every person who commits an offence under subsection (1) is liable*
  - (a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both; and*
  - (b) on summary conviction, to a fine of not more than \$300,000 or to imprisonment for a term of not more than six months, or to both."*
6. Section 280(1) of "CEPA 1999" states:  
*"Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted."*
7. Section 280.1(1) of "CEPA 1999" states:  
*"Every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with*
  - (a) this Act and the regulations; and*
  - (b) orders and directions of, and prohibitions and requirements imposed by, the Minister and enforcement officers and review officers"*

8. Canada is a signatory to the following international agreements governing the transboundary movement of hazardous waste:
- (a) The United Nations Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1992);
  - (b) The Organization for Cooperation and Economic Development (OECD) Council Decision concerning the control of Transfrontier movements of wastes destined for recovery operations (revised 2001);
  - (c) The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992 (herein after referred to as the "Bilateral Agreement").

The applicant makes application for:

The applicant requests relief from the court as it deems necessary under the Canadian Charter of Rights and Freedoms (herein after referred to as the "Charter"), as per:

**24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.**

In addition, the applicant also requests relief from the court as it deems necessary under the *Federal Courts Act*, as per:

**18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction**

- (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
- (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Therefore, the applicant additionally requests relief as stated in S. 18. (1)(a) of the *Federal Courts Act* in the form of:

- (i) an injunction against Environment Canada Enforcement Branch's enforcement of Section 36 when the authorized receiver of hazardous and non-hazardous wastes is in the United States of America, and or

- (ii) declaratory relief that the enforcement of S. 36 in instances when the authorized receiver is in the USA is outside the rules of natural justice and procedural fairness, and
- (iii) any other form of relief that the Court deems fair and necessary.

### The grounds for the application are:

The applicant submits that the standard of review is based on correctness concerning questions of law and questions of jurisdiction (*Dunsmuir v. New Brunswick*, 2008 SCC 9, paragraph 50).

The applicant argues that:

#### A) Section 36 has the effect of violating a person's right to liberty as guaranteed under Section 7 of the "Charter"

If an American disposal facility, authorized to receive and dispose hazardous wastes from a Canadian exporter, is not able to, or chooses not to supply a Certificate of Destruction within the prescribed time period of Section 36 to the Canadian exporter, that same American facility has not violated any domestic law or international regulation that it is bound to.

Yet, in the case of the above, the provisions within Section 36 would place a Canadian exporter and any of its directors in the position of committing an offence under Sections 272(1), 272(2), 280(1) and 280.1(1) of CEPA 1999 which provide for the possibility of imprisonment.

Section 36 unfairly places the exporter and directors at fault for failing to submit the Certificates even though the exporter and directors have no provenance or Chain of Custody with those documents.

Canadian directors would then be subjected to the threat of their rights to liberty of persons as guaranteed by Section 7 of the "Charter".

#### B) Section 36 is not valid due to jurisdictional issues:

Extraterritorial jurisdiction is governed by international law, rather than being at the absolute discretion of individual states and that jurisdiction "*cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention*", see *R. v. Hape* SCC 26 (para. 65).

Therefore, Section 36 is invalid because it is not provided for and does not comply with the principles of the three relevant international agreements concerning the transboundary movement of hazardous waste.



The "Bilateral Agreement" which is used to bridge the other two international agreements, stipulates:

Article 2- General Obligation:

*"The parties shall permit the export, import, and transit of hazardous waste and other waste across their common border for treatment, storage, or disposal pursuant to the terms of their **domestic laws, regulations and administrative practices**, and the provisions of this agreement."*

The issuance of Certificates by an authorized American facility is not pursuant to any American domestic rules and the facility is not compelled to produce them.

Furthermore, if the American facility does not provide a Certificate to the Canadian exporter for whatever reason, that means that the Canadian exporter has never been involved in the Chain of Custody of the Certificate – a document that the Canadian exporter is not capable of authoring.

In fact, there is no standard form for Certificates under Section 36, EIHWHRM or CEPA 1999, which underlines their lack of importance.

Yet, Section 36 creates a situation where a company and its directors can be held liable for not obtaining a foreign document, whether it exists or not, outside its Chain of Custody.

In such cases, there is an absence of mens rea by the exporter and its directors to commit an offence while, at the same time, there is also an absence of actus reus by the only possible authors of the Certificates – the American facilities.

Therefore, Section 36 deems that a serious violation worthy of penal punishment has been committed outside of domestic laws and international agreements.

Furthermore, the requirement for Certificates from authorized American facilities is not necessary to achieve the objectives and principles of the three international agreements governing the transboundary shipment of hazardous wastes.

The reason for this is that one of the major components of the three international agreements is the "prior informed consent regime" (PIC).

For many years, the PIC has been very effective in achieving the principles of the three international agreements.

Under CEPA 1999 and EIHWHRM, a Canadian export notice needs to be completed by the exporter and to be submitted to Environment Canada.

Once the notice has been reviewed, as well as meeting the contract and insurance requirements, the notice is forwarded to the competent American authority for their consent.

In this case, no permit will be issued until the American authority has authorized the movement and has confirmed that the final disposal of the hazardous waste is authorized.

The PIC is an effective, time-tested process that has not required Certificates of Destruction before and is not recognized and used by the Americans now.

Therefore, there would be no loss of effect to protecting human health or the environment by applying the requested remedies.

The "Bilateral Agreement" also states:

Article 5 – Cooperative Efforts:

1. *The parties will cooperate to ensure, to the extent possible, that all transboundary shipments of hazardous waste and other waste comply with the **manifest requirements** of both countries.*
2. *The parties will cooperate in monitoring and spot-checking transboundary shipments of hazardous waste and other waste to ensure, to the extent possible, that such shipments conform to the requirements of the applicable legislation and of this Agreement.*
3. *To the extent any implementing laws and regulations are necessary to comply with this Agreement, the parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the Parties will make best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The Parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such laws and regulations."*

Certificates are not a "manifest requirement" under CEPA 1999 or EIHWHMR and, therefore, are not a requirement for any of the three relevant international agreements including the "Bilateral Agreement".

The "Bilateral Agreement" also states:

Article 7 – Enforcement:

*"The Parties shall ensure, to the extent possible, that within their respective jurisdictions, their domestic laws and regulations are enforced with respect to the transportation, storage, treatment and disposal of transboundary shipments of hazardous waste and other waste."*

The applicant contends that it is sufficient that the Americans apply their own enforcement of their local laws and their obligations under the three international agreements without the need of the intrusion of the provisions of Section 36.

C) Section 36 violates Canadians' expectations of fair justice

In *R. v. Gibbons*, 2003 ABPC 114, the court reiterated the legal concept of reasonable doubt (paragraph 20) namely,

- (i) *the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;*
- (ii) *the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;*
- (iii) *a reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense;*
- (iv) *it is logically connected to the evidence or absence of evidence;*
- (v) *it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and*
- (vi) *more is required than proof that the accused is probably guilty (emphasis added).*

The application of Section 36 clearly places an inference of guilt onto an exporter and a person in Canada when an American facility does not provide a Certificate for whatever the reason.

Therefore, under such conditions, the applicant should not have to face additional charges from ECE in the future that, again, threaten his liberty.

The same reasoning applies to his Company.

This is not fair.

This application will be supported by the following material:

1. Canada Gazette Part II, Volume 139, No. 11: Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations
2. The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992
3. Will Say of Joe Wittwer, Manager of EC Waste Management and Reduction Branch
4. Applicant's Book of Authorities

August 4, 2011



(Signature of applicant)

Patrick Whitty  
164 South Service Road  
Stoney Creek, Ontario  
L8E 3H6  
Tel (905) 961-1866  
Fax (905) 662-3828

SOR/2004-283, ss. 35 and 38

T-1295-11

**FEDERAL COURT**

**BETWEEN:**

**PATRICK WHITTY**

Applicant

and

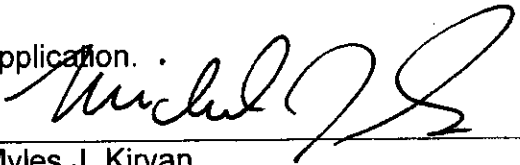
**THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA and the ATTORNEY  
GENERAL OF CANADA**

Respondents

**NOTICE OF APPEARANCE**

The Respondents intend to oppose this application.

August 12, 2011



Myles J. Kirvan  
Deputy Attorney General of Canada  
Per: Michael J. Sims  
Department of Justice  
Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6  
Tel: (416) 952-7116  
Fax: (416) 973-4323

Solicitor for the Respondents

TO: Patrick Whitty  
164 South Service Road  
Stoney Creek, Ontario  
L8E 3H6  
Tel (905) 961-1866  
Fax (905) 662-3828

Applicant

T-1295-11

**FEDERAL COURT**

**BETWEEN:**

**PATRICK WHITTY**

**Applicant**

**and**

**THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA and the ATTORNEY  
GENERAL OF CANADA**

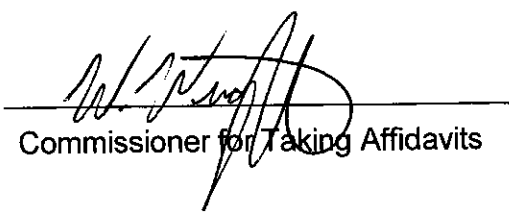
**Respondents**

**AFFIDAVIT OF SERVICE**

I, Asvini Krishnamoorthy, of the City of Toronto, in the Province of Ontario  
SWEAR THAT:

1. I am a legal assistant in the Regulatory Law Division at the Ontario Regional Office of the Department of Justice.
2. I served the Applicant, Patrick Whitty, with the Notice of Appearance dated August 12, 2011, by sending a copy via facsimile to the fax number (905) 662-3828.
3. Annexed and marked as Exhibit "A" is copy of the fax confirmation sheet as evidence thereto.

SWORN before me at the City of  
Toronto in the in the Province of  
Ontario on August 12, 2011.

  
Commissioner for Taking Affidavits

  
Asvini Krishnamoorthy

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE AUG-12-2011 \*\*\*\*\* TIME 12:22 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=AUG-12 12:21

END=AUG-12 12:22

FILE NO.=848

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	<p>This is Exhibit "A" mentioned and referred to in the affidavit of  <b>A. KRISHNAMOORTHY</b>  Sworn before me this 12<sup>TH</sup> day of  <b>AUGUST</b> A.D. 2011</p>	003	00:00:26

\*\*\*\*\* UF-7200 \*\*\*\*\* A. Commissioner for taking affidavits \* - 4169734323- \*\*\*\*\*

 Department of Justice Canada  
Ontario Regional Office

Ministère de la Justice Canada  
Bureau régional de l'Ontario

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SEND TO / ENVOYER À		FROM / DE	
<b>Name / Nom:</b>  Patrick Whitty Applicant		<b>Name / Nom:</b>  Michael J. Sims Counsel	
<b>Address / Adresse:</b>  164 South Service Road Stoney Creek, ON L8E 3H6		<b>Address / Adresse:</b>  Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
(905) 662-3828	(905) 961-1866	(416) 973-4323	(416) 952-7116
<b>Comments / Commentaires:</b> <b>RE: WHITTY, Patrick v. The Chief Enforcement Officer, Environment Enforcement, Environment Canada and Attorney General of Canada</b> <b>Court File No: T-1295-11</b> - Attaching Notice of Appearance			
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
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<b>Pages (including cover sheet)</b>	<b>Date:</b>	<b>Time:</b>	
3	August 12, 2011		

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
 Name / Nom: Asvini Krishnamoorthy at / au: (416) 954-5481

Canada

T-1295-11

**FEDERAL COURT**

**BETWEEN:**

**PATRICK WHITTY**

Applicant

and

**THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA and the ATTORNEY  
GENERAL OF CANADA**

Respondents

**NOTICE OF MOTION**

TAKE NOTICE THAT the Respondents will make a motion to the Court at a general sitting of the Court on Monday, September 26, 2011, at 9:30 or as soon thereafter as the motion can be heard, at 180 Queen Street West, Toronto, Ontario.

THE MOTION IS FOR an Order

- (a) striking out the Notice of Application, without leave to amend; or
- (b) in the alternative, granting an extension of time to file responding affidavits; and
- (c) the costs of this motion



- 2 -

THE GROUNDS FOR THE MOTION ARE

- (a) the Applicant does not seek judicial review of an administrative decision or other action;
- (b) absent some form of administrative action, the Court cannot grant the relief the Applicant seeks;
- (c) absent a decision of a federal board, commission or other tribunal to review, the Court lacks jurisdiction to hear the application;
- (d) the Applicant lacks standing to bring this application;
- (e) this application is, in essence, identical to an application for judicial review brought previously by an associate of the Applicant;
- (f) this application amounts to a collateral attack on previous criminal proceedings before the Ontario Court of Justice;
- (g) the application is, therefore, an abuse of the Court's process;
- (h) the application is so clearly improper as to be bereft of any possibility of success;
- (i) s. 18.1 *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended;
- (j) Rule 221, *Federal Courts Rules*, SOR/98-106;
- (k) such further and other grounds as counsel may advise and the Court may accept.

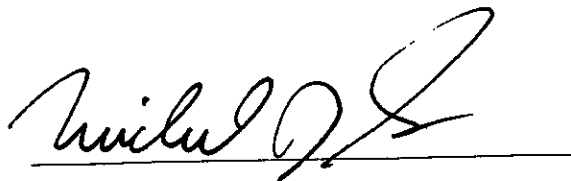
THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion

- (a) the affidavit of Diane Dyke;

- 3 -

(b) such further and other evidence as counsel may advise and the Court  
may accept.

September 12, 2011



Myles J. Kirvan  
Deputy Attorney General of Canada  
Per: Michael J. Sims  
Department of Justice  
Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6  
Tel: (416) 952-7116  
Fax: (416) 973-4323

Solicitor for the Respondents

TO: Patrick Whitty  
164 South Service Road  
Stoney Creek, Ontario  
L8E 3H6  
Tel (905) 961-1866  
Fax (905) 662-3828

Applicant

T-1295-11

**FEDERAL COURT**

**BETWEEN:**

**PATRICK WHITTY**

Applicant

and

**THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA and the ATTORNEY  
GENERAL OF CANADA**

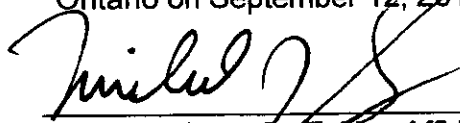
Respondents

**AFFIDAVIT OF SERVICE**

I, Diane Dyke, Legal Assistant, of the City of Toronto, in the Province of Ontario, in the Province of Ontario SWEAR THAT:

1. I served the Applicant, Patrick Whitty, with the Notice of Motion of the Respondents dated September 12, 2011, by sending a copy via facsimile to the fax number (905) 662-3828.
2. Annexed and marked as Exhibit "A" is copy of the fax confirmation sheet as evidence thereto.

SWORN before me at the City of  
Toronto in the in the Province of  
Ontario on September 12, 2011.

  
Commissioner for Taking Affidavits

  
Diane Dyke

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE SEP-12-2011 \*\*\*\*\* TIME 14:53 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=SEP-12 14:52

END=SEP-12 14:53

FILE NO.=950

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	19056623828	This is Exhibit <u>A</u> referred to in the affidavit of <u>Diane Dyke</u> sworn before me this <u>12th</u> day of <u>September</u> , 20 <u>11</u>	00:00:38

*Michael J. Sims*

\*\*\*\*\* UF-7200 \*\*\*\*\* -

\*\*\*\*\* -

4169734323- \*\*\*\*\*

 Department of Justice Canada / Ministère de la Justice Canada  
Ontario Regional Office / Bureau régional de l'Ontario

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<b>Name / Nom:</b>  Patrick Whitty Applicant		<b>Name / Nom:</b>  Michael J. Sims Counsel	
<b>Address / Adresse:</b>  164 South Service Road Stoney Creek, ON L8E 3H6		<b>Address / Adresse:</b>  Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
(905) 662-3828	(905) 961-1866	(416) 973-4323	(416) 952-7116
<b>Comments / Commentaires:</b>			
RE: WHITTY, Patrick v. The Chief Enforcement Officer, Environment Enforcement, Environment Canada and Attorney General of Canada Court File No: T-1295-11 Attaching Notice of Motion of the Respondents			
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
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<b>TRANSMISSION</b>			
<b>Pages (including cover sheet)</b>	<b>Date:</b>	<b>Time:</b>	
5	September 12, 2011		

<p align="center"><b>NOTICE:</b></p> <p>This message is intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you have received this communication in error, please notify us immediately by telephone. Thank you.</p> <p>Cette communication est exclusivement destinée à qui elle est adressée. Elle peut contenir de l'information privilégiée, confidentielle et ne pouvant être divulguée selon la loi applicable à l'espèce. Si vous avez reçu cette communication par erreur, veuillez nous en aviser immédiatement par téléphone. Merci.</p>
---

In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
 Name / Nom: Diane Dyke at / au: (416) 952-7114

**Canada**

NAME  
NOM

PLEADINGS, COURT DOCUMENTS

NO.

*WHITTY v. AGC et al.*

File No. 2-596385

T-1295-11

FORM 80A - Rule 80

**AFFIDAVIT**

FEDERAL COURT

BETWEEN:

PATRICK WHITTY

Applicant

and

ANTHONY BRATSCHITSCH

Intervenor

and

THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA AND THE ATTORNEY  
GENERAL OF CANADA

Respondents

**AFFIDAVIT OF PATRICK WHITTY**

I, Patrick Whitty, of the City of St. Catharines, in the Province of Ontario SWEAR  
THAT:

1. I am a Canadian citizen and a co-owner and director of three related companies including RPR Environmental Inc. (herein referred to as "RPR") of Stoney Creek, Ontario.
2. I am applying to the Federal Court for a remedy under the Canadian Charter of Rights and Freedoms (herein referred to as "The Charter").
3. I have been charged with violations under the Canadian Environmental Protection Act, 1999 (herein referred to as "CEPA 1999") and one of its regulations, the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* (herein referred to as "EIHWHRMR"), which was published in the Canada Gazette and is submitted as **Exhibit A**.

4. As a result of those charges, I suffered with the possibility of imprisonment.
5. Every day, I continue to suffer from the burden of that possibility being repeated.
6. My suffering included my companies being ravaged with the loss of reputation, key employees and substantial business revenue.
7. My suffering is the result of the actions of officials from the Enforcement Branch of Environment Canada (herein referred to as "ECE") with the co-operation of a Federal Crown Agent, Sandra Antionani (herein referred to as "*The Agent*"), in Hamilton, Ontario.
8. I am claiming that those charges against me were frivolous and vexatious.
9. The alleged violations under CEPA 1999 and EIHWHRMR were administrative in nature with no risk to human health or the environment.
10. I am also claiming – as stated in my Notice of Application – that I had and have no control over the cause of the alleged violations and that charges relating to those allegations are, essentially, constitutionally invalid.
11. In my opinion, those charges were laid against me as retaliation for my staunch but expensive legal defence of a previous set of charges which were based, as well, on alleged violations that were administrative in nature.
12. I am also alleging that both sets of charges were based on negligent ECE investigations that consisted of regulatory negligence, nepotism and cronyism.
13. My application for judicial review to the Federal Court and my request for a remedy under The Charter are absolutely necessary because the manner that ECE's officials conducted themselves.
14. This application is focused on the second investigation, ECE file No. 3007-2007-12-19-014.
15. The "Nepotism" is based on the fact that the two lead ECE investigators were a father and son team – Edward Glenn Wells and Edward Nicholas Wells – operating from the same enforcement branch in Burlington, Ontario.
16. I believe that enforcement officials have the responsibility of providing a duty of care to the public by ensuring each other's actions are compliant with rules, regulations and the law.

17. However, I do not believe that proper duty of care is likely to occur in the advent of father and son working together, especially on the same files.
18. The father – Edward Glenn Wells – originally assigned my file to his son – Edward Nicholas Wells – on May 4, 2006 for the purpose of “*putting together an investigative plan*”, as per paragraph 2 of page 2 of **Exhibit B**.
19. However, this was done before the son received Basic Enforcement Training, as per the lower part of page 2 of **Exhibit C**.
20. The “investigative plan” led to two search and seizure investigations.
21. In each case, the investigations consisted of eleven ECE officers arriving at RPR with warrants and occupying our location for the entire day with our employees being evacuated.
22. The ECE officers were accompanied by local police officers that sealed the entrances to our industrial mall with police cars with flashing lights on.
23. This was done in full view of the large volume of traffic on the Queen Elizabeth Highway (QEW) approximately 20 - 50 metres away.
24. Other businesses and their employees were denied entrance to their buildings in the industrial mall during those days.
25. The second investigation, the focus of this application, took place on March 27, 2008.
26. The charges that were laid against me and RPR from that second investigation were based on Section 36 of EIHWHMR (see **page number 1220 of Exhibit A**).
27. I have provided substantial information on Section 36 in my Notice of Application along with the grounds of my application for judicial review.
28. However, the essence of my application is that I have no other recourse but to seek a remedy from the Federal Court because ECE “does not play by the rules”, in my opinion.
29. The following is a list of allegations that I am making against ECE concerning its “rule breaking”:



a. CEPA 1999 Provisions were ignored.

- i. Part 10 (Enforcement) of the Act provides for **Environmental Protection Compliance Orders (EPCOs)** to be written including in cases of alleged administrative errors. However, I suspect that ECE circumvented this procedure because there is a built-in review process that I could have applied to defend myself including appeals to the Federal Court.
- ii. ECE denied me the option of the **Environmental Protection Alternative Measure**. They went against their own guidelines in doing so because – if their allegations were correct – RPR would have qualified.

b. ECE Guidelines were also ignored.

Environment Canada's **Compliance and Enforcement Policy for the Canadian Environmental Protection Act, 1999 (CEPA, 1999)** (**Exhibit D**), herein referred to as "The Policy Manual", originally published March 2001, has stated its Guiding Principles on page 5.

They include:

- i. *"Enforcement officers throughout Canada will apply the Act in a manner that is fair, predictable and consistent. They will use rules, sanctions and processes securely founded in law."*
- ii. *"Enforcement officers will administer the Act with an emphasis on prevention of damage to the environment."*

In my opinion, surprise large-scale search and seizure investigations based on alleged administrative errors cannot be considered as *"fair, predictable and consistent"* – especially when alternative measures are encouraged as per 29. d.

None of the allegations against me and RPR indicated a threat to human health or the environment.

c. Search Warrant violation

The Policy Manual states in the last part of the 3rd paragraph on page 18 :

*"In the inspection warrant, the justice may name any person to accompany the enforcement officer or authorize, in the inspection warrant, the use of any power that the justice deems required, including the use of force to break locks or force open a locked door."*

However, after arriving at RPR, ECE contacted *Keymaster* of Hamilton, Ontario to cut locks on some of my filing cabinets without being named by the justice on the search warrant.

d. Misapplication of Enforcement Tools

I understand and agree that enforcement officers have the discretion to utilize their enforcement tools to best serve the purposes of CEPA 1999.

The Policy Manual itemizes the enforcement tools starting at page 19.

The attached Environment Canada publication *The Canadian Environmental Protection Act* (CEPA 1999) and Enforcement (**Exhibit E**), herein referred to as "The Publication", succinctly lists the available options available to enforcement officers on page 2 of the exhibit :

*CEPA 1999 enforcement officers have the following enforcement tools at their disposal:*

- *warnings to indicate the existence of an alleged violation, so that the alleged violator can take notice and return to compliance;*
- *directions that environmental officers may issue to deal with or prevent illegal releases of regulated substances;*
- *tickets for offences such as the failure to submit written reports;*
- *environmental protection compliance orders to put an immediate stop to illegal activity, to prevent a violation from occurring or to require action to be taken;*
- *Environmental Protection Alternative Measures*
- *prosecution under the authority of a Crown prosecutor; and*

In both search warrant investigations against RPR, ECE proceeded to the prosecution tool without undergoing any of the other tools at their disposal.

Considering the administrative nature of both sets of allegation, it is my belief that ECE has contravened the principles of CEPA 1999 and their own enforcement guidelines.

Regarding the 2<sup>nd</sup> search investigation, ECE Investigator Edward Nicholas Wells swore an information against me and RPR on January 10, 2008.

I was served with the summons on February 13, 2008.

Then, on February 26, 2008, ECE Investigator Edward Nicholas Wells swore another information against me and RPR.

As I wrote in my Notice of Application, page 7 :

*"If an American disposal facility, authorized to receive and dispose hazardous wastes from a Canadian exporter, is not able to, or chooses not to supply a Certificate of Destruction within the prescribed time period of Section 36 to the Canadian exporter, that same American facility has not violated any domestic law or international regulation that it is bound to.*

*Yet, in the case of the above, the provisions within Section 36 would place a Canadian exporter and any of its directors in the position of committing an offence under Sections 272(1), 272(2), 280(1) and 280.1(1) of CEPA 1999 which provide for the possibility of imprisonment.*

*Section 36 unfairly places the exporter and directors at fault for failing to submit the Certificates even though the exporter and directors have no provenance or Chain of Custody with those documents.*

*Canadian directors would then be subjected to the threat of their rights to liberty of persons as guaranteed by Section 7 of the "Charter". "*

I found myself in a position where I was facing imprisonment due to circumstances beyond my control.

I also found myself in the same position, for the second time, where all avenues of reasonable defence or alternative resolution measures were taken away from me by ECE and The Agent.

It is my opinion that both ECE and The Agent took this heavy-handed course of action to punish me, personally, as well as to exhaust my companies' limited financial resources.

Please refer to Counsel Dianne Saxe's internet blog (**Exhibit F**).

Another counsel appeared on my behalf at the Hamilton Court on February 28, 2008.

The 2<sup>nd</sup> search investigation was carried out on March 27, 2008.

On February 5, 2009, almost a full year after I was served with the summons, and approximately 1 ½ years after my substantial legal expenses commenced with ECE's first search investigation on August 9, 2007, I agreed to let RPR do a plea to avoid the possibility of my imprisonment.

At that time, my company was almost ruined, my reputation was tarnished and my finances were depleted.

To this day, I am adamant that I did not commit any violations, that the allegations were merely administrative in nature, that human health and the environment was never placed at risk, that the charges and investigations were heavy-handed measures, and that the public interest was not served – which is the intent of CEPA 1999.

Also, to this day, I fully believe that I carry the same burden of risk of being criminally charged and that my right to liberty under The Charter is continuously subject to violation by ECE.

e. Creation of Violations

On February 26, 2008, Investigator Edward Nicholas Wells swore information on alleged violations that included two "*movement documents*" (herein referred to as MDs).

The two MDs were part of the seized evidence taken during the first investigation conducted on August 9, 2007.

While he returned the balance of the seized evidence from that investigation on February 13, 2008, Investigator Wells held onto those two MDs without informing me.

By holding on to those MDs, Investigator Wells prevented me from requesting the Section 36 Certificates of Destruction from the American facility.

Whether by design or by error, Investigator Wells positioned me into violations of Section 36.

f. Culpable Conduct

After the summons was served to me on February 13, 2008, ECE launched the second search investigation on March 27, 2008.

From an information release obtained through the Access to Information Act that I received on July 5, 2010, I discovered that ECE added three additional files into the search warrant after the justice signed it.

Please refer to the following Exhibits :

EXHIBIT	DATE	DOCUMENT	NEMISIS FILE NOS.
G	March 25, 2008	Search Warrant EAB Note	3007-2007-12-19-014
H	March 25, 2008	Signed Search Warrant	
I	March 26, 2008	Search Warrant EAB Note	3007-2008-01-17-002 3007-2007-12-19-014 3007-2005-09-16-001 3007-2002-04-16-006

Note that ECE added three additional NEMISIS files into the search warrant one day after it was signed by the justice and one day before the search investigation took place at RPR on March 28, 2008.

The three additional files would have been time-barred if presented to a justice.

The top file listed in the March 26/08 EAB - 3007-2008-01-17-002 – is a matter that took place in December, 2000.

ECE had a discoverability date in early 2001 as indicated by **Exhibit J**.

The lower part of the exhibit's first page confirms that Environment Canada made ECE Manager Bradley May aware of the incident at the time when the applicable statute of limitations was six years.

The upper part of the same page shows that Mr. May decided to ignore that revelation – and the fact that limitation period expired - and to launch another investigation.

I have many other concerns about this particular investigation (Section 17 of CEPA 1999) and I have previously submitted another application for judicial review to the Federal Court (T-2176-10).

It is my belief that, since I was summonsed and charged with the Section 36 violations before the search and seizure investigation of March 27, 2008, that the search warrant was presented to the justice under false premises for the purpose of ECE conducting a search based on time-barred files.

It is my opinion that this demonstrates culpable conduct on ECE's part.

I also believe that this information is another example that supports my contention that ECE does not play by the rules and that I cannot expect them to enforce CEPA 1999's laws and regulations in a fair, consistent and predictable manner.

However, I do not believe that these actions are merely the work of the front-line investigators.

**Exhibit K** is an email indicating that the top officials of ECE's directorate were monitoring and directing the investigation.

I believe that this would indicate that such culpable conduct was encouraged as a matter of ECE policy.

Hence, my request for relief under The Charter.

30. Crown Agent

The following is an allegation that I am making against the Crown Agent, Sandra Antionani:

Unnecessary Prosecution

As I presented in my Notice of Application, the central issue of ECE's second investigation against me and RPR is the matter of allegedly missing Certificates of Destruction (herein referred to as "*Certificates*") that originated from American facilities.

There are no forms or format to the Certificates.

Mr. Joachim Wittwer, BSc., CChem., is the Head of the Operations Section of the Waste Management Division of Environment Canada.

He is the expert and Environment Canada's ultimate authority on the movement of hazardous wastes.

**Exhibit L** is his Will Say on the Canadian Manifesting Mechanism, which is critical to managing and monitoring hazardous waste movement, storage and compliance.

Mr. Wittwer's Will Say is initialed and dated 18/07/07, well after November 1, 2005, which is the date that Section 36 came into effect.

Yet, Mr. Wittwer's Will Say does not once mention the Certificates.

This emphasizes the triviality of ECE's charges against me and RPR.

Also, **Exhibit M** is the Canada – USA Agreement (herein referred to as "*The Bilateral Agreement*") that is central to Mr. Wittwer's Will Say and forms the basis for transboundary movement of hazardous materials.

The Bilateral Agreement also has no mention of the need for the Certificates.

I have never disregarded the requirement to comply with obtaining the Certificates, as required by the provisions of Section 36, from the Americans, to the best of my ability.

Yet, based on the lack of urgency expressed for the Certificates in Mr. Wittwer's Will Say and The Bilateral Agreement, I would equate the importance of obtaining the Certificates as equivalent to paying a speeding ticket on time.

While important, I would not expect to lose my driver's licence for not paying a ticket on time.

If I was to lose my licence for being chronically late in paying for speeding tickets, I would expect to have some warning and notice of time to correct the matter.

However, I would not expect to face imprisonment from such prosecution as I have received from The Agent who never approached me for pre-prosecution consultation to resolve the allegations.

Ms. Antionani was the Federal Crown Agent who prosecuted both investigations against me and RPR.

To the best of my knowledge, she made no effort to explore any other means other than prosecution to serve the public interest.

**Exhibit N** is an excerpt from The Federal Prosecution Service DESKBOOK.

The first indented paragraph on page 2 of the exhibit states :

[t]he criminal law is, however, a weapon of last resort intended for use only in cases where the conduct is so inconsistent with the shared morality of society so as to warrant public condemnation and punishment.

I do not believe that ECE's allegations against me concerning the Certificates would be considered as worthy of the above paragraph.

If so, how could The Agent think so?

The second indented paragraph on page 2 of the exhibit states :

[W]here preventative measures to promote compliance with a regulatory regime or a compliance program have failed, and non-compliance has occurred, referral for prosecution should not be automatic: it should only occur as a last resort. In fact, prosecution should only be considered at the end of the unsuccessful application of an Alternate Dispute Resolution strategy (ADR). And such alternative measures will be considered both before charges are laid and after they are laid.

The Agent has not complied to the above approach, as recommended in The Federal Prosecution Service DESKBOOK.

She made no effort to provide warnings or to conduct a pre-charge diversion approach.

Furthermore, on page 3 of the exhibit, Section 56.4.1 (FPS Counsel) provides descriptions of the following ways that Federal Prosecution Service Counsels provide services to regulatory agencies, such as :

- Legal advice
- Prosecution services
- Training

I have not read anywhere that Federal Prosecution Service Counsels can take the lead in launching investigations and in requesting search warrants.

I submit **Exhibit O** as one piece of evidence that The Agent did take a very active role in conducting, at least, the second investigation against me and RPR.

From the information release obtained through the Access to Information Act that I received on July 5, 2010, I read at least one email where the father-son team of investigators agreed to meet with The Agent at one of their residences in Dundas, Ontario where all three co-incidentally lived.



To me, this smacks of "cronyism" and, along with nepotism, does not seem to be a judicious way of dispensing justice.

Therefore, it is my belief that it was not reasonable for The Agent to prosecute criminal charges against me for such allegations that ECE had presented to her.

31. The ECE Section 36 investigation and prosecution of RPR is a matter of public information and is of significant concern to the industry, for the reasons including fairness, predictability and consistency. **Exhibit F** is an internet publication by a reknown environmental law practioner, Dr. Dianne Saxe, detailing the Section 36 violation and her own reaction to it.
32. Dr. Saxe's internet publication refers to ECE enforcement and compliance in this manner (last paragraph) :

***We need it to be fair, and proportional to the real fault involved.***

As explained in the Application, the Canadian exporter has no control over the issuance of confirmations, commonly described as Certificates of Destruction, from the United States.

As a result, there is a perception in the industry of, at least, unfairness in the enforcement of Section 36 on Canadian exporters.

It is also my belief that there is no real fault because American legislation does not require the issuance of those Certificates, as explained in the Application.

33. Section 2.(1)(o) of CEPA 1999 states

***2. (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),  
(o) apply and enforce this Act in a fair, predictable and consistent manner.***

I believe that EIHWHRMR is the Minister's regulation with good intent.


However, I also believe that ECE had taken upon themselves to bend or break the rules to accommodate their own objectives.

I have written in this Affidavit and my Notice about negligent investigation, regulatory negligence, nepotism and cronyism.


If any of the above is true in my case, CEPA 1999 has not been applied or enforced in a fair, predictable and consistent manner, as required by law.

34. My request for relief is within the jurisdiction of The Federal Court and would not provide for large scale changes.

However, it would provide assurances for me and other Canadians in a similar position that our rights under The Charter are protected.

  
\_\_\_\_\_  
Patrick Whitty  
(Signature of Deponent)

Sworn (or Affirmed) before me at the City of Hamilton in the Province of Ontario

on Wednesday of September (date) 20 11  


Commissioner for Taking Affidavits Deborah Patricia Pigott, a Commissioner, etc.,  
(or as the case may be) Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

Exhibits :

- A. Canada Gazette Part II, Volume 139, No. 11: *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*
- B. Will Say of Edward Glenn Wells
- C. Performance Review and Communication Record of Edward Nicholas Wells
- D. Compliance and Enforcement Policy for the *Canadian Environmental Protection Act, 1999* (CEPA 1999)
- E. The Canadian Environmental Protection Act (CEPA 1999) and Enforcement
- F. Internet publication by Dr. Dianne Saxe publishing information about concerns over the fairness of the enforcement of the Section 36 regulation
- G. Enforcement Action Briefing (EAB) Note, March 25, 2008
- H. Search Warrant signed March 25, 2008

- I. Enforcement Action Briefing (EAB) Note, March 26, 2008
- J. Email communication based on Section 17 discoverability
- K. Email communication to ECE Directorate
- L. *Canadian Manifesting Mechanism* Will Say of Joachim Wittwer, Head of Operations Section, Waste Management Division of Environment Canada
- M. *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992*
- N. Federal Prosecution Service DESKBOOK
- O. Email communication regarding Crown Agent authorization of search warrant

This is Exhibit A referred to in the Affidavit  
of Patrick W. Hitty

sworn before me on this 14th day  
of September, 2011

  
\_\_\_\_\_

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

Vol. 139, No. 11

Vol. 139, n° 11

# Canada Gazette



# Gazette du Canada

## Part II

## Partie II

OTTAWA, WEDNESDAY, JUNE 1, 2005

OTTAWA, LE MERCREDI 1<sup>er</sup> JUIN 2005

Statutory Instruments 2005

Textes réglementaires 2005

SOR/2005-131 to 159 and SI/2005-43 to 53

DORS/2005-131 à 159 et TR/2005-43 à 53

Pages 1036 to 1356

Pages 1036 à 1356

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The *Canada Gazette* Part II is published under authority of the *Statutory Instruments Act* on January 12, 2005, and at least every second Wednesday thereafter.

Part II of the *Canada Gazette* contains all "regulations" as defined in the *Statutory Instruments Act* and certain other classes of statutory instruments and documents required to be published therein. However, certain regulations and classes of regulations are exempted from publication by section 15 of the *Statutory Instruments Regulations* made pursuant to section 20 of the *Statutory Instruments Act*.

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### AVIS AU LECTEUR

La *Gazette du Canada* Partie II est publiée en vertu de la *Loi sur les textes réglementaires* le 12 janvier 2005, et au moins tous les deux mercredis par la suite.

La Partie II de la *Gazette du Canada* est le recueil des « règlements » définis comme tels dans la loi précitée et de certaines autres catégories de textes réglementaires et de documents qu'il est prescrit d'y publier. Cependant, certains règlements et catégories de règlements sont soustraits à la publication par l'article 15 du *Règlement sur les textes réglementaires*, établi en vertu de l'article 20 de la *Loi sur les textes réglementaires*.

On peut consulter la *Gazette du Canada* Partie II dans la plupart des bibliothèques.

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Des exemplaires des textes réglementaires enregistrés par le greffier du Conseil privé sont à la disposition du public, dans les deux langues officielles, pour examen et vente à la Pièce 418, Édifice Blackburn, 85, rue Sparks, Ottawa, Canada.

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

Registration  
SOR/2005-149 May 17, 2005

Enregistrement  
DORS/2005-149 Le 17 mai 2005

CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999

LOI CANADIENNE SUR LA PROTECTION DE  
L'ENVIRONNEMENT (1999)

**Export and Import of Hazardous Waste and  
Hazardous Recyclable Material Regulations**

**Règlement sur l'exportation et l'importation de  
déchets dangereux et de matières recyclables  
dangereuses**

P.C. 2005-930 May 17, 2005

C.P. 2005-930 Le 17 mai 2005

Whereas, pursuant to subsection 332(1)<sup>a</sup> of the *Canadian Environmental Protection Act, 1999*<sup>b</sup>, the Minister of the Environment published in the *Canada Gazette, Part I*, on March 20, 2004 a copy of the proposed *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, substantially in the annexed form, and persons were given an opportunity to file comments with respect to the proposed Regulations or to file a notice of objection requesting that a board of review be established and stating the reasons for the objection;

Attendu que, conformément au paragraphe 332(1)<sup>a</sup> de la *Loi canadienne sur la protection de l'environnement (1999)*<sup>b</sup>, le ministre de l'Environnement a fait publier dans la *Gazette du Canada* Partie I, le 20 mars 2004, le projet de règlement intitulé *Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuses*, conforme en substance au texte ci-après, et que les intéressés ont ainsi eu la possibilité de présenter leurs observations à cet égard ou un avis d'opposition motivé demandant la constitution d'une commission de révision,

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to section 191 of the *Canadian Environmental Protection Act, 1999*<sup>b</sup>, hereby makes the annexed *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*.

À ces causes, sur recommandation du ministre de l'Environnement et en vertu de l'article 191 de la *Loi canadienne sur la protection de l'environnement (1999)*<sup>b</sup>, Son Excellence la Gouverneure générale en conseil prend le *Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuses*, ci-après.

<sup>a</sup> S.C. 2004, c. 15, s. 31

<sup>b</sup> S.C. 1999, c. 33

<sup>a</sup> L.C. 2004, ch. 15, art. 31

<sup>b</sup> L.C. 1999, ch. 33

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SORDORS/2005-149

**EXPORT AND IMPORT OF HAZARDOUS WASTE  
AND HAZARDOUS RECYCLABLE  
MATERIAL REGULATIONS**

**TABLE OF CONTENTS**

**Interpretation**

- 1 Hazardous Waste
- 2 Hazardous Recyclable Material
- 3 *Transportation of Dangerous Goods Regulations*
- 4 Definitions

**PART 1**

**Notice**

- 5 Application
- 6-7 Notice Procedure
- 8 Content of Notice

**PART 2**

**Export**

- 9 Conditions
- 10-14 Movement Document

**PART 3**

**Import**

- 15 Department of National Defence Exemption
- 16 Conditions
- 17-21 Movement Document

**PART 4**

**Transit**

- 22 Conditions
- 23-27 Movement Document - Transits Through Canada
- 28-32 Movement Document - Transits Through a Country Other than Canada

**PART 5**

**Returns**

- 33 Application
- 34 Returns to Canada
- 35 Returns to the Country of Export

**PART 6**

**Miscellaneous Matters**

- 36 Confirmation of Disposal or Recycling
- 37 Liability Insurance
- 38 Export Reduction Plans
- 39 Environmentally Sound Management

**Consequential matters**

- 40 Consequential Amendment

**Repeal**

- 41 Repeal

**Coming into Force**

- 42 Coming into Force

**RÈGLEMENT SUR L'EXPORTATION ET  
L'IMPORTATION DE DÉCHETS DANGEREUX ET DE  
MATIÈRES RECYCLABLES DANGEREUSES**

**TABLE DES MATIÈRES**

**Définitions et interprétation**

- 1 Déchet dangereux
- 2 Matière recyclable dangereuse
- 3 *Règlement sur le transport des marchandises dangereuses*
- 4 Définitions

**PARTIE 1**

**Notification**

- 5 Champ d'application
- 6-7 Procédure de notification
- 8 Éléments de la notification

**PARTIE 2**

**Exportation**

- 9 Conditions
- 10-14 Document de mouvement

**PARTIE 3**

**Importations**

- 15 Exemption visant le ministère de la Défense nationale
- 16 Conditions
- 17-21 Document de mouvement

**PARTIE 4**

**Transit**

- 22 Conditions
- 23-27 Document de mouvement pour les transits au Canada
- 28-32 Document de mouvement pour les transits dans un pays autre que le Canada

**PARTIE 5**

**Renvois**

- 33 Champ d'application
- 34 Renvoi au Canada
- 35 Renvoi au pays d'exportation

**PARTIE 6**

**Dispositions générales**

- 36 Déclaration d'élimination ou de recyclage
- 37 Assurance responsabilité
- 38 Plans de réduction des exportations de déchets
- 39 Gestion écologiquement rationnelle

**Modification corrélative**

- 40 Modification corrélative

**Abrogation**

- 41 Abrogation

**Entrée en vigueur**

- 42 Entrée en vigueur

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

TABLE OF CONTENTS — *Continued*

TABLE DES MATIÈRES (*suite*)

Schedule 1	Disposal Operations for Hazardous Waste	Annexe 1	Opérations d'élimination des déchets dangereux
Schedule 2	Recycling Operations for Hazardous Recyclable Material	Annexe 2	Opérations de recyclage des matières recyclables dangereuses
Schedule 3	Hazardous Wastes and Hazardous Recyclable Materials	Annexe 3	Déchets dangereux et matières recyclables dangereuses
Schedule 4	Part 1 - Hazardous Wastes and Hazardous Recyclable Materials from Non-Specific Sources Part 2 - Hazardous Wastes and Hazardous Recyclable Materials from Specific Sources	Annexe 4	Partie 1 – Déchets dangereux et matières recyclables dangereuses de sources non spécifiques Partie 2 – Déchets dangereux et matières recyclables dangereuses de sources spécifiques
Schedule 5	Environmentally Hazardous Substances	Annexe 5	Matières dangereuses pour l'environnement
Schedule 6	Hazardous Constituents Controlled under Leachate Test and Regulated Limits	Annexe 6	Constituants dangereux faisant l'objet d'un contrôle au moyen de l'épreuve relative aux lixiviats et des limites réglementaires
Schedule 7	Part 1 - Acute Hazardous Waste and Hazardous Recyclable Material Chemicals Part 2 - Hazardous Waste and Hazardous Recyclable Material Chemicals	Annexe 7	Partie 1 – Déchets dangereux et matières recyclables dangereuses (substances chimiques aiguës) Partie 2 – Déchets dangereux et matières recyclables dangereuses (substances chimiques)
Schedule 8	Excluded Materials		
Schedule 9	Movement Document	Annexe 8	Matières exclues
Schedule 10	Persistent Organic Pollutants	Annexe 9	Document de mouvement
		Annexe 10	Substances polluantes organiques persistantes



**EXPORT AND IMPORT OF HAZARDOUS  
WASTE AND HAZARDOUS RECYCLABLE  
MATERIAL REGULATIONS**

**DEFINITIONS AND INTERPRETATION**

Definition of  
"hazardous  
waste"

1. (1) In Division 8 of Part 7 and Part 10 of the Act and in these Regulations, "hazardous waste" means anything that is intended to be disposed of using one of the operations set out in Schedule 1 and that

- (a) is set out in column 2 of Schedule 3;
- (b) is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (c) is set out in column 2 of Schedule 4 and is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (d) is set out in column 1 of Schedule 5 in a concentration equal to or greater than the applicable concentration set out in column 2 of that Schedule;
- (e) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure*, July 1992, in *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, Third Edition, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3;
- (f) is set out in column 2 of Schedule 7, is pure or is the only active ingredient, and is unused; or
- (g) according to information that Canada has received from the United States or in accordance with the Convention, is considered or defined as hazardous under the legislation of the country receiving it and is prohibited by that country from being imported or conveyed in transit.

Exclusion

(2) The definition "hazardous waste" in subsection (1) does not include anything that is

- (a) exported, imported or conveyed in transit in a quantity of less than 5 kg or 5 L per shipment or, in the case of mercury, in a quantity of less than 50 mL per shipment, other than anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*;
- (b) collected from households in the course of regular municipal waste collection services; or
- (c) part of the exporter's or importer's personal effects or household effects not resulting from commercial use.

**RÈGLEMENT SUR L'EXPORTATION  
ET L'IMPORTATION DE DÉCHETS  
DANGEREUX ET DE MATIÈRES  
RÉCYCLABLES DANGEREUSES**

**DÉFINITIONS ET INTERPRÉTATION**

Définition de  
« déchet  
dangereux »

1. (1) Pour l'application de la section 8 de la partie 7 et de la partie 10 de la Loi et du présent règlement, « déchet dangereux » s'entend de toute chose qui est destinée à être éliminée selon une opération prévue à l'annexe 1 et qui répond à l'une ou l'autre des conditions suivantes :

- a) elle figure à la colonne 2 de l'annexe 3;
- b) elle est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- c) elle figure à la colonne 2 de l'annexe 4 et est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- d) elle figure à la colonne 1 de l'annexe 5 et se trouve dans une concentration égale ou supérieure à la concentration applicable prévue à la colonne 2 de cette annexe;
- e) produit un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de cette annexe, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, 3<sup>e</sup> édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3;
- f) elle figure à la colonne 2 de l'annexe 7, elle est pure ou est le seul ingrédient actif, et elle est inutilisée;
- g) selon les informations que le Canada a obtenues des États-Unis ou aux termes de la Convention, elle est considérée ou définie comme dangereuse par la législation du pays où elle est destinée et son importation ou son transit est interdit dans ce pays.

(2) Ne sont pas considérés comme des déchets dangereux :

- a) les déchets qui sont exportés ou importés ou qui transitent en une quantité inférieure à 5 kg ou 5 L par envoi ou, dans le cas de mercure, en une quantité inférieure à 50 mL par envoi, sauf ceux qui sont compris dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*;
- b) ceux qui sont enlevés dans le cours normal des services municipaux d'enlèvement des ordures ménagères;

Definition of  
"hazardous  
recyclable  
material"

2. (1) In Division 8 of Part 7 and Part 10 of the Act and in these Regulations, "hazardous recyclable material" means anything that is intended to be recycled using one of the operations set out in Schedule 2 and that

- (a) is set out in column 2 of Schedule 3;
- (b) is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (c) is set out in column 2 of Schedule 4 and is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (d) is set out in column 1 of Schedule 5 in a concentration equal to or greater than the applicable concentration set out in column 2 of that Schedule;
- (e) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure*, July 1992, in *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, Third Edition, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3;
- (f) is set out in column 2 of Schedule 7, is pure or is the only active ingredient, and is unused; or
- (g) according to information that Canada has received from the United States or in accordance with the Convention, is considered or defined as hazardous under the legislation of the country receiving it and is prohibited by that country from being imported or conveyed in transit.

Exclusion

(2) The definition "hazardous recyclable material" in subsection (1) does not include anything that is

- (a) exported, imported or conveyed in transit in a quantity of less than 5 kg or 5 L per shipment or, in the case of mercury, in a quantity of less than 50 mL per shipment, other than anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*;
- (b) collected from households in the course of regular municipal waste collection services;
- (c) part of the exporter's or importer's personal effects or household effects not resulting from commercial use;
- (d) exported to, imported from, or conveyed in transit through a country that is a party to OECD Decision C(2001)107/Final and that

c) ceux qui font partie des effets personnels ou des articles ménagers de l'exportateur ou de l'importateur et qui ne résultent pas d'un usage commercial.

2. (1) Pour l'application de la section 8 de la partie 7 et de la partie 10 de la Loi et du présent règlement, « matière recyclable dangereuse » s'entend de toute chose qui est destinée à être recyclée selon une opération prévue à l'annexe 2 et qui répond à l'une ou l'autre des conditions suivantes :

- a) elle figure à la colonne 2 de l'annexe 3;
- b) elle est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- c) elle figure à la colonne 2 de l'annexe 4 et est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- d) elle figure à la colonne 1 de l'annexe 5 et se trouve dans une concentration égale ou supérieure à la concentration applicable prévue à la colonne 2 de cette annexe;
- e) elle produit un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de cette annexe, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, 3<sup>e</sup> édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3;
- f) elle figure à la colonne 2 de l'annexe 7, elle est pure ou est le seul ingrédient actif, et elle est inutilisée;
- g) selon les informations que le Canada a obtenues des États-Unis ou aux termes de la Convention, elle est considérée ou définie comme dangereuse par la législation du pays où elle est destinée et son importation ou son transit est interdit dans ce pays.

Définition de  
« matière  
recyclable  
dangereuse »

(2) Ne sont pas considérées comme des matières recyclables dangereuses :

- a) les matières qui sont exportées ou importées ou qui transitent en une quantité inférieure à 5 kg ou 5 L par envoi ou, dans le cas de mercure, en une quantité inférieure à 50 mL par envoi, sauf celles qui sont comprises dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*;
- b) celles qui sont enlevées dans le cours normal des services municipaux d'enlèvement des ordures ménagères;
- c) celles qui font partie des effets personnels ou des articles ménagers de l'exportateur ou de l'importateur et qui ne résultent pas d'un usage commercial;

Exceptions

- (i) is in a quantity of 25 kg or 25 L or less,
- (ii) is exported or imported for the purpose of conducting measurements, tests or research with respect to the recycling of that material,
- (iii) is accompanied by a shipping document, as defined in section 1.4 of the *Transportation of Dangerous Goods Regulations*, that includes the name and address of the exporter or importer and the words "test samples" or "échantillons d'épreuve", and
- (iv) is not and does not contain an infectious substance as defined in section 1.4 of the *Transportation of Dangerous Goods Regulations*; or
- (e) exported to, imported from, or conveyed in transit through a country that is a party to OECD Decision C(2001)107/Final and that
  - (i) is set out in Schedule 8,
  - (ii) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure*, July 1992, in *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods, Third Edition*, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3, and
  - (iii) is intended to be recycled at an authorized facility in the country of import using one of the operations set out in Schedule 2.

d) celles qui sont exportées dans un pays partie à la décision C(2001)107/Final de l'OCDE, qui en sont importées ou qui y transitent, et qui, à la fois :

- (i) le sont en une quantité de 25 kg ou moins ou de 25 L ou moins,
- (ii) sont exportées ou importées aux fins d'évaluation, d'essai ou de recherche concernant leur recyclage,
- (iii) sont accompagnées d'un document d'expédition, au sens de l'article 1.4 du *Règlement sur le transport des marchandises dangereuses*, qui porte les nom et adresse de l'exportateur ou de l'importateur, selon le cas, et la mention « échantillons d'épreuve » ou « test samples »,
- (iv) ne sont pas des matières infectieuses au sens de l'article 1.4 du *Règlement sur le transport des marchandises dangereuses*, et n'en contiennent aucune;

e) celles qui sont exportées dans un pays partie à la décision C(2001)107/Final de l'OCDE, qui en sont importées ou qui y transitent, et qui, à la fois :

- (i) figurent à l'annexe 8,
- (ii) produisent un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de l'annexe 6, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, 3<sup>e</sup> édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3,
- (iii) sont destinées à être recyclées dans une installation agréée dans le pays d'importation selon une opération prévue à l'annexe 2.

*Transportation of Dangerous Goods Regulations*

3. For the purposes of sections 1 and 2, references to the *Transportation of Dangerous Goods Regulations* shall be read as follows:

- (a) the reference to "public safety" in subparagraph 2.43(b)(i) shall be read as a reference to "the environment and human health"; and
- (b) subparagraph 2.43(b)(i) shall be read without reference to "during transport".

Definitions

4. The following definitions apply in Division 8 of Part 7 of the Act and in these Regulations.

"Act"  
« Loi »

"Act" means the *Canadian Environmental Protection Act, 1999*.

"authorities of the country"  
« autorités du pays »

"authorities of the country" means the competent authorities designated in the *Compilation of Country Fact Sheets (CFS)*, Basel Convention

3. Pour l'application de la définition de « déchet dangereux » prévue à l'article 1 et de la définition de « matière recyclable dangereuse » prévue à l'article 2, le *Règlement sur le transport des marchandises dangereuses* se lit avec les adaptations suivantes :

- a) « la santé publique » est remplacé par « l'environnement et la santé humaine », au sous-alinéa 2.43b)(i);
- b) « pendant le transport » est supprimé au sous-alinéa 2.43b)(i).

4. Les définitions qui suivent s'appliquent à la section 8 de la partie 7 de la Loi et au présent règlement.

« accord Canada-États-Unis » L'Accord entre le gouvernement du Canada et le gouvernement des États-Unis d'Amérique concernant les déplacements transfrontaliers de déchets dangereux,

*Règlement sur le transport des marchandises dangereuses*

Definitions

« accord Canada-États-Unis »  
"Canada-USA Agreement"

	Series No. 01/04, as amended from time to time, and the United States Environmental Protection Agency.	entré en vigueur le 8 novembre 1986, avec ses modifications successives.	
"authorized carrier" « transporteur agréé »	"authorized carrier" means a carrier that is authorized by the authorities of the jurisdiction in which the waste or material is transported, to transport the hazardous waste or hazardous recyclable material that is to be exported, imported or conveyed in transit.	« autorités du pays » Les autorités compétentes mentionnées dans le <i>Compilation of Country Fact Sheets (CFS)</i> , <i>Basel Convention Series No. 01/04</i> , avec ses modifications successives, ou la United States Environmental Protection Agency.	« autorités du pays » "authorities of the country"
"authorized facility" « installation agréée »	"authorized facility" means a facility that is authorized by the authorities of the jurisdiction in which the facility is located to (a) dispose of the hazardous waste being exported or imported using an operation set out in Schedule 1; or (b) recycle the hazardous recyclable material being exported or imported using an operation set out in Schedule 2.	« Convention » La Convention de Bâle sur le contrôle des mouvements transfrontières de déchets dangereux et de leur élimination, entrée en vigueur le 5 mai 1992. « décision C(94)152/Final de l'OCDE » La décision C(88)90/Final de l'Organisation de coopération et de développement économiques intitulée <i>Décision du conseil sur les mouvements transfrontières de déchets dangereux</i> , en date du 27 mai 1988 et modifiée par la décision C(94)152/Final intitulée <i>Décision du conseil portant amendement à la décision sur les mouvements transfrontières de déchets dangereux</i> , en date du 28 juillet 1994.	« Convention » "Convention" « décision C(94)152/Final de l'OCDE » "OECD Decision C(94)152/Final"
"Canada-USA Agreement" « accord Canada - États-Unis »	"Canada-USA Agreement" means the Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, which entered into force on November 8, 1986, as amended from time to time.	« décision C(2001)107/Final de l'OCDE » La décision C(2001)107/Final de l'Organisation de coopération et de développement économiques intitulée <i>Décision du conseil concernant la révision de la décision C(92)39/Final sur le contrôle des mouvements transfrontières de déchets destinés à des opérations de valorisation</i> , en date du 21 mai 2002.	« décision C(2001)107/Final de l'OCDE » "OECD Decision C(2001)107/Final"
"Convention" « Convention »	"Convention" means the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which entered into force on May 5, 1992.	« destinataire étranger » Toute personne qui importe des déchets dangereux ou des matières recyclables dangereuses dans un pays autre que le Canada.	« destinataire étranger » "foreign receiver"
"foreign exporter" « expéditeur étranger »	"foreign exporter" means the person who exports hazardous waste or hazardous recyclable material from a country other than Canada.	« document de mouvement » Document établi en la forme prévue à l'annexe 9.	« document de mouvement » "movement document"
"foreign receiver" « destinataire étranger »	"foreign receiver" means the person who imports hazardous waste or hazardous recyclable material into a country other than Canada.	« expéditeur étranger » Toute personne qui exporte des déchets dangereux ou des matières recyclables dangereuses d'un pays autre que le Canada.	« expéditeur étranger » "foreign exporter"
"movement document" « document de mouvement »	"movement document" means the form set out in Schedule 9.	« installation agréée » Installation qui est autorisée par les autorités du territoire où elle est située à, selon le cas : a) éliminer des déchets dangereux exportés ou importés selon une opération prévue à l'annexe 1; b) recycler des matières recyclables dangereuses exportées ou importées selon une opération prévue à l'annexe 2.	« installation agréée » "authorized facility"
"notice" « notification »	"notice" means the notice of export, import or transit referred to in paragraph 185(1)(a) of the Act.	« Loi » La Loi canadienne sur la protection de l'environnement (1999).	« Loi » "Act"
"OECD Decision C(94)152/Final" « décision C(94)152/Final de l'OCDE »	"OECD Decision C(94)152/Final" means Decision C(88)90/Final of the Organization for Economic Co-operation and Development, <i>Decision of the Council on Transfrontier Movements of Hazardous Wastes</i> , dated May 27, 1988, as amended by Decision C(94)152/Final, <i>Decision of the Council Amending the Decision on Transfrontier Movements of Hazardous Wastes</i> , dated July 28, 1994.	« notification » La notification préalable visée à l'alinéa 185(1)a) de la Loi.	« notification » "notice"
"OECD Decision C(2001)107/Final" « décision C(2001)107/Final de l'OCDE »	"OECD Decision C(2001)107/Final" means Decision C(2001)107/Final of the Organization for Economic Co-operation and Development, <i>Decision of the Council Concerning the Revision of Decision C(92)39/FINAL on the Control of Transboundary Movements of Wastes Destined for Recovery Operations</i> , dated May 21, 2002.	« numéro d'immatriculation » Numéro qui est attribué par une province ou un pays et qui atteste du droit d'exercer une activité se rapportant aux déchets dangereux ou aux matières recyclables dangereuses.	« numéro d'immatriculation » "registration number"
"permit" « permis »	"permit" means the export, import or transit permit referred to in paragraph 185(1)(b) of the Act.		

"registration number"  
« numéro d'immatriculation »

"registration number" means the number assigned by a province or country indicating the authority to undertake an activity with respect to a hazardous waste or hazardous recyclable material.

« permis » Tout permis d'exportation, d'importation ou de transit visé à l'alinéa 185(1)b) de la Loi.

« permis »  
"permit"

« transporteur agréé » Transporteur autorisé, par les autorités du territoire où il effectue le transport, à transporter des déchets dangereux ou des matières recyclables dangereuses en vue de leur exportation, importation ou transit.

« transporteur agréé »  
"authorized carrier"

## PART 1

### NOTICE

#### Application

Application

5. This Part applies to the export, import and transit of hazardous waste and hazardous recyclable material other than returns of that waste or material under Part 5.

#### Notice Procedure

Notice reference number

6. The Minister shall provide a notice reference number to any person who requests one for the purpose of submitting a notice.

Delivery of notice

7. (1) The person that proposes to export, import or convey in transit a hazardous waste or hazardous recyclable material must submit a notice to the Minister in writing within 12 months before the export, import or transit.

Separate notices

(2) In the case of an export or import, the notice must not include both hazardous waste and hazardous recyclable material.

Notice for multiple hazardous wastes or hazardous recyclable materials

(3) The notice may provide for more than one hazardous waste or more than one hazardous recyclable material, as the case may be, if they

(a) are to be shipped

(i) to the same authorized facility at the same location,

(ii) through the same port of exit or the same port of entry, and

(iii) within the same 12-month period;

(b) are to be reported to the same customs office;

(c) originate from the same person and the same facility; and

(d) in the case of an export or import, have essentially the same physical and chemical characteristics.

Language

(4) In the case of an export or a transit where the French or English language is not acceptable to the authorities of the country of import or transit, the person who submits the notice must submit it in the French or English language and in a language used by those authorities.

Application for permit

(5) The notice shall serve as an application for a permit.

New notice

(6) A person must submit a new notice to the Minister if there is a change to any of the information contained in the permit, except that the person

## PARTIE 1

### NOTIFICATION

#### Champ d'application

5. La présente partie s'applique à l'exportation, à l'importation et au transit de déchets dangereux et de matières recyclables dangereuses, sauf s'il s'agit d'un renvoi visé à la partie 5.

Champ d'application

#### Procédure de notification

6. Le ministre attribue un numéro de référence à quiconque en fait la demande pour une notification.

Numéro de référence de la notification

7. (1) Quiconque projette d'exporter, d'importer ou de faire transiter des déchets dangereux ou des matières recyclables dangereuses doit présenter au ministre une notification écrite, dans les douze mois précédant l'exportation, l'importation ou le transit.

Notification

(2) Dans le cas d'une exportation ou d'une importation, la notification ne peut viser à la fois des déchets dangereux et des matières recyclables dangereuses.

Objet de la notification

(3) La notification peut viser plusieurs déchets dangereux ou matières recyclables dangereuses, selon le cas, s'ils satisfont aux conditions suivantes :

Notification visant plus d'un déchet ou d'une matière

a) ils seront expédiés, à la fois :

(i) à la même installation agréée et au même endroit,

(ii) par le même point de sortie ou d'entrée,

(iii) durant la même période de douze mois;

b) ils seront déclarés au même bureau de douane;

c) ils proviennent de la même personne et de la même installation;

d) dans le cas d'une exportation ou d'une importation, ils ont essentiellement les mêmes propriétés physiques et chimiques.

(4) Dans le cas d'une exportation ou d'un transit, si l'utilisation du français ou de l'anglais n'est pas jugée acceptable par les autorités du pays d'importation ou de transit, l'auteur de la notification rédige celle-ci en français ou en anglais et dans une langue utilisée par ces autorités.

Langue

(5) La notification tient lieu de demande de permis.

Demande de permis

(6) Une nouvelle notification doit être présentée en cas de modification d'un renseignement figurant au permis. Toutefois, la présentation au ministre

Nouvelle notification

who submitted the notice may advise the Minister in writing of a change to quantity of hazardous waste or hazardous recyclable material or the number of shipments, or may add authorized carriers, ports of exit or entry or customs offices.

#### Content of Notice

Content

8. The person who submits the notice must include the following information in the notice:

- (a) the notice reference number provided by the Minister under section 6;
- (b) the name, registration number, civic, mailing and electronic addresses and telephone and facsimile numbers of, and the name of the contact person for,
  - (i) the person submitting the notice,
  - (ii) the foreign receiver or the foreign exporter, as the case may be,
  - (iii) the facility from which the hazardous waste or hazardous recyclable material will be shipped,
  - (iv) the authorized carriers that will transport the hazardous waste or hazardous recyclable material, and
  - (v) all authorized facilities that will receive the hazardous waste or hazardous recyclable material;
- (c) all modes of transport that will be used;
- (d) the proposed number of shipments;
- (e) the port of exit or the port of entry through which the export or import will take place, as the case may be and, in the case of a transit, the port of exit and entry through which the transit will take place;
- (f) the customs office at which the hazardous waste or hazardous recyclable material is to be reported, if applicable;
- (g) the proposed date of the first and last shipments or, in the case of a transit, the proposed dates of entry of the first shipment and exit of the last shipment;
- (h) the name of each insurance company and the policy number for each insurance policy required under these Regulations;
- (i) the countries of transit through which the hazardous waste or hazardous recyclable material will be conveyed and the length of time it will be in each country of transit;
- (j) the following information with respect to each hazardous waste or hazardous recyclable material, namely,
  - (i) the International Waste Identification Code under OECD Decision C(94)152/Final, substituting the disposal or recycling code with the disposal or recycling code set out in column 1 of Schedule 1 or 2 to these Regulations for the applicable operation set out in column 2 of that Schedule and, if the hazardous waste or hazardous recyclable material is a gas, substituting the letter G for the letter L, P or S in the International Waste Identification Code,

d'un simple avis écrit suffit dans le cas d'une modification de la quantité de déchets ou de matières ou du nombre d'envois ou de l'ajout d'un transporteur agréé, d'un point de sortie ou d'entrée ou d'un bureau de douane.

#### Éléments de la notification

8. L'auteur de la notification doit y inscrire les renseignements suivants :

Éléments de la notification

- a) le numéro de référence attribué par le ministre aux termes de l'article 6;
- b) les nom, numéro d'immatriculation, adresses municipale, postale et électronique et numéros de téléphone et de télécopieur des personnes et installations ci-après, ainsi que le nom de leur personne-ressource :
  - (i) l'auteur de la notification,
  - (ii) le destinataire étranger ou l'expéditeur étranger, selon le cas,
  - (iii) l'installation d'où proviendront les déchets dangereux ou les matières recyclables dangereuses,
  - (iv) les transporteurs agréés qui effectueront le transport,
  - (v) toutes les installations agréées où les déchets ou les matières seront reçus;
- c) les moyens de transport qui seront utilisés;
- d) le nombre d'envois prévus;
- e) le point de sortie ou d'entrée prévu pour l'exportation ou l'importation, selon le cas, ou, dans le cas d'un transit, les points de sortie et d'entrée prévus;
- f) le bureau de douane où seront déclarés les déchets ou les matières, le cas échéant;
- g) la date prévue pour les premier et dernier envois ou, dans le cas d'un transit, la date d'entrée prévue pour le premier envoi et la date de sortie prévue pour le dernier envoi;
- h) le numéro de chaque police d'assurance exigée par le présent règlement, ainsi que le nom de l'assureur;
- i) tout pays de transit des déchets ou des matières, ainsi que la durée du transit dans chaque pays;
- j) relativement à chaque déchet ou matière :
  - (i) le code international d'identification des déchets applicable selon la décision C(94)152/Final de l'OCDE, sauf que son code d'élimination ou de recyclage est remplacé par celui prévu à la colonne 1 des annexes 1 ou 2 du présent règlement pour l'opération applicable figurant à la colonne 2, et que les lettres « L », « P » ou « S » sont remplacées par la lettre « G » si le déchet ou la matière est un gaz,
  - (ii) si le pays d'importation, d'exportation ou de transit n'est pas partie à la décision C(2001)107/Final de l'OCDE, le code applicable figurant à la liste A de l'annexe VIII de la Convention, avec ses modifications successives.

- (ii) for hazardous waste, or for hazardous recyclable material that will be exported to, imported from or transited through a country that is not a party to OECD Decision C(2001)107/Final, the applicable code set out in List A of Annex VIII of the Convention, as amended from time to time,
- (iii) for hazardous recyclable material that will be exported to, imported from or transited through a country that is a party to OECD Decision C(2001)107/Final, the applicable code set out in Part II of Appendix 4 to that Decision,
- (iv) the tariff item and the statistical suffix set out in the *Customs Tariff Departmental Consolidation*, published by the Canada Border Services Agency, as amended from time to time,
- (v) the applicable identification number set out in column 1 of Schedule 3, 4 or 7 for the hazardous waste or hazardous recyclable material set out in column 2 of that Schedule, or the applicable hazardous constituent code number set out in column 1 of Schedule 6 for the hazardous constituent set out in column 2 of that Schedule,
- (vi) the following information set out in the applicable schedules to the *Transportation of Dangerous Goods Regulations*, namely,
  - (A) the applicable UN number set out in column 1 of Schedule 1 or column 5 of Schedule 3,
  - (B) the applicable class set out in column 3 of Schedule 1 or the primary class set out in column 4 of Schedule 3, and
  - (C) the applicable packing group and risk group set out in column 4 of Schedule 1,
- (vii) the total quantity in kilograms or litres of each hazardous waste or hazardous recyclable material,
- (viii) the applicable disposal or recycling code set out in column 1 of Schedule 1 or 2 for every applicable operation set out in column 2 of that Schedule, and the name and description of the processes to be employed with respect to those operations, and
- (ix) in the case of an export, the options considered for reducing or phasing out the export of the hazardous waste and the reason that the final disposal is taking place outside Canada;
- (k) the name, quantity and concentration of any persistent organic pollutant set out in column 2 of Schedule 10 that is contained in the hazardous waste or hazardous recyclable material, if the concentration is equal to or greater than the concentration set out in column 3;
- (l) distinct line item numbers for each hazardous waste or hazardous recyclable material;
- (m) in the case of an export or import, a copy of the contract or series of contracts, excluding financial information, or the statement referred to in paragraph 9(f) or 16(e); and
- (iii) si le pays d'importation, d'exportation ou de transit est partie à la décision C(2001)107/Final de l'OCDE, le code applicable figurant à la partie II de l'appendice 4 de la décision,
- (iv) le numéro tarifaire et le suffixe de statistique selon la *Codification ministérielle du Tarif des douanes*, publiée par l'Agence des services frontaliers du Canada, avec ses modifications successives,
- (v) le numéro d'identification applicable prévu à la colonne 1 des annexes 3, 4 ou 7 pour le déchet ou la matière figurant à la colonne 2 ou le numéro de code du constituant dangereux applicable prévu à la colonne 1 de l'annexe 6 pour le constituant dangereux figurant à la colonne 2,
- (vi) les renseignements ci-après, tirés des annexes applicables du *Règlement sur le transport des marchandises dangereuses* :
  - (A) le numéro UN applicable prévu à la colonne 1 de l'annexe 1 ou à la colonne 5 de l'annexe 3,
  - (B) la classe applicable prévue à la colonne 3 de l'annexe 1 ou la classe primaire applicable prévue à la colonne 4 de l'annexe 3,
  - (C) le groupe d'emballage/groupe de risque applicable prévu à la colonne 4 de l'annexe 1,
- (vii) le poids en kilogrammes ou le volume en litres de chaque déchet ou matière,
- (viii) le code d'élimination ou de recyclage prévu à la colonne 1 des annexes 1 ou 2 pour toutes les opérations applicables figurant à la colonne 2, ainsi que le nom et la description du processus qui sera mis en œuvre,
- (ix) dans le cas d'une exportation, les solutions qui ont été envisagées en vue de réduire ou de supprimer les exportations de déchets et les raisons pour lesquelles l'élimination a lieu à l'étranger;
- k) les nom, quantité et concentration de toute substance polluante organique persistante visée à la colonne 2 de l'annexe 10 qui se trouve dans les déchets ou les matières, si la concentration est égale ou supérieure à la concentration applicable prévue à la colonne 3;
- l) un numéro de ligne distinct pour chaque déchet ou matière;
- m) dans le cas d'une exportation ou d'une importation, une copie du contrat ou de la série de contrats, sans les renseignements financiers, ou de la déclaration qui sont visés aux alinéas 9f) ou 16e);
- n) une déclaration signée et datée par l'auteur de la notification, comportant ce qui suit :
  - (i) dans le cas d'une exportation ou d'une importation, une mention que le contrat ou la série de contrats visé aux alinéas 9f) ou 16e) est en vigueur,

(n) a statement signed and dated by the person submitting the notice indicating that

(i) in the case of an export or import, the contract or series of contracts referred to in paragraph 9(f) or 16(e) is in force,

(ii) in the case of an export or import, if the hazardous waste cannot be disposed of or the hazardous recyclable material cannot be recycled in accordance with the export or import permit, the exporter or importer will implement the alternative arrangements required under Part 5 or, if alternative arrangements cannot be made, the exporter or importer will return the waste or material to the facility from which it originated in accordance with section 34 or 35,

(iii) the insurance policy referred to in section 37 will cover the period referred to in that section, and

(iv) the information in the notice is complete and correct.

## PART 2

### EXPORT

#### Conditions

Conditions of  
export

9. An exporter may export hazardous waste and hazardous recyclable material if

(a) at the time of the export

(i) the export is not prohibited under the laws of Canada,

(ii) the country of import is a party to the Convention, the Canada-USA Agreement or OECD Decision C(2001)107/Final and the import of the hazardous waste or hazardous recyclable material is not prohibited by that country, and

(iii) the country of transit does not prohibit the transit of the hazardous waste or hazardous recyclable material;

(b) the hazardous waste or hazardous recyclable material is not to be disposed of or recycled south of 60° south latitude;

(c) in the case of biomedical wastes set out in column 2 of Schedule 3 or anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*, the export is only for the purposes of disposal;

(d) the exporter is a resident of Canada or, in the case of a corporation, has a place of business in Canada;

(e) the exporter

(i) is the owner or operator of the facility from which the hazardous waste or hazardous recyclable material is exported, or

(ii) buys and sells hazardous recyclable material for the purposes of recycling and exports it to a country that is a party to OECD Decision C(2001)107/Final;

(ii) dans le cas d'une exportation ou d'une importation, si les déchets ne peuvent être éliminés ou les matières ne peuvent être recyclées conformément au permis d'exportation ou d'importation, un engagement de l'exportateur ou de l'importateur à mettre en œuvre les mesures de renvoi prévues à la partie 5 ou, à défaut, à ramener les déchets ou les matières à l'installation d'origine conformément aux articles 34 ou 35,

(iii) un engagement à maintenir en vigueur la police d'assurance visée à l'article 37 pour la période prévue à cet article,

(iv) une mention portant que les renseignements figurant à la notification sont complets et exacts.

## PARTIE 2

### EXPORTATIONS

#### Conditions

Conditions

9. L'exportation de déchets dangereux ou de matières recyclables dangereuses est assujettie aux conditions suivantes :

a) au moment de l'exportation :

(i) les lois du Canada n'en interdisent pas l'exportation,

(ii) le pays d'importation est partie à la Convention, à l'accord Canada - États-Unis ou à la décision C(2001)107/Final de l'OCDE et n'en interdit pas l'importation,

(iii) le pays de transit n'en interdit pas le transit;

b) l'élimination ou le recyclage n'aura pas lieu au sud du 60° degré de latitude Sud;

c) dans le cas d'un déchet biomédical figurant à la colonne 2 de l'annexe 3 ou de toute chose comprise dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*, le déchet ou la chose est exporté pour être éliminé;

d) l'exportateur est un résident du Canada ou, s'il s'agit d'une personne morale, il a un établissement au Canada;

e) l'exportateur, selon le cas :

(i) est le propriétaire ou l'exploitant de l'installation d'où les déchets ou les matières sont exportés,

(ii) achète ou vend, à des fins de recyclage, des matières exportées dans un pays qui est partie à la décision C(2001)107/Final de l'OCDE;

f) il existe un contrat ou une série de contrats écrit et signé par l'exportateur, le destinataire



(f) there is a signed, written contract or a series of contracts among the exporter, the foreign receiver and the authorized facilities or, if any of those persons are the same legal entity, a written statement signed by that entity, that

(i) describes the hazardous waste or hazardous recyclable material,

(ii) sets out the quantity of hazardous waste or hazardous recyclable material to be exported,

(iii) indicates that the hazardous waste will be disposed of, or the hazardous recyclable material will be recycled, in accordance with the export permit,

(iv) describes the operation set out in Schedule 1 or 2 that will be used,

(v) requires the foreign receiver to complete Part C of the movement document, or authorizes the exporter to complete Part C on the foreign receiver's behalf if the waste or material is not considered or defined as hazardous under the legislation of the country of import, and to provide a copy of the movement document and a copy of the export permit to the exporter on delivery of the hazardous waste or hazardous recyclable material to the authorized facility, and

(vi) requires the foreign receiver

(A) to complete the disposal of the hazardous waste or recycling of the hazardous recyclable material within the time set out in paragraph (o),

(B) to submit written confirmation to the exporter of the disposal of the hazardous waste or recycling of the hazardous recyclable material within 30 days after the day on which the disposal or recycling is completed, and

(C) to take all practicable measures to assist the exporter in fulfilling the terms of the exporter's obligations under these Regulations if delivery is not accepted by the authorized facility named in the export permit, or if the authorized facility cannot, or refuses to, dispose of the hazardous waste or recycle the hazardous recyclable material in accordance with the export permit;

(g) the exporter and the authorized carrier if other than Her Majesty in right of Canada or of a province are insured in accordance with section 37;

(h) the hazardous waste or hazardous recyclable material is transported by the authorized carriers named in the export permit;

(i) the applicable safety mark is displayed on each shipment of hazardous waste or hazardous recyclable material in accordance with Part 4 of the *Transportation of Dangerous Goods Regulations*;

(j) the hazardous waste or hazardous recyclable material is exported through the port of exit named in the export permit;

étranger et l'installation agréée ou, dans le cas où deux ou trois de ces personnes sont la même entité juridique, il existe une déclaration écrite et signée par celle-ci :

(i) décrivant les déchets ou les matières,

(ii) indiquant la quantité de déchets ou de matières qui sera exportée,

(iii) portant que l'élimination ou le recyclage sera effectué conformément au permis d'exportation,

(iv) décrivant l'opération visée aux annexes 1 ou 2 qui sera utilisée,

(v) stipulant que le destinataire étranger doit remplir la partie C du document de mouvement – ou, si les déchets ou les matières ne sont pas considérés ou définis comme dangereux selon les lois du pays d'importation, autorisant l'exportateur à signer la partie C en son nom – et remettre une copie du document de mouvement et du permis d'exportation à l'exportateur lors de la livraison des déchets ou des matières à l'installation agréée,

(vi) stipulant que le destinataire étranger doit :

(A) achever l'élimination ou le recyclage dans le délai prévu à l'alinéa o),

(B) remettre à l'exportateur une confirmation écrite de l'élimination ou du recyclage dans les trente jours suivant l'achèvement de l'opération,

(C) prendre toutes les mesures possibles pour aider l'exportateur à remplir ses obligations au titre du présent règlement si l'installation agréée indiquée dans le permis d'exportation n'accepte pas les déchets ou les matières ou si elle est incapable ou refuse de les éliminer ou de les recycler conformément au permis d'exportation;

g) l'exportateur et le transporteur agréé, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détiennent l'assurance responsabilité visée à l'article 37;

h) le transport des déchets ou des matières est effectué par les transporteurs agréés nommés dans le permis d'exportation;

i) chaque envoi de déchets ou de matières porte une indication de danger conforme aux exigences de la partie 4 du *Règlement sur le transport des marchandises dangereuses*;

j) l'exportation se fait via le point de sortie indiqué dans le permis d'exportation;

k) la quantité de déchets ou de matières n'excède pas celle prévue dans le permis d'exportation;

l) une copie du permis d'exportation et une copie du document de mouvement rempli conformément aux articles 11 à 13 :

(i) accompagnent les déchets ou les matières,

(ii) sont déposées par l'exportateur ou le transporteur agréé au bureau de douane où les déchets et les matières doivent être déclarés en vertu de l'article 95 de la *Loi sur les douanes*;

(k) the quantity of hazardous waste or hazardous recyclable material exported does not exceed the quantity set out in the export permit;

(l) a copy of the export permit and a copy of the movement document completed in accordance with sections 11 to 13

(i) accompanies the hazardous waste or hazardous recyclable material, and

(ii) is deposited by the exporter or the authorized carrier at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under section 95 of the *Customs Act*;

(m) the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at the authorized facility named in the export permit using the disposal or recycling operation set out in the export permit;

(n) after operation D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2 is completed, the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at an authorized facility using an operation set out in Schedule 1 or 2 other than operation D13, D14 or D17 or R12, R13 or R16;

(o) in the case of operation D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the authorities of the jurisdiction in which the authorized facility is located require shorter time periods, in which case those time periods apply; and

(p) in the event that the hazardous waste or hazardous recyclable material is exported but is not accepted by the authorized facility named in the export permit, or if the authorized facility cannot, or refuses to, dispose of or recycle it in accordance with the export permit, the exporter

(i) immediately notifies the Minister, the foreign receiver and the authorities of the country of import of the non-acceptance or refusal and the reason for it,

(ii) if necessary, stores the hazardous waste or hazardous recyclable material in a facility authorized to store the waste or material by the authorities of the jurisdiction in which the facility is located, and

(iii) within 90 days after the day on which the Minister is notified, makes arrangements to return the hazardous waste or hazardous recyclable material to the facility in Canada from which it was shipped in accordance with section 34 or makes arrangements for the disposal of the waste or the recycling of the material in the country of import at an authorized facility other than the one named in the export permit and provides the Minister with the name and address of that facility and the name of a contact person.

m) l'élimination ou le recyclage est effectué dans l'installation agréée indiquée dans le permis d'exportation, selon l'opération qui y est indiquée;

n) une fois les opérations D13, D14 ou D17 figurant à l'annexe 1 ou les opérations R12, R13 ou R16 figurant à l'annexe 2 achevées, l'élimination ou le recyclage est effectué dans une installation agréée, selon une opération prévue aux annexes 1 ou 2, autre que D13, D14 ou D17 ou R12, R13 ou R16;

o) dans le cas de l'une ou l'autre des opérations D13, D14 ou D17 figurant à l'annexe 1 ou des opérations R12, R13 ou R16 figurant à l'annexe 2, elle est achevée dans les cent quatre-vingts jours suivant l'acceptation des déchets ou des matières par l'installation agréée ou, dans le cas d'une autre opération, elle est achevée dans l'année suivant cette acceptation, ou dans toute autre période plus courte exigée par les autorités du territoire où est située l'installation agréée;

p) si l'installation agréée indiquée dans le permis d'exportation n'accepte pas les déchets ou les matières ou est incapable ou refuse de les éliminer ou de les recycler conformément au permis :

(i) l'exportateur en avise aussitôt le ministre, le destinataire étranger et les autorités du pays d'importation, en précisant la raison du refus,

(ii) il les entrepose, au besoin, dans une installation autorisée à ces fins par les autorités du territoire où l'installation est située,

(iii) dans les quatre-vingt-dix jours suivant l'avis au ministre, il prend les arrangements en vue de leur renvoi à l'installation d'où ils proviennent au Canada, conformément à l'article 34, ou en vue de leur élimination ou recyclage dans le pays d'importation, dans une installation agréée autre que celle indiquée dans le permis, et communique au ministre les nom et adresse de l'installation ainsi que le nom d'une personne-ressource de celle-ci.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

	<i>Movement Document</i>	<i>Document de mouvement</i>	
Movement document reference number	10. The Minister shall provide a movement document reference number to an exporter who requests one for the purpose of completing a movement document.	10. Le ministre attribue un numéro de référence à tout exportateur qui en fait la demande pour un document de mouvement.	Numéro de référence
Exporter	11. (1) Prior to shipping the hazardous waste or hazardous recyclable material, the exporter must complete Part A of a movement document, indicate the movement document reference number and provide a copy of the movement document and a copy of the export permit to the first authorized carrier.	11. (1) Avant l'expédition de déchets dangereux ou de matières recyclables dangereuses, l'exportateur remplit la partie A d'un document de mouvement, en indiquant le numéro de référence attribué par le ministre, et remet une copie du document et du permis d'exportation au premier transporteur agréé.	Exportateur
First authorized carrier	(2) Immediately on receipt of the movement document, the first authorized carrier must complete Part B of the movement document and provide a copy to the exporter.	(2) Sur réception du document de mouvement, le premier transporteur agréé en remplit la partie B et remet sans délai une copie de celui-ci à l'exportateur.	Premier transporteur agréé
Copy of movement document	(3) Within three working days after the day on which the hazardous waste or hazardous recyclable material is shipped, the exporter must send a copy of the movement document completed in accordance with subsections (1) and (2) to (a) the Minister; and (b) the authorities of the province of export, if they require it.	(3) Dans les trois jours ouvrables suivant le jour de l'expédition des déchets ou des matières, l'exportateur envoie une copie du document de mouvement rempli conformément aux paragraphes (1) et (2) : a) au ministre; b) aux autorités de la province d'exportation, si elles l'exigent.	Copie du document de mouvement
Authorized carriers	(4) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the export permit to the next authorized carrier or the foreign receiver, as the case may be, on delivery of the waste or material to that carrier or the foreign receiver.	(4) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis d'exportation, au transporteur agréé suivant ou au destinataire étranger, selon le cas, lors de la livraison.	Autres transporteurs agréés
Exporter	(5) The exporter must ensure that (a) every authorized carrier that transports the hazardous waste or hazardous recyclable material completes Part B of the movement document; and (b) the foreign receiver completes Part C of the movement document, unless the exporter is authorized to do so on the foreign receiver's behalf under the contract referred to in paragraph 9(f).	(5) L'exportateur veille à ce que : a) tous les transporteurs agréés ayant transporté les déchets ou les matières remplissent la partie B du document de mouvement; b) le destinataire étranger remplisse la partie C du document de mouvement, à moins que l'exportateur soit autorisé à la signer au nom de celui-ci aux termes du contrat visé à l'alinéa 9f).	Exportateur
Copy of movement document	(6) Within three working days after the day on which the hazardous waste or hazardous recyclable material is delivered to the authorized facility, the exporter must send a copy of the completed movement document to (a) the Minister; (b) the authorities of the province of export, if they require it; and (c) every authorized carrier of the hazardous waste or hazardous recyclable material.	(6) Dans les trois jours ouvrables suivant la livraison des déchets ou des matières à l'installation agréée, l'exportateur envoie une copie du document de mouvement rempli : a) au ministre; b) aux autorités de la province d'exportation, si elles l'exigent; c) à tout transporteur agréé ayant transporté les déchets ou les matières.	Copie du document de mouvement
Rail consist	12. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.	12. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.	Feuille de train
Unit of measure	13. The exporter must ensure that the quantity of hazardous waste or hazardous recyclable material indicated in the movement document is in the same unit of measure as is used in the export permit.	13. L'exportateur veille à ce que les quantités de déchets dangereux ou de matières recyclables dangereuses indiquées dans le document de mouvement soient exprimées au moyen de la même unité	Unité de mesure

Retention of  
movement  
document

14. The exporter and every authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the day on which the hazardous waste or hazardous recyclable material is exported.

de mesure que celle utilisée dans le permis d'exportation.

14. L'exportateur et les transporteurs agréés conservent une copie du document de mouvement à leur principal établissement au Canada pour une période de trois ans suivant la date de l'exportation.

Conservation

### PART 3

#### IMPORT

##### *Department of National Defence Exemption*

Exemption

15. This Part does not apply to the Department of National Defence if the hazardous waste or hazardous recyclable material is

- (a) generated by that Department in the course of an operation conducted by it outside Canada;
- (b) transported from the site of operation to a defence establishment as defined in subsection 2(1) of the *National Defence Act*; and
- (c) transported under the sole direction or control of the Minister of National Defence as described in section 1.20 of the *Transportation of Dangerous Goods Regulations*, as though the hazardous waste or hazardous recyclable material is a dangerous good under those Regulations.

##### *Conditions*

Conditions of  
import

16. An importer may import hazardous waste or hazardous recyclable material if

- (a) at the time of the import
  - (i) the import is not prohibited under the laws of Canada,
  - (ii) the country of export is a party to the Convention, the Canada-USA Agreement or OECD Decision C(2001)107/Final, and
  - (iii) the country of transit does not prohibit the transit of the hazardous waste or hazardous recyclable material;
- (b) in the case of biomedical wastes set out in column 2 of Schedule 3 or anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*, the import is only for the purposes of disposal;
- (c) the importer is a resident of Canada or, in the case of a corporation, has a place of business in Canada;
- (d) the importer
  - (i) is the owner or operator of the authorized facility named in the import permit, or
  - (ii) buys and sells hazardous recyclable material for the purposes of recycling;
- (e) there is a signed, written contract or a series of contracts among the importer, the foreign exporter and the authorized facilities or, if any of

### PARTIE 3

#### IMPORTATIONS

##### *Exemption visant le ministère de la Défense nationale*

Exemption

15. La présente partie ne s'applique pas à l'importation par le ministère de la Défense nationale de déchets dangereux ou de matières recyclables dangereuses, si ceux-ci sont à la fois :

- a) produits par le ministère dans le cadre d'une opération menée par celui-ci à l'extérieur du Canada;
- b) transportés du lieu de l'opération à un établissement de défense au sens du paragraphe 2(1) de la *Loi sur la défense nationale*;
- c) transportés sous la seule responsabilité du ministre de la Défense nationale, selon l'article 1.20 du *Règlement sur le transport des marchandises dangereuses*, comme s'il s'agissait de marchandises dangereuses visées par ce règlement.

##### *Conditions*

16. L'importation de déchets dangereux ou de matières recyclables dangereuses est assujettie aux conditions suivantes :

- a) au moment de l'importation :
  - (i) les lois du Canada n'en interdisent pas l'importation,
  - (ii) le pays d'exportation est partie à la Convention, à l'accord Canada - États-Unis ou à la décision C(2001)107/Final de l'OCDE,
  - (iii) le pays de transit n'en interdit pas le transit;
- b) dans le cas d'un déchet biomédical figurant à la colonne 2 de l'annexe 3 ou de toute chose comprise dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*, le déchet ou la chose est importé pour être éliminé;
- c) l'importateur est un résident du Canada ou, s'il s'agit d'une personne morale, il a un établissement au Canada;
- d) l'importateur, selon le cas :
  - (i) est le propriétaire ou l'exploitant de l'installation agréée visée par le permis d'importation,
  - (ii) achète ou vend des matières à des fins de recyclage;
- e) il existe un contrat ou une série de contrats écrit et signé par l'importateur, l'expéditeur

Conditions

those persons are the same legal entity, a written statement signed by that entity, that

- (i) describes the hazardous waste or hazardous recyclable material,
- (ii) sets out the quantity of hazardous waste or hazardous recyclable material to be imported,
- (iii) indicates that the hazardous waste will be disposed of, or the hazardous recyclable material will be recycled, in accordance with the import permit,
- (iv) describes the operation set out in Schedule 1 or 2 that will be used,
- (v) requires the foreign exporter to complete Part A of the movement document, or authorizes the importer to complete Part A on the foreign exporter's behalf if the waste or material is not considered or defined as hazardous under the legislation of the country of export, and to provide a copy of it and a copy of the import permit to the first authorized carrier prior to the shipment of the hazardous waste or hazardous recyclable material,
- (vi) requires the foreign exporter
  - (A) to send a copy of the movement document to the importer once Part A is completed by the foreign exporter, Part B is completed by the first authorized carrier and the hazardous waste or hazardous recyclable material has been shipped, and
  - (B) to take all practicable measures to assist the importer in fulfilling the terms of the importer's obligations under these Regulations if delivery is not accepted by the authorized facility named in the import permit, or if the authorized facility cannot, or refuses to, dispose of the hazardous waste or recycle the hazardous recyclable material in accordance with the import permit;
- (f) the importer and the authorized carrier if other than Her Majesty in right of Canada or of a province are insured in accordance with section 37;
- (g) the hazardous waste or hazardous recyclable material is transported by the authorized carriers named in the import permit;
- (h) the applicable safety mark is displayed on each shipment of hazardous waste or hazardous recyclable material in accordance with Part 4 of the *Transportation of Dangerous Goods Regulations*;
- (i) the hazardous waste or hazardous recyclable material is imported through the port of entry named in the import permit;
- (j) the quantity of hazardous waste or hazardous recyclable material imported does not exceed the quantity set out in the import permit;
- (k) a copy of the import permit and a copy of the movement document completed in accordance with sections 18 to 20
  - (i) accompanies the hazardous waste or hazardous recyclable material, and

étranger et l'installation agréée ou, dans le cas où deux ou trois de ces personnes sont la même entité juridique, il existe une déclaration écrite et signée par celle-ci :

- (i) décrivant les déchets ou les matières,
- (ii) indiquant la quantité de déchets ou de matières qui sera importée,
- (iii) portant que l'élimination ou le recyclage sera effectué conformément au permis d'importation,
- (iv) décrivant l'opération visée aux annexes 1 ou 2 qui sera utilisée,
- (v) stipulant que l'expéditeur étranger doit remplir la partie A du document de mouvement – ou, si les déchets ou les matières ne sont pas considérés ou définis comme dangereux selon les lois du pays d'exportation, autorisant l'importateur à remplir la partie A en son nom – et remettre une copie du document de mouvement et du permis d'importation au premier transporteur agréé avant l'expédition des déchets ou des matières,
- (vi) stipulant que l'expéditeur étranger doit :
  - (A) remettre une copie du document de mouvement à l'importateur une fois qu'il a rempli la partie A, que le premier transporteur agréé a rempli la partie B et que les des déchets ou des matières ont été expédiés,
  - (B) prendre toutes les mesures possibles pour aider l'importateur à remplir ses obligations au titre du présent règlement si l'installation agréée indiquée dans le permis d'importation n'accepte pas les déchets ou les matières ou si elle est incapable ou refuse de les éliminer ou de les recycler conformément au permis d'importation;
- f) l'importateur et le transporteur agréé, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détiennent l'assurance responsabilité visée à l'article 37;
- g) le transport des déchets ou des matières est effectué par les transporteurs agréés nommés dans le permis d'importation;
- h) chaque envoi de déchets ou de matières porte une indication de danger conforme aux exigences de la partie 4 du *Règlement sur le transport des marchandises dangereuses*;
- i) l'importation se fait via le point d'entrée indiqué dans le permis d'importation;
- j) la quantité de déchets ou de matières importés n'excède pas celle prévue dans le permis d'importation;
- k) une copie du permis d'importation et une copie du document de mouvement rempli conformément aux articles 18 à 20 :
  - (i) accompagnent les déchets ou les matières,
  - (ii) sont déposées par l'importateur ou le transporteur agréé au bureau de douane où les déchets et les matières doivent être déclarés en vertu de l'article 12 de la *Loi sur les douanes*;

(ii) is deposited by the importer or the authorized carrier at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under section 12 of the *Customs Act*;

(l) the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at the authorized facility named in the import permit using the disposal or recycling operation set out in the import permit;

(m) after operation D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2 is completed, the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at an authorized facility using an operation set out in Schedule 1 or 2, other than operation D13, D14 or D17 or R12, R13 or R16;

(n) in the case of operations D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the laws of the jurisdiction in which the authorized facility is located requires shorter time periods, in which case those time periods apply; and

(o) in the event that the hazardous waste or hazardous recyclable material is imported but is not accepted by the authorized facility named in the import permit, or if the authorized facility cannot, or refuses to, dispose of the waste or recycle the material in accordance with the permit, the importer

(i) immediately notifies the Minister, the foreign exporter and the authorities of the country of export of the non-acceptance or refusal and the reason for it,

(ii) if necessary, stores the hazardous waste or hazardous recyclable material at a facility authorized to store the waste or material by the authorities of the jurisdiction in which the facility is located,

(iii) within 90 days after the day on which the Minister is notified,

(A) makes arrangements to dispose of the hazardous waste or recycle the hazardous recyclable material in Canada at an authorized facility other than the one named in the import permit and advises the Minister of the name and address of the facility and the name of a contact person, or

(B) makes arrangements to return the hazardous waste or hazardous recyclable material to the facility from which it was exported in accordance with section 35, and

(iv) before shipping the hazardous waste or hazardous recyclable material to the authorized facility referred to in clause (iii)(A), receives confirmation from the Minister that the facility is an authorized facility.

l) l'élimination ou le recyclage est effectué dans l'installation agréée indiquée dans le permis d'importation, selon l'opération qui y est indiquée;

m) une fois les opérations D13, D14 ou D17 figurant à l'annexe 1 ou les opérations R12, R13 ou R16 figurant à l'annexe 2 achevées, l'élimination ou le recyclage est effectué dans une installation agréée, selon une opération prévue aux annexes 1 ou 2, autre que D13, D14 ou D17 ou R12, R13 ou R16;

n) dans le cas de l'une ou l'autre des opérations D13, D14 ou D17 figurant à l'annexe 1 ou des opérations R12, R13 ou R16 figurant à l'annexe 2, elle est achevée dans les cent quatre-vingts jours suivant l'acceptation des déchets ou des matières par l'installation agréée ou, dans le cas d'une autre opération, elle est achevée dans l'année suivant cette acceptation, ou dans toute autre période plus courte prévue par une loi du territoire où est située l'installation agréée;

o) si l'installation agréée indiquée dans le permis d'importation n'accepte pas les déchets ou les matières ou est incapable ou refuse de les éliminer ou de les recycler conformément au permis :

(i) l'importateur en avise aussitôt le ministre, l'expéditeur étranger et les autorités du pays d'exportation, en précisant la raison du refus,

(ii) il les entrepose, au besoin, dans une installation autorisée à ces fins par les autorités du territoire où l'installation est située,

(iii) dans les quatre-vingt-dix jours suivant l'avis au ministre :

(A) soit il prend des arrangements en vue de leur élimination ou recyclage au Canada, dans une installation agréée autre que celle indiquée dans le permis, et communique au ministre les nom et adresse de l'installation ainsi que le nom d'une personne-ressource de celle-ci,

(B) soit il prend des arrangements en vue de leur renvoi à l'installation d'où ils ont été exportés, conformément à l'article 35,

(iv) avant de transporter les déchets ou les matières à l'installation agréée visée à la division (iii)(A), l'importateur reçoit une confirmation du ministre indiquant qu'elle est une installation agréée.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

	<i>Movement Document</i>	<i>Document de mouvement</i>	
Movement document reference number	17. The Minister shall provide a movement document reference number to an importer who requests one for the purpose of completing a movement document.	17. Le ministre attribue un numéro de référence à tout importateur qui en fait la demande pour un document de mouvement.	Numéro de référence
Importer – prior to import	18. (1) Prior to importing the hazardous waste or hazardous recyclable material, the importer shall provide the foreign exporter with a copy of the movement document indicating the movement document reference number and a copy of the import permit.	18. (1) Avant l'importation de déchets dangereux ou de matières recyclables dangereuses, l'importateur envoie à l'expéditeur étranger une copie du permis d'importation et un document de mouvement sur lequel il indique le numéro de référence attribué par le ministre.	Responsabilité de l'importateur avant l'importation
Importer – at time of import	(2) At the time of the import of the hazardous waste or hazardous recyclable material, the importer must ensure that (a) the foreign exporter has completed Part A of the movement document unless the importer is authorized to do so on the foreign exporter's behalf under the contract referred to in paragraph 16(e); (b) the foreign exporter has provided a copy of the movement document and a copy of the import permit to the first authorized carrier; and (c) the first authorized carrier has completed Part B of the movement document and has provided a copy to the foreign exporter.	(2) Au moment de l'importation de déchets dangereux ou de matières recyclables dangereuses, l'importateur s'assure que : a) l'expéditeur étranger a rempli la partie A du document de mouvement, à moins que l'importateur soit autorisé à la signer en son nom aux termes du contrat visé à l'alinéa 16e); b) l'expéditeur étranger a remis une copie du document de mouvement et du permis d'importation au premier transporteur agréé; c) le premier transporteur a rempli la partie B du document de mouvement et a remis celui-ci à l'expéditeur étranger.	Responsabilité de l'importateur au moment de l'importation
Copy of movement document	(3) Within three working days after the day on which the importer receives a copy of the movement document with Parts A and B completed in accordance with subsection (2), the importer must send a copy of it to (a) the Minister; and (b) the authorities of the province of import, if they require it.	(3) Dans les trois jours ouvrables après avoir reçu une copie du document de mouvement dont les parties A et B ont été remplies conformément au paragraphe (2), l'importateur envoie une copie : a) au ministre; b) aux autorités de la province d'importation, si elles l'exigent.	Copie du document de mouvement
Authorized carriers	(4) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the import permit to the next authorized carrier or the importer, as the case may be, on delivery of the waste or material to that carrier or the importer.	(4) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis d'importation, au transporteur agréé suivant ou à l'importateur, selon le cas, lors de la livraison.	Transporteurs agréés
Importer	(5) The importer must ensure that every authorized carrier that transports the hazardous waste or hazardous recyclable material completes Part B of the movement document.	(5) L'importateur s'assure que tous les transporteurs agréés ayant transporté les déchets ou les matières ont rempli la partie B du document de mouvement.	Importateur
Copy of movement document	(6) Within three working days after the day on which the hazardous waste or hazardous recyclable material is delivered to the authorized facility, the importer must complete Part C of the movement document and must send a copy of the completed movement document to (a) the Minister; (b) the authorities of the province of import, if they require it; (c) the foreign exporter; and (d) every authorized carrier of the hazardous waste or hazardous recyclable material.	(6) Dans les trois jours ouvrables suivant la livraison des déchets ou des matières à l'installation agréée, l'importateur remplit la partie C du document de mouvement et envoie une copie de celui-ci : a) au ministre; b) aux autorités de la province d'importation, si elles l'exigent; c) à l'expéditeur étranger; d) à tout transporteur agréé ayant transporté les déchets ou les matières.	Copie du document de mouvement
Rail consist	19. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the	19. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu	Feuille de train

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.

qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.

Unit of  
measure

20. The importer must ensure that the quantity of hazardous waste or hazardous recyclable material indicated in the movement document is in the same unit of measure as is used in the import permit.

20. L'importateur veille à ce que les quantités de déchets dangereux ou de matières recyclables dangereuses indiquées dans le document de mouvement soient exprimées au moyen de la même unité de mesure que celle utilisée dans le permis d'importation.

Unité de  
mesure

Retention of  
movement  
document

21. The importer and every authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the date of import.

21. L'importateur et les transporteurs agréés conservent une copie du document de mouvement à leur principal établissement au Canada pour une période de trois ans suivant la date de l'importation.

Conservation

PART 4  
TRANSIT  
Conditions

PARTIE 4  
TRANSIT  
Conditions

Conditions of  
transit

22. A person may convey hazardous waste or hazardous recyclable material in transit if

- (a) at the time of transit, the export or import of the hazardous waste or hazardous recyclable material is not prohibited under the laws of Canada or the laws of the country of transit;
- (b) the hazardous waste or hazardous recyclable material is transported by the authorized carriers named in the transit permit;
- (c) the applicable safety mark is displayed on each shipment of hazardous waste or hazardous recyclable material in accordance with Part 4 of the *Transportation of Dangerous Goods Regulations*;
- (d) the hazardous waste or hazardous recyclable material is exported and imported through the port of entry and port of exit named in the transit permit;
- (e) the quantity of hazardous waste or hazardous recyclable material conveyed in transit does not exceed the quantity set out in the transit permit;
- (f) in the case of a transit through Canada, the authorized carrier if other than Her Majesty in right of Canada or of a province is insured in accordance with section 37;
- (g) in the case of a transit through a country other than Canada, the exporter and importer if other than Her Majesty in right of Canada or of a province are insured in accordance with section 37;
- (h) in the case of a transit through Canada, the country of export has provided the Minister with written confirmation that the country of import and any countries through which the hazardous waste or hazardous recyclable material will be transited after it has left Canada, has consented to the proposed import into or transit through that country; and
- (i) a copy of the transit permit and a copy of the movement document completed in accordance

22. Le transit de déchets dangereux ou de matières recyclables dangereuses est assujéti aux conditions suivantes :

- a) au moment du transit, les lois du Canada et celles du pays de transit n'en interdisent pas l'exportation ou l'importation;
- b) le transport des déchets ou des matières est effectué par les transporteurs agréés nommés dans le permis de transit;
- c) chaque envoi de déchets ou de matières porte une indication de danger conforme aux exigences de la partie 4 du *Règlement sur le transport des marchandises dangereuses*;
- d) l'importation et l'exportation se font via le point de sortie et le point d'entrée indiqués dans le permis de transit;
- e) la quantité de déchets ou de matières n'excède pas celle prévue dans le permis de transit;
- f) dans le cas d'un transit au Canada, le transporteur agréé, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détient l'assurance responsabilité visée à l'article 37;
- g) dans le cas d'un transit dans un pays autre que le Canada, l'exportateur et l'importateur, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détiennent l'assurance responsabilité visée à l'article 37;
- h) dans le cas d'un transit au Canada, le pays d'exportation a fourni au ministre une confirmation écrite portant que le pays d'importation ainsi que tout pays de transit où les déchets ou les matières doivent aller après leur sortie du Canada ont consenti à l'importation ou au transit;
- i) une copie du permis de transit et une copie du document de mouvement rempli conformément aux articles 25 et 26 ou 30 et 31, selon le cas :
  - (i) accompagnent les déchets ou les matières,
  - (ii) sont déposées par l'exportateur, l'importateur ou le transporteur agréé au bureau de

Conditions



with sections 25 and 26, or 30 and 31, as the case may be,

(i) accompanies the hazardous waste or hazardous recyclable material, and

(ii) is deposited by the exporter, importer or authorized carrier at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under sections 12 and 95 of the *Customs Act*.

*Movement Document – Transits Through Canada*

Application

23. Sections 24 to 27 apply to the transit of hazardous waste and hazardous recyclable material through Canada.

Movement document reference number

24. The Minister shall provide a movement document reference number to any person who requests one for the purpose of completing a movement document.

Authorized carrier

25. (1) At the time the hazardous waste or hazardous recyclable material enters Canada, the authorized carrier must ensure that the foreign exporter has completed Part A of a movement document and that the movement document reference number provided by the Minister is indicated on the movement document.

Authorized carriers

(2) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the transit permit to the next authorized carrier on delivery of the waste or material to that carrier.

Copy of movement document

(3) Within three working days after the day on which the hazardous waste or hazardous recyclable material exits Canada, the authorized carrier that transports the waste or material out of Canada must send a copy of the movement document completed in accordance with subsections (1) and (2) to the Minister.

Rail consist

26. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.

Retention of movement document

27. If the authorized carrier has a place of business in Canada, the authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the day on which the hazardous waste or hazardous recyclable material exits Canada.

*Movement Document – Transits Through a Country Other than Canada*

Application

28. Sections 29 to 32 apply to the transit of hazardous waste and hazardous recyclable material where Canada is the country of origin and the country of destination.

douane où les déchets et les matières doivent être déclarés en vertu des articles 12 ou 95 de la *Loi sur les douanes*.

*Document de mouvement pour les transits au Canada*

23. Les articles 24 à 27 s'appliquent au transit de déchets dangereux et de matières recyclables dangereuses au Canada.

24. Le ministre attribue un numéro de référence à quiconque en fait la demande pour un document de mouvement.

25. (1) Au moment de l'entrée des déchets dangereux ou des matières recyclables dangereuses au Canada, le transporteur agréé s'assure que l'expéditeur étranger a rempli la partie A d'un document de mouvement et que le numéro de référence attribué par le ministre y figure.

(2) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis de transit, au transporteur agréé suivant lors de la livraison.

(3) Dans les trois jours ouvrables suivant la sortie des déchets ou des matières du Canada, le transporteur agréé qui les a sortis du Canada envoie au ministre une copie du document de mouvement rempli conformément aux paragraphes (1) et (2).

26. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.

27. Si le transporteur agréé a un établissement au Canada, il y conserve une copie du document de mouvement pour une période de trois ans suivant la sortie des déchets ou des matières du Canada.

*Document de mouvement pour les transits dans un pays autre que le Canada*

28. Les articles 29 à 32 s'appliquent au transit de déchets dangereux et de matières recyclables dangereuses dans le cas où le pays d'origine et de destination est le Canada.

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* **SOR/DORS/2005-149**

Movement document reference number	29. The Minister shall provide a movement document reference number to any exporter who requests one for the purpose of completing a movement document.	29. Le ministre attribue un numéro de référence à tout exportateur qui en fait la demande pour un document de mouvement.	Numéro de référence
Exporter	30. (1) At the time the hazardous waste or hazardous recyclable material exits Canada, the exporter must complete Part A of a movement document, indicate the movement document reference number provided by the Minister and provide a copy of the movement document and a copy of the transit permit to the first authorized carrier.	30. (1) Au moment de la sortie des déchets dangereux ou des matières recyclables dangereuses du Canada, l'exportateur remplit la partie A d'un document de mouvement, en indiquant le numéro de référence attribué par le ministre, et remet une copie du document et du permis de transit au premier transporteur agréé.	Exportateur
First authorized carrier	(2) Immediately on receipt of the movement document, the first authorized carrier must complete Part B of the movement document and provide a copy to the exporter.	(2) Sur réception du document de mouvement, le premier transporteur agréé en remplit la partie B et remet sans délai une copie du document à l'exportateur.	Premier transporteur agréé
Copy of movement document	(3) Within three working days after the day on which the hazardous waste or hazardous recyclable material exits Canada, the exporter must send a copy of the movement document completed in accordance with subsections (1) and (2) to (a) the Minister; and (b) the authorities of the province of export, if they require it.	(3) Dans les trois jours ouvrables suivant la sortie des déchets ou des matières du Canada, l'exportateur envoie une copie du document de mouvement rempli conformément aux paragraphes (1) et (2) : a) au ministre; b) aux autorités de la province d'exportation, si elles l'exigent.	Copie du document de mouvement
Other authorized carriers	(4) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the transit permit on delivery of the waste or material to the next carrier or the importer, as the case may be.	(4) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis de transit, au transporteur agréé suivant ou à l'importateur, selon le cas, lors de la livraison.	Autres transporteurs agréés
Exporter	(5) The exporter must ensure that Part B of the movement document is completed by every authorized carrier that transports the hazardous waste or hazardous recyclable material.	(5) L'exportateur veille à ce que tous les transporteurs agréés ayant transporté les déchets ou les matières remplissent la partie B du document de mouvement.	Exportateur
Copy of movement document	(6) Within three working days after the day on which the hazardous waste or hazardous recyclable material is delivered to the authorized facility, the importer must complete Part C of the movement document and must send a copy of the completed movement document to (a) the Minister; (b) the authorities of the province of import, if they require it; (c) the exporter; and (d) every authorized carrier of the hazardous waste or hazardous recyclable material.	(6) Dans les trois jours ouvrables suivant la livraison des déchets ou des matières à l'installation agréée, l'importateur remplit la partie C du document de mouvement et envoie une copie de celui-ci : a) au ministre; b) aux autorités de la province d'importation, si elles l'exigent; c) à l'exportateur; d) à tout transporteur agréé ayant transporté les déchets ou les matières.	Copie du document de mouvement
Rail consist	31. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.	31. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.	Feuille de train
Retention of movement document	32. The exporter, the importer and every authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the day on which the hazardous waste or hazardous recyclable material is imported.	32. L'exportateur, l'importateur et les transporteurs agréés conservent une copie du document de mouvement à leur principal établissement au Canada pour une période de trois ans suivant la date de l'importation.	Conservation

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

PART 5  
RETURNS

*Application*

Returns

33. This Part applies to the return of hazardous waste or hazardous recyclable material to  
(a) Canada after it has been exported from Canada; and  
(b) the country of export after it has been imported into Canada.

*Returns to Canada*

Notice

34. (1) If the hazardous waste or hazardous recyclable material is returned to Canada, the exporter that exported the waste or material from Canada must submit a notice to the Minister in writing, containing the following information:

- (a) the name, civic, mailing and electronic addresses and telephone and facsimile numbers of, and the name of the contact person for, the exporter, the foreign receiver and any authorized carriers that were not named in the original export permit;
- (b) the name of each insurance company and the policy number for each insurance policy required under these Regulations;
- (c) the reason for the return;
- (d) the quantity of hazardous waste or hazardous recyclable material that will be returned using the same unit of measure as in the original export permit;
- (e) if the quantity of hazardous waste or hazardous recyclable material to be returned is less than the quantity of waste or material exported from Canada, the reason for the difference;
- (f) the port of entry through which the return will take place and the customs office at which the hazardous waste or hazardous recyclable material will be reported;
- (g) the notice reference number contained in the original export permit; and
- (h) the line item number contained in the original export permit for the hazardous waste or hazardous recyclable material that will be returned.

Exporter

(2) After an import permit is issued, the exporter must

- (a) return the hazardous waste or hazardous recyclable material to the facility from which it was exported, using the authorized carriers and the port of entry named in the import permit;
- (b) ensure that a copy of the import permit and a copy of the movement document with Parts A and B completed, clearly indicating that the hazardous waste or hazardous recyclable material is being returned to Canada,
  - (i) accompanies the hazardous waste or hazardous recyclable material, and

PARTIE 5  
RENVOIS

*Champ d'application*

Application

33. La présente partie s'applique :  
a) au renvoi au Canada de déchets dangereux ou de matières recyclables dangereuses qui ont été exportés du Canada;  
b) au renvoi au pays d'exportation de déchets dangereux ou de matières recyclables dangereuses après leur importation au Canada.

*Renvoi au Canada*

Notification

34. (1) En cas de renvoi de déchets dangereux ou de matières recyclables dangereuses au Canada, l'exportateur qui les a exportés du Canada présente au ministre une notification écrite et fournit les renseignements suivants :

- a) le nom, les adresses municipale, postale et électronique et les numéros de téléphone et de télécopieur de l'exportateur, du destinataire étranger et de tout transporteur agréé autre que ceux nommés dans le permis d'exportation original, ainsi que le nom de leur personne-ressource;
- b) le nom de l'assureur et le numéro de la police;
- c) les motifs du renvoi;
- d) la quantité de déchets ou de matières qui sera renvoyée, exprimée à l'aide de la même unité de mesure que celle utilisée dans le permis d'exportation original;
- e) si la quantité de déchets ou de matières renvoyée est inférieure à celle qui a été exportée du Canada, les raisons de cette différence;
- f) le point d'entrée prévu pour l'importation et le bureau de douane où les déchets ou les matières seront déclarés;
- g) le numéro de référence de la notification figurant au permis d'exportation original;
- h) le numéro de la ligne dans le permis d'exportation original où sont inscrits les déchets ou les matières qui seront renvoyés.

(2) Une fois le permis d'importation délivré, l'exportateur

- a) renvoie les déchets dangereux ou les matières recyclables dangereuses à l'installation d'où ils ont été exportés, en utilisant le point d'entrée indiqué dans le permis d'importation et en ayant recours aux transporteurs agréés qui y sont nommés;
- b) veille à ce qu'une copie du permis d'importation et une copie du document de mouvement dont les parties A et B sont remplies et qui indique clairement que les déchets ou les matières sont renvoyés au Canada :

- (ii) is deposited at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under section 12 of the *Customs Act*; and
- (c) submit a copy of the movement document referred to in paragraph (b) to the Minister, every authorized carrier and if they require it, to the authorities of the province of export.

#### Returns to the Country of Export

Notice –  
returns to  
country of  
export

35. (1) If the hazardous waste or hazardous recyclable material is returned to the country of export, the importer that imported the waste or material into Canada must submit a notice to the Minister in writing, containing the following information:

- (a) the name, civic, mailing and electronic addresses and telephone and facsimile numbers of, and the name of the contact person for, the importer, the foreign exporter and any authorized carriers that were not named in the original import permit;
- (b) the name of each insurance company and the policy number for each insurance policy required under these Regulations;
- (c) the reason for the return;
- (d) the quantity of hazardous waste or hazardous recyclable material that will be returned using the same unit of measure as in the original import permit;
- (e) if the quantity of hazardous waste or hazardous recyclable material to be returned is less than the quantity of waste or material imported into Canada, the reason for the difference;
- (f) the port of entry through which the return will take place and the customs office at which the hazardous waste or hazardous recyclable material will be reported;
- (g) the notice reference number contained in the original import permit for the import of the hazardous waste or hazardous recyclable material into Canada; and
- (h) the line item number contained in the original import permit for the hazardous waste or hazardous recyclable material that will be returned.

Importer's  
obligations

(2) After an export permit is issued, the importer must

- (a) return the hazardous waste or hazardous recyclable material to the facility from which it was imported, using the authorized carriers and the port of exit named in the export permit;
- (b) ensure that a copy of the export permit and a copy of the movement document with Parts B and C completed, clearly indicating that the hazardous waste or hazardous recyclable material is being returned to the country of export,
  - (i) accompanies the hazardous waste or hazardous recyclable material, and
  - (ii) is deposited at the customs office at which the hazardous waste or hazardous recyclable

- (i) accompagnent les déchets ou les matières,
- (ii) soient déposées au bureau de douane où les déchets ou les matières doivent être déclarés en vertu de l'article 12 de la *Loi sur les douanes*;
- c) envoie une copie du document de mouvement visé à l'alinéa b) au ministre, à chaque transporteur agréé et, si elles l'exigent, aux autorités de la province d'exportation.

#### Renvoi au pays d'exportation

Notification

35. (1) En cas de renvoi de déchets dangereux ou de matières recyclables dangereuses dans le pays d'exportation, l'importateur qui les a importés au Canada présente au ministre une notification écrite et fournit les renseignements suivants :

- a) le nom, les addresses municipale, postale et électronique et les numéros de téléphone et de télécopieur de l'importateur et de l'expéditeur étranger et de tout transporteur agréé, autre que ceux nommés dans le permis d'importation original, qui transporteront les déchets ou les matières, ainsi que le nom de leur personne-ressource;
- b) le nom de l'assureur et le numéro de la police;
- c) les motifs du renvoi;
- d) la quantité de déchets ou de matières renvoyée, exprimée à l'aide de la même unité de mesure que celle utilisée dans le permis d'importation original;
- e) si la quantité de déchets ou de matières renvoyée est inférieure à celle qui a été importée au Canada, les raisons de cette différence;
- f) le point de sortie prévu pour l'exportation et le bureau de douane où les déchets ou les matières seront déclarés;
- g) le numéro de référence figurant au permis d'importation original pour l'importation des déchets ou des matières au Canada;
- h) le numéro de la ligne dans le permis d'importation original où sont inscrits les déchets ou les matières qui seront renvoyés.

(2) Une fois le permis d'exportation délivré, l'importateur :

Obligations de  
l'importateur

- a) renvoie les déchets dangereux ou les matières recyclables dangereuses à l'installation d'où ils ont été importés, en utilisant le point de sortie indiqué dans le permis d'exportation et en ayant recours aux transporteurs agréés qui y sont nommés;
- b) veille à ce qu'une copie du permis d'exportation et une copie du document de mouvement dont les parties B et C sont remplies et qui indique clairement que les déchets ou les matières sont renvoyés dans le pays d'exportation :

material is to be reported under section 95 of the *Customs Act*; and  
(c) submit a copy of the movement document referred to in paragraph (b) to the Minister, every authorized carrier and if they require it, the authorities of the province of import.

(i) accompagnent les déchets ou les matières,  
(ii) soient déposées au bureau de douane où les déchets ou les matières doivent être déclarés en vertu de l'article 95 de la *Loi sur les douanes*;  
c) envoie une copie du document de mouvement visé à l'alinéa b) au ministre, à chaque transporteur agréé et, si elles l'exigent, aux autorités de la province d'importation.

## PART 6

### MISCELLANEOUS MATTERS

#### Confirmation of Disposal or Recycling

**Confirmation** 36. (1) Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled

- (a) in accordance with the export or import permit;
- (b) in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and
- (c) within the period referred to in paragraph 9(o) or 16(n).

**Mandatory reference** (2) The exporter or importer must include the movement document reference number and line item number for the applicable hazardous waste or hazardous recyclable material referred to in subsection (1) in the confirmation.

**Retention of confirmation** (3) The exporter or importer must keep a copy of the confirmation at their principal place of business in Canada for a period of three years after the day on which it is submitted to the Minister.

#### Liability Insurance

**Coverage** 37. (1) The liability insurance required by these Regulations must be in respect of

- (a) any damages to third parties for which the exporter, importer or authorized carrier is responsible; and
- (b) any costs imposed by law on the exporter, importer or authorized carrier to clean up the environment in respect of any hazardous waste or hazardous recyclable material that is released.

**Amount** (2) The amount of liability insurance required in respect of each export or import of hazardous waste or hazardous recyclable material is

- (a) for exporters or importers, at least \$5,000,000 for hazardous waste;
- (b) for exporters or importers, at least \$1,000,000 for hazardous recyclable material; and

## PARTIE 6

### DISPOSITIONS GÉNÉRALES

#### Déclaration d'élimination ou de recyclage

**Déclaration** 36. (1) Dans les trente jours suivant l'élimination des déchets dangereux ou le recyclage des matières recyclables dangereuses, l'exportateur ou l'importateur présente au ministre une déclaration écrite, signée et datée attestant que l'élimination ou le recyclage a été effectué :

- a) conformément au permis;
- b) d'une manière qui garantit la protection de l'environnement et de la santé humaine contre les effets nuisibles que les déchets ou les matières peuvent avoir;
- c) dans le délai visé aux alinéas 9o) ou 16n).

(2) L'exportateur ou l'importateur indique sur la déclaration le numéro de référence du document de mouvement et le numéro de la ligne dans le permis d'exportation ou d'importation où sont inscrits les déchets dangereux ou les matières recyclables dangereuses.

**Mentions obligatoires**

(3) L'exportateur ou l'importateur conserve une copie de la déclaration à son principal établissement au Canada pendant la période de trois ans suivant la date de la présentation de la déclaration au ministre.

**Conservation de la déclaration**

#### Assurance responsabilité

37. (1) L'assurance responsabilité exigée par le présent règlement couvre :

**Couverture**

- a) les dommages subis par des tiers dont l'exportateur, l'importateur ou le transporteur agréé est responsable;
- b) les frais qu'une règle de droit oblige l'exportateur, l'importateur ou le transporteur agréé à payer pour nettoyer l'environnement à la suite d'un rejet de déchets dangereux ou de matières recyclables dangereuses.

(2) Le montant de la protection pour chaque exportation ou importation est :

**Montant**

- a) dans le cas d'un exportateur ou d'un importateur de déchets, d'au moins 5 000 000 \$;
- b) dans le cas d'un exportateur ou d'un importateur de matières, d'au moins 1 000 000 \$;

Coverage period	<p>(c) for authorized carriers, the amount required by the laws of the jurisdiction in which the hazardous waste or hazardous recyclable material is transported.</p> <p>(3) The insurance must cover liability arising</p> <p>(a) in the case of an export from Canada, from the time the hazardous waste or hazardous recyclable material leaves the exporter's facility to the time an authorized facility, including an authorized facility in Canada if the waste or material is returned to Canada in accordance with section 34, accepts delivery of the waste for disposal or the material for recycling;</p> <p>(b) in the case of an import into Canada, from the time the hazardous waste or hazardous recyclable material enters Canada to the time an authorized facility in Canada accepts delivery of the waste or material, or to the time the waste or material leaves Canada for return to the country of export in accordance with section 35; or</p> <p>(c) if Canada is a country of transit, at any time during the transit through Canada.</p>	<p>c) dans le cas d'un transporteur agréé, le montant exigé par les lois du territoire sur lequel les déchets ou les matières sont transportés.</p> <p>(3) L'assurance doit couvrir la responsabilité : Période</p> <p>a) dans le cas d'une exportation, à compter du moment où les déchets ou les matières quittent l'installation de l'exportateur jusqu'à ce qu'une installation agréée, y compris une installation au Canada s'ils y sont renvoyés conformément à l'article 34, en accepte la livraison en vue de leur élimination ou de leur recyclage;</p> <p>b) dans le cas d'une importation, à compter du moment où ils entrent au Canada jusqu'à ce qu'une installation agréée en accepte la livraison, ou jusqu'à ce qu'ils quittent le Canada en raison de leur renvoi dans le pays d'exportation conformément à l'article 35;</p> <p>c) dans le cas d'un transit au Canada, pendant la durée de celui-ci.</p>
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*Export Reduction Plans*

*Plans de réduction des exportations de déchets dangereux*

Content of plan	<p>38. (1) The plan referred to in subsection 188(1) of the Act must contain</p> <p>(a) the following information with respect to the hazardous waste to which the plan applies, namely,</p> <p>(i) the International Waste Identification Code under OECD Decision C(94)152/Final, substituting the disposal code with the disposal code set out in column 1 of Schedule 1 to these Regulations for the applicable operation set out in column 2 of that Schedule and, if the hazardous waste is a gas, substituting the letter G for the letter L, P or S in the International Waste Identification Code,</p> <p>(ii) the applicable code set out in List A of Annex VIII to the Convention,</p> <p>(iii) the identification number set out in column 1 of Schedule 3, 4 or 7, and</p> <p>(iv) the following information set out in the applicable schedules to the <i>Transportation of Dangerous Goods Regulations</i>, namely,</p> <p>(A) the applicable UN number set out in column 1 of Schedule 1 or column 5 of Schedule 3,</p> <p>(B) the applicable class set out in column 3 of Schedule 1 or the primary class set out in column 4 of Schedule 3, and</p> <p>(C) the applicable packing group and risk group set out in column 4 of Schedule 1;</p> <p>(b) the name, quantity and concentration of any persistent organic pollutant set out in column 2 of Schedule 10 that is contained in the hazardous waste referred to in the plan;</p>	<p>38. (1) Le plan visé au paragraphe 188(1) de la Loi comporte les renseignements suivants : Contenu</p> <p>a) relativement à chaque déchet dangereux qu'il vise :</p> <p>(i) le code international d'identification des déchets applicable selon la décision C(94)152/Final de l'OCDE, sauf que le code d'élimination est remplacé par celui prévu à la colonne 1 de l'annexe 1 du présent règlement pour l'opération applicable figurant à la colonne 2, et que les lettres « L », « P » ou « S » sont remplacées par la lettre « G » si le déchet est un gaz,</p> <p>(ii) le code applicable figurant à la liste A de l'annexe VIII de la Convention,</p> <p>(iii) le numéro d'identification prévu à la colonne 1 des annexes 3, 4 ou 7,</p> <p>(iv) les renseignements ci-après provenant des annexes applicables du <i>Règlement sur le transport des marchandises dangereuses</i> :</p> <p>(A) le numéro UN applicable prévu à la colonne 1 de l'annexe 1 ou à la colonne 5 de l'annexe 3,</p> <p>(B) la classe applicable prévue à la colonne 3 de l'annexe 1 ou la classe primaire applicable prévue à la colonne 4 de l'annexe 3,</p> <p>(C) le groupe d'emballage/groupe de risque applicable prévu à la colonne 4 de l'annexe 1;</p> <p>b) les nom, quantité et concentration de toute substance polluante organique persistante visée à la colonne 2 de l'annexe 10 qui se trouve dans les déchets visés par le plan;</p>
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- (c) if the exporter generates the hazardous waste referred to in the plan, the name and a description of the process that generated the waste and the activity in which that process is used;
- (d) the origin of the hazardous waste if the exporter does not generate the waste referred to in the plan;
- (e) the quantity of hazardous waste exported at the start of the implementation of the plan and the quantity of export reduction to be achieved at each stage of the plan;
- (f) a description of the manner in which the exporter will reduce or phase out exports of the hazardous waste referred to in the plan;
- (g) the options considered for reducing or phasing out the export of the hazardous waste referred to in the plan, including options for disposing or recycling it in Canada;
- (h) the stages of the plan and a schedule for implementing the plan; and
- (i) for each stage of the plan, an estimate of the quantity of goods produced that generates the hazardous waste to which the plan applies and a description of the impact of any changes to the quantity produced on the reduction or phasing out of exports of that waste.

Retention of  
plan

(2) A person who submits a plan to the Minister must keep a copy of the plan at their principal place of business in Canada for a period of five years after the day on which the plan is submitted.

#### *Environmentally Sound Management*

Refusal to issue  
permit

39. If the Minister is of the opinion that the hazardous waste or hazardous recyclable material will not be managed in a manner that will protect the environment and human health against the adverse effects that may result from that waste or material, the Minister may, in accordance with subsection 185(2) of the Act, refuse to issue a permit taking into account the following criteria:

(a) the implementation of an environmental management system at the authorized facility that includes

(i) procedures for ensuring the protection of the environment and human health against the adverse effects that may result from the disposal of the hazardous waste or the recycling of the hazardous recyclable material including measures for monitoring the efficiency of the procedures and modifying them in the event that they do not protect the environment and human health,

(ii) measures to monitor and ensure compliance with applicable laws with respect to the protection of the environment and human health, and

(iii) a certification that the system includes those procedures and measures;

(b) the implementation of a plan at the authorized facility to prevent, prepare for and respond to an

c) si l'exportateur produit les déchets visés par le plan, le nom et une description du procédé de production des déchets et de l'activité dans laquelle ce procédé est utilisé;

d) si l'exportateur ne produit pas les déchets visés par le plan, la provenance des déchets;

e) la quantité de déchets exportée à la mise en œuvre du plan et la réduction visée à chaque étape du plan;

f) la façon dont l'exportateur réduira ou supprimera l'exportation des déchets visés par le plan;

g) les solutions qui ont été envisagées en vue de réduire ou de supprimer les exportations de déchets visés par le plan, y compris celles concernant le recyclage des déchets au Canada;

h) les étapes du plan et l'échéancier;

i) pour chaque étape du plan, la quantité estimative de biens dont la production génère les déchets visés par le plan, ainsi qu'une description de l'effet des variations de quantité sur la réduction ou la suppression des exportations de déchets.

(2) La personne qui remet le plan au ministre en conserve une copie à son principal établissement au Canada pour une période de cinq ans suivant la remise du plan.

Conservation

#### *Gestion écologiquement rationnelle*

39. Si le ministre estime que les déchets dangereux ou les matières recyclables dangereuses ne seront pas gérés d'une manière qui garantisse la protection de l'environnement et de la santé humaine contre les effets nuisibles qu'ils peuvent avoir, il peut refuser, en vertu du paragraphe 185(2) de la Loi, de délivrer le permis compte tenu des facteurs suivants :

Refus de  
délivrer un  
permis

a) la mise en application d'un système de gestion environnementale à l'installation agréée, lequel comprend notamment :

(i) des modalités qui garantissent la protection de l'environnement et de la santé humaine contre les effets nuisibles que l'élimination des déchets ou le recyclage des matières pourrait entraîner ainsi que des mesures pour contrôler l'efficacité de ces modalités et les modifier si elles ne protègent pas l'environnement et la santé humaine,

(ii) des mesures pour assurer le respect des lois applicables concernant la protection de l'environnement et de la santé humaine,

(iii) une attestation du fait que le système comprend les modalités et les mesures;

b) la mise en application, à l'installation agréée, d'un plan pour prévenir tout rejet non contrôlé, non planifié ou accidentel de déchets ou de matières et pour faire face à un tel rejet;

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

uncontrolled, unplanned or accidental release of hazardous waste or hazardous recyclable material; and

(c) the existence of prohibitions or conditions relating to the disposal of hazardous waste or the recycling of hazardous recyclable material in Canada or abroad.

c) l'existence d'interdictions ou de conditions concernant l'élimination des déchets ou le recyclage des matières au Canada ou à l'étranger.

CONSEQUENTIAL AMENDMENT

MODIFICATION CORRÉLATIVE

Consequential amendment

40. Paragraph 2(2)(b) of the *Export of Substances Under the Rotterdam Convention Regulations*<sup>1</sup> is replaced by the following:

40. L'alinéa 2(2)b) du *Règlement sur l'exportation de substances aux termes de la Convention de Rotterdam*<sup>1</sup> est remplacé par ce qui suit :

Modification corrélatrice

(b) is, or is contained in, a hazardous waste or hazardous recyclable material regulated by the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*;

b) la substance est un déchet dangereux ou une matière recyclable dangereuse — ou est contenue dans un tel déchet ou une telle matière — qui est régi par le *Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuse*;

REPEAL

ABROGATION

Repeal

41. The *Export and Import of Hazardous Wastes Regulations*<sup>2</sup> are repealed.

41. Le *Règlement sur l'exportation et l'importation des déchets dangereux*<sup>2</sup> est abrogé.

Abrogation

COMING INTO FORCE

ENTRÉE EN VIGUEUR

Coming into Force

42. These Regulations come into force on November 1, 2005.

42. Le présent règlement entre en vigueur le 1<sup>er</sup> novembre 2005.

Entrée en vigueur

<sup>1</sup> SOR/2002-317  
<sup>2</sup> SOR/92-637

<sup>1</sup> DORS/2002-317  
<sup>2</sup> DORS/92-637



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

# SCHEDULE 1

(Subsection 1(1), section 4, subparagraphs 8(j)(i) and (viii) and 9(f)(iv), paragraphs 9(n) and (o), subparagraph 16(e)(iv), paragraphs 16(m) and (n) and subparagraph 38(1)(a)(i))

## DISPOSAL OPERATIONS FOR HAZARDOUS WASTE

Column 1		Column 2
Item	Disposal Code	Operation
1.	D1	Release into or onto land, other than by any of operations D3 to D5 or D12.
2.	D2	Land treatment, such as biodegradation of liquids or sludges in soil.
3.	D3	Deep injection, such as injection into wells, salt domes, mines or naturally occurring repositories.
4.	D4	Surface impoundment, such as placing liquids or sludges into pits, ponds or lagoons.
5.	D5	Specially engineered landfilling, such as placement into separate lined cells that are isolated from each other and the environment.
6.	D6	Release into water, other than a sea or ocean, other than by operation D4.
7.	D7	Release into a sea or ocean, including sea-bed insertion, other than by operation D4.
8.	D8	Biological treatment, not otherwise set out in this Schedule.
9.	D9	Physical or chemical treatment, not otherwise referred to in this Schedule, such as calcination, neutralization or precipitation.
10.	D10	Incineration or thermal treatment on land.
11.	D11	Incineration or thermal treatment at sea.
12.	D12	Permanent storage.
13.	D13	Blending or mixing, prior to any of operations D1 to D12.
14.	D14	Repackaging, prior to any of operations D1 to D13.
15.	D15	Release, including the venting of compressed or liquified gases, or treatment, other than by any of operations D1 to D12.
16.	D16	Testing of a new technology to dispose of a hazardous waste.
17.	D17	Interim storage, prior to any of operations D1 to D12.

# SCHEDULE 2

(Subsection 2(1), subparagraph 2(2)(e)(iii), section 4, subparagraphs 8(j)(i) and (viii) and 9(f)(iv), paragraphs 9(n) and (o), subparagraph 16(e)(iv) and paragraphs 16(m) and (n))

## RECYCLING OPERATIONS FOR HAZARDOUS RECYCLABLE MATERIAL

Column 1		Column 2
Item	Recycling Code	Operation
1.	R1	Use as a fuel in an energy recovery system, where the net heating value of the material is at least 12 780 kJ/kg.
2.	R2	Recovery or regeneration of substances that have been used as solvents.
3.	R3	Recovery of organic substances that have not been used as solvents.
4.	R4	Recovery of metals and metal compounds.
5.	R5	Recovery of inorganic materials other than metals or metal compounds.
6.	R6	Regeneration of acids or bases.
7.	R7	Recovery of components used for pollution abatement.
8.	R8	Recovery of components from catalysts.
9.	R9	Re-refining or re-use of used oil, other than by operation R1.
10.	R10	Land treatment resulting in agricultural or ecological improvement.
11.	R11	Use of residual materials obtained by any of operations R1 to R10 or R14.
12.	R12	Exchange of a recyclable material for another recyclable material prior to recycling by any of operations R1 to R11 or R14.
13.	R13	Accumulation prior to recycling by any of operations R1 to R11 or R14.
14.	R14	Recovery or regeneration of a substance or use or re-use of a recyclable material, other than by any of operations R1 to R10.
15.	R15	Testing of a new technology to recycle a hazardous recyclable material.
16.	R16	Interim storage prior to any of operations R1 to R11 or R14.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

### SCHEDULE 3

(Paragraphs 1(1)(a) and 2(1)(a), subparagraph 8(j)(v), paragraphs 9(c) and 16(b) and subparagraph 38(1)(a)(iii))

### HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS

	Column 1	Column 2																																		
Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material																																		
1.	HAZ1	<p>Biomedical waste – the following wastes, other than those generated from building maintenance, office administration or food preparation and consumption, that are generated by human or animal health care establishments, medical, health care or veterinary teaching or research establishments, clinical laboratories or facilities that test or produce vaccines and needle and syringe exchange programs:</p> <ul style="list-style-type: none"><li>(a) human tissues, organs or body parts, excluding teeth, hair or nails;</li><li>(b) human blood or blood products;</li><li>(c) human bodily fluids that are contaminated with blood;</li><li>(d) human bodily fluids removed in the course of autopsy, treatment, or surgery for diagnosis;</li><li>(e) animal tissues, organs, body parts or carcasses, excluding teeth, nails, hair, bristles, feathers, horns and hooves, resulting from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraph 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</li><li>(f) animal blood or blood products resulting from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraph 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</li><li>(g) animal bodily fluids that are visibly contaminated with animal blood and that result from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraph 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</li><li>(h) animal bodily fluids removed in the course of surgery, treatment or necropsy, and that result from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraphs 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</li><li>(i) live or attenuated vaccines, human or animal cell cultures, microbiology laboratory cultures, stocks or specimens of microorganisms and any items that have come into contact with them;</li><li>(j) any items that are saturated with the blood or bodily fluids referred to in paragraphs (b) to (d) or (f) to (h), including items that were saturated but that have dried; and</li><li>(k) cytotoxic drugs and any items, including tissues, tubing, needles or gloves, that have come into contact with a cytotoxic drug.</li></ul> <p>Biomedical waste does not include</p> <ul style="list-style-type: none"><li>(a) urine or feces;</li><li>(b) wastes that are controlled under the <i>Health of Animals Act</i>; or</li><li>(c) wastes that result from the breeding or raising of animals.</li></ul>																																		
2.	HAZ2	Used lubricating oils in quantities of 500 L or more, from internal combustion engines or gear boxes, transmissions, transformers, hydraulic systems or other equipment associated with such engines.																																		
3.	HAZ3	Used oil filters containing more than 6 % of oil by mass.																																		
4.	HAZ4	Cyanide, or substances containing cyanide, in a concentration equal to or greater than 100 mg/kg.																																		
5.	HAZ5	Wastes that contain more than 2 mg/kg of polychlorinated terphenyls or polybrominated biphenyls described in Schedule 1 to the Act.																																		
6.	HAZ6	<p>Wastes that contain, in a concentration of more than 100 ng/kg of 2,3,7,8-tetrachlorodibenzo-p-dioxin equivalent,</p> <ul style="list-style-type: none"><li>(a) total polychlorinated dibenzofurans that have a molecular formula <math>C_{12}H_{8-n}Cl_nO</math> in which "n" is greater than 1; or</li><li>(b) total polychlorinated dibenzo-p-dioxins that have a molecular formula <math>C_{12}H_{8-n}Cl_nO_2</math> in which "n" is greater than 1.</li></ul> <p>The concentration is calculated in accordance with "International Toxicity Equivalency Factor (I-TEF) Method of Risk Assessment for Complex Mixtures of Dioxins and Related Compounds", <i>Pilot Study on International Information Exchange on Dioxins and Related Compounds</i>, Committee on the Challenges of Modern Society, North Atlantic Treaty Organization, Report Number 176, August 1988, as amended from time to time, using the following factors:</p> <table><tr><td>2,3,7,8-tetrachlorodibenzodioxin</td><td>1.001</td></tr><tr><td>1,2,3,7,8-pentachlorodibenzodioxin</td><td>0.5</td></tr><tr><td>1,2,3,4,7,8-hexachlorodibenzodioxin</td><td>0.1</td></tr><tr><td>1,2,3,7,8,9-hexachlorodibenzodioxin</td><td>0.1</td></tr><tr><td>1,2,3,6,7,8-hexachlorodibenzodioxin</td><td>0.1</td></tr><tr><td>1,2,3,4,6,7,8-heptachlorodibenzodioxin</td><td>0.01</td></tr><tr><td>octachlorodibenzodioxin</td><td>0.001</td></tr><tr><td>2,3,7,8-tetrachlorodibenzofuran</td><td>0.1</td></tr><tr><td>2,3,4,7,8-pentachlorodibenzofuran</td><td>0.5</td></tr><tr><td>1,2,3,7,8-pentachlorodibenzofuran</td><td>0.05</td></tr><tr><td>1,2,3,4,7,8-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>1,2,3,7,8,9-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>1,2,3,6,7,8-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>2,3,4,6,7,8-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>1,2,3,4,6,7,8-heptachlorodibenzofuran</td><td>0.01</td></tr><tr><td>1,2,3,4,7,8,9-heptachlorodibenzofuran</td><td>0.01</td></tr><tr><td>octachlorodibenzofuran</td><td>0.001</td></tr></table>	2,3,7,8-tetrachlorodibenzodioxin	1.001	1,2,3,7,8-pentachlorodibenzodioxin	0.5	1,2,3,4,7,8-hexachlorodibenzodioxin	0.1	1,2,3,7,8,9-hexachlorodibenzodioxin	0.1	1,2,3,6,7,8-hexachlorodibenzodioxin	0.1	1,2,3,4,6,7,8-heptachlorodibenzodioxin	0.01	octachlorodibenzodioxin	0.001	2,3,7,8-tetrachlorodibenzofuran	0.1	2,3,4,7,8-pentachlorodibenzofuran	0.5	1,2,3,7,8-pentachlorodibenzofuran	0.05	1,2,3,4,7,8-hexachlorodibenzofuran	0.1	1,2,3,7,8,9-hexachlorodibenzofuran	0.1	1,2,3,6,7,8-hexachlorodibenzofuran	0.1	2,3,4,6,7,8-hexachlorodibenzofuran	0.1	1,2,3,4,6,7,8-heptachlorodibenzofuran	0.01	1,2,3,4,7,8,9-heptachlorodibenzofuran	0.01	octachlorodibenzofuran	0.001
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SCHEDULE 4  
(Paragraphs 1(1)(c) and 2(1)(c) and subparagraphs 8(j)(v) and 38(1)(a)(iii))

PART 1

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM NON-SPECIFIC SOURCES

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
1.	F001	The following spent halogenated solvents used in degreasing: tetrachloroethylene, trichloroethylene, methylene chloride, 1,1,1-trichloroethane, carbon tetrachloride and chlorinated fluorocarbons; all spent solvent mixtures and blends used in degreasing containing, before use, a total of 10% or more (by volume) of one or more of the above halogenated solvents or those solvents listed as F002, F004 or F005; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
2.	F002	The following spent halogenated solvents: tetrachloroethylene, methylene chloride, trichloroethylene, 1,1,1-trichloroethane, chlorobenzene, 1,1,2-trichloro-1,2,2-trifluoroethane, ortho-dichlorobenzene, trichlorofluoromethane and 1,1,2-trichloroethane; all spent solvent mixtures and blends containing, before use, a total of 10% or more (by volume) of one or more of the above halogenated solvents or those listed as F001, F004 or F005; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
3.	F003	The following spent non-halogenated solvents: xylene, acetone, ethyl acetate, ethyl benzene, ethyl ether, methyl isobutyl ketone, n-butyl alcohol, cyclohexanone and methanol; all spent solvent mixtures and blends containing, before use, only the above spent non-halogenated solvents; and all spent solvent mixtures and blends containing, before use, one or more of the above spent non-halogenated solvents, and a total of 10% or more (by volume) of one or more of those solvents listed as F001, F002, F004 or F005; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
4.	F004	The following spent non-halogenated solvents: cresols, cresylic acid and nitrobenzene; all spent solvent mixtures and blends containing, before use, a total of 10% or more (by volume) of one or more of the above spent non-halogenated solvents or those solvents listed as F001, F002 or F005; and still bottoms from the recovery of these spent solvents and spent solvent mixtures.
5.	F005	The following spent non-halogenated solvents: toluene, methyl ethyl ketone, carbon disulphide, isobutanol, pyridine, benzene, 2-ethoxyethanol and 2-nitropropane; all spent solvent mixtures and blends containing, before use, a total of 10% or more (by volume) of one or more of the above spent non-halogenated solvents or those solvents listed as F001, F002 or F004; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
6.	F006	Wastewater treatment sludges from electroplating operations except for the following processes: (1) sulphuric acid anodizing of aluminum; (2) tin plating on carbon steel; (3) zinc plating (on a segregated basis) on carbon steel; (4) aluminum or aluminum-zinc plating on carbon steel; (5) cleaning or stripping associated with tin, zinc or aluminum plating on carbon steel; and (6) chemical etching and milling of aluminum.
7.	F007	Spent cyanide plating bath solutions from electroplating operations.
8.	F008	Plating bath sludge from the bottom of plating baths from electroplating operations where cyanides are used in the process.
9.	F009	Spent stripping and cleaning bath solutions from electroplating operations where cyanides are used in the process.
10.	F010	Quenching bath sludge from oil baths from metal heat treating operations where cyanides are used in the process.
11.	F011	Spent cyanide solutions from salt bath pot cleaning from metal heat treating operations.
12.	F012	Quenching wastewater treatment sludge from metal heat treating operations where cyanides are used in the process.
13.	F019	Wastewater treatment sludge from the chemical conversion coating of aluminum except from zirconium phosphating in aluminum can washing if such phosphating is an exclusive conversion coating process.
14.	F020	Wastes from the production or manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tri- or tetrachlorophenol or of intermediates used to produce their pesticide derivatives, excluding wastewater and spent carbon from hydrogen chloride purification and wastes from the production of hexachlorophene from highly purified 2,4,5-trichlorophenol.
15.	F021	Wastes from the production or manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of pentachlorophenol or of intermediates used to produce its derivatives, excluding wastewater and spent carbon from hydrogen chloride purification.
16.	F022	Wastes from the manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tetra-, penta- or hexachlorobenzenes under alkaline conditions, excluding wastewater and spent carbon from hydrogen chloride purification.
17.	F023	Wastes from the production of materials on equipment previously used for the production or manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tri- and tetrachlorophenols, excluding wastewater and spent carbon from hydrogen chloride purification and wastes from equipment used only for the production or use of hexachlorophene from highly purified 2,4,5-trichlorophenol.
18.	F024	Process wastes, including, but not limited to, distillation residues, heavy ends, tars and reactor clean-out wastes from the production of certain chlorinated aliphatic hydrocarbons by free radical catalyzed processes, those chlorinated aliphatic hydrocarbons being those having carbon chain lengths ranging from 1 to and including 5, with varying amounts and positions of chlorine substitution, and excluding wastewaters, wastewater treatment sludge, spent catalysts and wastes set out in Schedule 7.
19.	F025	Condensed light ends, spent filters and filler aids, and spent desiccant wastes from the production of certain chlorinated aliphatic hydrocarbons, by free radical catalyzed processes, those chlorinated aliphatic hydrocarbons being those having carbon chain lengths ranging from 1 to and including 5, with varying amounts and positions of chlorine substitution.
20.	F026	Wastes from the production of materials on equipment previously used for the manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tetra-, penta- or hexachlorobenzene under alkaline conditions, excluding wastewater and spent carbon from hydrogen chloride purification.
21.	F027	Discarded unused formulations containing tri-, tetra- or pentachlorophenol or discarded unused formulations containing compounds derived from those chlorophenols, excluding formulations containing hexachlorophene synthesized from prepurified 2,4,5-trichlorophenol as the sole component.
22.	F028	Residues resulting from incineration or treatment of soil contaminated with wastes listed as F020, F021, F022, F023, F026 or F027.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4 — Continued

PART 1 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM NON-SPECIFIC SOURCES — Continued

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material
23.	F032	Wastewaters, spent formulations from wood preserving processes generated at plants that currently use or have previously used chlorophenolic formulations, process residuals and preservative drippage, except wastewaters that have not come into contact with process contaminants, spent formulations that potentially cross-contaminated wastes from wood preserving processes at plants that do not resume or initiate use of chlorophenolic preservatives, and bottom sediment sludge listed as K001.
24.	F034	Wastewaters, process residuals, preservative drippage and spent formulations from wood preserving processes generated at plants that use creosote formulations, excluding bottom sediment sludge listed as K001 and wastewaters that have not come into contact with process contaminants.
25.	F035	Wastewaters, process residuals, preservative drippage and spent formulations from wood preserving processes generated at plants that use inorganic preservatives containing arsenic or chromium, excluding bottom sediment sludge listed as K001 and wastewaters that have not come into contact with process contaminants.
26.	F037	Petroleum refinery primary oil, water and solids separation sludge; sludge generated from the gravitational separation of oil, water and solids during the storage or treatment of process wastewaters and oil cooling wastewaters from petroleum refineries, including, but not limited to, those generated in oil, water and solids separators, tanks and impoundments, ditches and other conveyances, sumps and stormwater units receiving dry weather flow; sludge generated in stormwater units that do not receive dry weather flow; sludge generated from non-contact once-through cooling waters segregated for treatment from other processes or oily cooling waters; sludge generated in biological treatment units that employ one of the following treatment methods: activated sludge, trickling filter, rotating biological contactor for the continuous accelerated biological oxidation of wastewaters, or high-rate aeration (including sludge generated in one or more additional units after wastewaters have been treated in biological treatment units). Wastes listed as K051 are excluded.
27.	F038	Petroleum refinery secondary (emulsified) oil, water and solids separation sludge; sludge or float generated from the physical or chemical separation of oil, water and solids in process wastewaters and oily cooling wastewaters from petroleum refineries, including, but not limited to, sludge and floats generated in induced air flotation (IAF) units, tanks and impoundments, and in dissolved air flotation (DAF) units; sludge generated in stormwater units that do not receive dry weather flow; sludge generated from non-contact once-through cooling waters segregated for treatment from other processes or oily cooling water; sludge and float generated in biological treatment units that employ one of the following treatment methods: activated sludge, trickling filter, rotating biological contactor for the continuous accelerated biological oxidation of wastewaters, or high-rate aeration (including sludge and float generated in one or more additional units after wastewaters have been treated in a biological treatment unit). Wastes listed as F037, K048 and K051 are excluded.
28.	F039	Leachate (liquids that percolated through land disposed wastes) resulting from the disposal of more than one waste classified as a hazardous waste by being included in this Schedule.

PART 2

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material
<b>Wood Preservation</b>		
1.	K001	Bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote or pentachlorophenol or both.
<b>Inorganic Pigments</b>		
2.	K002	Wastewater treatment sludge from the production of chrome yellow and orange pigments.
3.	K003	Wastewater treatment sludge from the production of molybdate orange pigments.
4.	K004	Wastewater treatment sludge from the production of zinc yellow pigments.
5.	K005	Wastewater treatment sludge from the production of chrome green pigments.
6.	K006	Wastewater treatment sludge from the production of chromeoxide green pigments (anhydrous and hydrated).
7.	K007	Wastewater treatment sludge from the production of iron blue pigments.
8.	K008	Oven residue from the production of chromeoxide green pigments.
<b>Organic Chemicals</b>		
9.	K009	Distillation bottoms from the production of acetaldehyde from ethylene.
10.	K010	Distillation side cuts from the production of acetaldehyde from ethylene.
11.	K011	Bottom stream from the wastewater stripper in the production of acrylonitrile.
12.	K013	Bottom stream from the acetonitrile column in the production of acrylonitrile.
13.	K014	Bottoms from the acetonitrile purification column in the production of acrylonitrile.
14.	K015	Still bottoms from the distillation of benzylchloride.
15.	K016	Heavy ends or distillation residues from the production of carbon tetrachloride.
16.	K017	Heavy ends (still bottoms) from the purification column in the production of epichlorohydrin.
17.	K018	Heavy ends from the fractionation column in ethyl chloride production.

SCHEDULE 4 — Continued

PART 2 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
18.	K019	Heavy ends from the distillation of ethylene dichloride in ethylene dichloride production.
19.	K020	Heavy ends from the distillation of vinyl chloride in vinyl chloride monomer production.
20.	K021	Aqueous spent antimony catalyst waste from fluoromethanes production.
21.	K022	Distillation bottom tars from the production of phenol and acetone from cumene.
22.	K023	Distillation light ends from the production of phthalic anhydride from naphthalene.
23.	K024	Distillation bottoms from the production of phthalic anhydride from naphthalene.
24.	K025	Distillation bottoms from the production of nitrobenzene by the nitration of benzene.
25.	K026	Stripping still tails from the production of methyl ethyl pyridines.
26.	K027	Centrifuge and distillation residues from toluene diisocyanate production.
27.	K028	Spent catalyst from the hydrochlorinator reactor in the production of 1,1,1-trichloroethane.
28.	K029	Waste from the product stream stripper in the production of 1,1,1-trichloroethane.
29.	K030	Column bottoms or heavy ends from the combined production of trichloroethylene and perchloroethylene.
30.	K083	Distillation bottoms from aniline production.
31.	K085	Distillation or fractionating column bottoms from the production of chlorobenzenes.
32.	K093	Distillation light ends from the production of phthalic anhydride from o-xylene.
33.	K094	Distillation bottoms from the production of phthalic anhydride from o-xylene.
34.	K095	Distillation bottoms from the production of 1,1,1-trichloroethane.
35.	K096	Heavy ends from the heavy ends columns from the production of 1,1,1-trichloroethane.
36.	K103	Process residues from aniline extraction from the production of aniline.
37.	K104	Combined wastewater streams from nitrobenzene and aniline production.
38.	K105	Separated aqueous stream from the reactor product washing step in the production of chlorobenzene.
39.	K107	Column bottoms from product separation from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
40.	K108	Condensed column overheads from product separation and condensed reactor vent gases from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
41.	K109	Spent filter cartridges from product purification from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
42.	K110	Condensed column overheads from intermediate separation from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
43.	K111	Product washwaters from the production of dinitrotoluene via nitration of toluene.
44.	K112	Reaction by-product water from the drying column in the production of toluenediamine via hydrogenation of dinitrotoluene.
45.	K113	Condensed liquid light ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.
46.	K114	Vicinals from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.
47.	K115	Heavy ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.
48.	K116	Organic condensate from the solvent recovery column in the production of toluene diisocyanate via phosgenation of toluenediamine.
49.	K117	Wastewater from the reactor vent gas scrubber in the production of ethylene dibromide via bromination of ethene.
50.	K118	Spent adsorbent solids from the purification of ethylene dibromide in the production of ethylene dibromide via bromination of ethene.
51.	K136	Still bottoms from the purification of ethylene dibromide in the production of ethylene dibromide via bromination of ethene.
52.	K140	Floor sweepings, off-specification product and spent filter media from the production of 2,4,6-tribromophenol.
53.	K149	Distillation bottoms from the production of alpha- (or methyl-) chlorinated toluenes, ring- chlorinated toluenes, benzoyl chlorides and compounds with mixtures of those functional groups, excluding still bottoms from the distillation of benzyl chloride.
54.	K150	Organic residuals, excluding spent carbon adsorbent, from the spent chlorine gas and hydrochloric acid recovery processes associated with the production of alpha- (or methyl-) chlorinated toluenes, ring-chlorinated toluenes, benzoyl chlorides and compounds with mixtures of those functional groups.
55.	K151	Wastewater treatment sludge generated during the treatment of wastewaters from the production of alpha- (or methyl-) chlorinated toluenes, ring-chlorinated toluenes, benzoyl chlorides and compounds with mixtures of those functional groups, excluding neutralization and biological sludge.
56.	K156	Organic waste (including heavy ends, still bottoms, light ends, spent solvents, filtrates and decantates) from the production of carbamates and carbamoyl oximes, excluding waste generated from the manufacture of 3-iodo-2-propynyl n-butylcarbamate.
57.	K157	Wastewaters (including scrubber waters, condenser waters, washwaters and separation waters) from the production of carbamates and carbamoyl oximes, excluding wastes generated from the manufacture of 3-iodo-2-propynyl n-butylcarbamate.
58.	K158	Bag house dusts and filter or separation solids from the production of carbamates and carbamoyl oximes, excluding wastes generated from the manufacture of 3-iodo-2-propynyl n-butylcarbamate.
59.	K159	Organics from the treatment of thiocarbamate wastes.
60.	K161	Purification solids (including filtration, evaporation and centrifugation solids), bag house dust and floor sweepings from the production of dithiocarbamate acids and their salts, excluding substances listed as K125 or K126.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4 — Continued

PART 2 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES — Continued

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material
<b>Inorganic chemicals</b>		
61.	K071	Brine purification sludge from the mercury cell process in chlorine production if separately prepurified brine is not used.
62.	K073	Chlorinated hydrocarbon wastes from the purification step of the diaphragm cell process using graphite anodes in chlorine production.
63.	K106	Wastewater treatment sludge from the mercury cell process in chlorine production.
<b>Pesticides</b>		
64.	K031	By-product salts generated in the production of monosodium acid methanearsonate (MSMA) and cacodylic acid.
65.	K032	Wastewater treatment sludge from the production of chlordane.
66.	K033	Wastewater and scrub water from the chlorination of cyclopentadiene in the production of chlordane.
67.	K034	Filter solids from the filtration of hexachlorocyclopentadiene in the production of chlordane.
68.	K035	Wastewater treatment sludge from the production of creosote.
69.	K036	Still bottoms from toluene reclamation distillation in the production of disulfoton.
70.	K037	Wastewater treatment sludge from the production of disulfoton.
71.	K038	Wastewater from the washing and stripping of phorate production.
72.	K039	Filter cake from the filtration of diethylphosphorodithioic acid in the production of phorate.
73.	K040	Wastewater treatment sludge from the production of phorate.
74.	K041	Wastewater treatment sludge from the production of toxaphene.
75.	K042	Heavy ends or distillation residues from the distillation of tetrachlorobenzene in the production of 2,4,5-T.
76.	K043	2,6-Dichlorophenol waste from the production of 2,4-D.
77.	K097	Vacuum stripper discharge from the chlordane chlorinator in the production of chlordane.
78.	K098	Untreated process wastewater from the production of toxaphene.
79.	K099	Untreated wastewater from the production of 2,4-D.
80.	K123	Process wastewater, including supernates, filtrates and washwaters, from the production of ethylenebisdithiocarbamic acid and its salts.
81.	K124	Reactor vent scrubber water from the production of ethylenebisdithiocarbamic acid and its salts.
82.	K125	Filtration, evaporation and centrifugation solids from the production of ethylenebisdithiocarbamic acid and its salts.
83.	K126	Baghouse dust and floor sweepings in milling and packaging operations from the production or formulation of ethylenebisdithiocarbamic acid and its salts.
84.	K131	Wastewater from the reactor and spent sulfuric acid from the acid dryer from the production of methyl bromide.
85.	K132	Spent absorbent and wastewater separator solids from the production of methyl bromide.
<b>Explosives</b>		
86.	K044	Wastewater treatment sludge from the manufacturing and processing of explosives.
87.	K045	Spent carbon from the treatment of wastewater containing explosives.
88.	K046	Wastewater treatment sludge from the manufacturing, formulation and loading of lead-based initiating compounds.
89.	K047	Pink and red water from the production of TNT.
<b>Petroleum refining</b>		
90.	K048	Dissolved air flotation (DAF) float from the petroleum refining industry.
91.	K049	Slop oil emulsion solids from the petroleum refining industry.
92.	K050	Heat exchanger bundle cleaning sludge from the petroleum refining industry.
93.	K051	American Petroleum Institute (API) separator sludge from the petroleum refining industry.
94.	K052	Tanks bottoms (lead) from the petroleum refining industry.
95.	K169	Crude oil storage tank sediment from refining petroleum.
96.	K170	Clarified slurry oil tank sediment and in-line filter or separation solids from refining petroleum.
97.	K171	Spent hydrotreating catalyst from refining petroleum, including guard beds used to desulfurize feeds to other catalytic reactors, excluding inert support media.
98.	K172	Spent hydrorefining catalyst from refining petroleum, including guard beds used to desulfurize feeds to other catalytic reactors, excluding inert support media.
<b>Iron and steel</b>		
99.	K061	Emission control dust and sludge from the primary production of steel in electric furnaces.
100.	K062	Spent pickle liquor from steel finishing operations of facilities within the iron and steel industry at steel works, blast furnaces (including coke ovens), rolling mills, iron and steel foundries, gray and ductile iron foundries, malleable iron foundries, steel investment foundries or other miscellaneous steel foundries, or at facilities in the electrometallurgical products (except steel) industry, steel wiredrawing and steel nails and spikes industry, coldrolled steel sheet, strip and bars industry or steel pipes and tubes industry.
<b>Primary copper</b>		
101.	K064	Acid plant blowdown slurry and sludge resulting from the thickening of blowdown slurry from primary copper production.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4 — Continued

PART 2 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES — Continued

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material
<b>Primary lead</b>		
102.	K065	Surface impoundment solids contained in and dredged from surface impoundments at primary lead smelting facilities.
<b>Primary zinc</b>		
103.	K066	Sludge from treatment of process wastewater and acid plant blowdown from primary zinc production.
<b>Primary aluminum</b>		
104.	K088	Spent potliners from primary aluminum reduction.
<b>Ferroalloys</b>		
105.	K090	Emission control dust or sludge from ferrochromiumsilicon production.
106.	K091	Emission control dust or sludge from ferrochromium production.
<b>Secondary lead</b>		
107.	K069	Emission control dust and sludge from secondary lead smelting.
108.	K100	Waste leaching solution from acid leaching of emission control dust and sludge from secondary lead smelting.
<b>Veterinary pharmaceuticals</b>		
109.	K084	Wastewater treatment sludge from the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.
110.	K101	Distillation tar residues from the distillation of aniline-based compounds in the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.
111.	K102	Residue from the use of activated carbon for decolourization in the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.
<b>Ink formulation</b>		
112.	K086	Solvent washes and sludge, caustic washes and sludge or water washes and sludge from cleaning tubs and equipment used in the formulation of ink from pigments, driers, soaps and stabilizers containing chromium and lead.
<b>Coking</b>		
113.	K060	Ammonia still lime sludge from coking operations.
114.	K087	Decanter tank tar sludge from coking operations.
115.	K141	Process residues from the recovery of coal tar, including, but not limited to, collecting sump residues from the production of coke from coal and the recovery of coke by-products produced from coal, excluding those wastes listed as K087.
116.	K142	Tar storage tank residues from the production of coke from coal or from the recovery of coke by-products produced from coal.
117.	K143	Process residues from the recovery of light oil, including, but not limited to, those generated in stills, decanters and wash oil recovery units from the recovery of coke by-products produced from coal.
118.	K144	Wastewater sump residues from light oil refining, including, but not limited to, intercepting or contamination sump sludge from the recovery of coke by-products produced from coal.
119.	K145	Residues from naphthalene collection and recovery operations from the recovery of coke by-products produced from coal.
120.	K147	Tar storage tank residues from coal tar refining.
121.	K148	Residues from coal tar distillation, including, but not limited to, still bottoms.

SCHEDULE 5  
(Paragraphs 1(1)(d) and 2(1)(d))

ENVIRONMENTALLY HAZARDOUS SUBSTANCES

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
1.	Acetaldehyde	100.0
2.	Acetaldehyde ammonia	100.0
3.	Acetic acid	100.0
4.	Acetic anhydride	100.0
5.	Acetone cyanohydrin	100.0
6.	Acetyl bromide	100.0
7.	Acetyl chloride	100.0
8.	Acrolein, stabilized	100.0
9.	Acrylonitrile, stabilized	100.0
10.	Adipic acid	100.0

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

SCHEDULE 5 — *Continued*

ENVIRONMENTALLY HAZARDOUS SUBSTANCES — *Continued*

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
11.	Allethrin	100.0
12.	Allyl alcohol	100.0
13.	Allyl chloride	100.0
14.	Aluminum sulphate	100.0
15.	N-Aminopropylmorpholine	100.0
16.	Ammonia	100.0
17.	Ammonia solutions	100.0
18.	Ammonium acetate	100.0
19.	Ammonium benzoate	100.0
20.	Ammonium bicarbonate	100.0
21.	Ammonium bisulphite	100.0
22.	Ammonium carbamate	100.0
23.	Ammonium carbonate	100.0
24.	Ammonium chloride	100.0
25.	Ammonium citrate, dibasic	100.0
26.	Ammonium oxalate	100.0
27.	Ammonium sulphamate	100.0
28.	Ammonium sulphide	100.0
29.	Ammonium tartrate	100.0
30.	Ammonium thiocyanate	100.0
31.	Ammonium thiosulphate	100.0
32.	Amyl acetates	100.0
33.	Aniline	100.0
34.	Antimony pentachloride	100.0
35.	Antimony potassium tartrate	100.0
36.	Antimony tribromide	100.0
37.	Antimony trichloride	100.0
38.	Antimony trioxide	100.0
39.	Benzidine	100.0
40.	Benzoic acid	100.0
41.	Benzonitrile	100.0
42.	Benzoyl chloride	100.0
43.	Benzyl chloride	100.0
44.	Beryllium chloride	100.0
45.	Butyl acetates	100.0
46.	n-Butylamine	100.0
47.	n-Butyl phthalate	100.0
48.	Calcium hypochlorite	100.0
49.	Captan	100.0
50.	Carbon disulphide	100.0
51.	Chlordecone	100.0
52.	2-Chlorophenol	100.0
53.	Chlorosulphonic acid (with or without sulphur trioxide)	100.0
54.	Cobaltous bromide	100.0
55.	Cobaltous formate	100.0
56.	Cobaltous sulphamate	100.0
57.	Copper-based pesticides (all forms)	100.0
58.	Copper chloride	100.0
59.	Coumaphos	100.0
60.	Creosote	100.0
61.	Crotonaldehyde	100.0
62.	Cupric acetate	100.0
63.	Cupric oxalate	100.0
64.	Cupric sulphate	100.0
65.	Cupric sulphate, ammoniated	100.0
66.	Cupric tartrate	100.0
67.	Cyclohexane	100.0



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 5 — Continued

ENVIRONMENTALLY HAZARDOUS SUBSTANCES — Continued

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
68.	Dichlobenil	100.0
69.	Dichlone	100.0
70.	1,1-Dichloro-2,2-di-(p-chlorophenyl) ethane	100.0
71.	Dichlorodiphenyltrichloroethane	100.0
72.	2,2-Dichloroethyl ether	100.0
73.	Dichloropropene	100.0
74.	2,2-Dichloropropionic acid	100.0
75.	Dichlorvos	100.0
76.	Dicofol	100.0
77.	Diethylamine	100.0
78.	Dimethylamine	100.0
79.	Dinitrobenzenes	100.0
80.	Dinitrophenol	100.0
81.	Dinitrotoluenes (excluding 2,4-dinitrotoluene)	100.0
82.	Disulfoton	100.0
83.	Endosulfan	100.0
84.	Epichlorohydrin	100.0
85.	Ethion	100.0
86.	Ethylbenzene	100.0
87.	Ethylenediamine	100.0
88.	Ethylenediaminetetraacetic acid	100.0
89.	Ethylene dibromide	100.0
90.	Ethylene dichloride	100.0
91.	Ferric ammonium citrate	100.0
92.	Ferric ammonium oxalate	100.0
93.	Ferric chloride	100.0
94.	Ferric nitrate	100.0
95.	Ferric sulphate	100.0
96.	Ferrous ammonium sulphate	100.0
97.	Ferrous chloride	100.0
98.	Ferrous sulphate	100.0
99.	Formaldehyde	100.0
100.	Formic acid	100.0
101.	Fumaric acid	100.0
102.	Furfural	100.0
103.	Hexachlorocyclopentadiene	100.0
104.	Isobutyl acetate	100.0
105.	Isobutylamine	100.0
106.	Isobutyric acid	100.0
107.	Isoprene	100.0
108.	Kelthane	100.0
109.	Mercaptodimethur	100.0
110.	Methyl bromide and ethylene dibromide mixtures	100.0
111.	Methyl methacrylate	100.0
112.	Methylamine	100.0
113.	Mevinphos	100.0
114.	Mexacarbate	100.0
115.	Naled	100.0
116.	Naphthalene	100.0
117.	Naphtheneic acid	100.0
118.	Nickel ammonium sulphate	100.0
119.	Nickel chloride	100.0
120.	Nickel hydroxide	100.0
121.	Nickel sulphate	100.0
122.	Nitrophenols (o-, m-, p-)	100.0
123.	Nitrotoluenes, (o-, m-, p-)	100.0
124.	Organotin compounds (all forms)	100.0

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 5 — Continued

ENVIRONMENTALLY HAZARDOUS SUBSTANCES — Continued

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
125.	Organotin Pesticides (all forms)	100.0
126.	Oxalates, water soluble	100.0
127.	Paraformaldehyde	100.0
128.	Phenacpton	100.0
129.	Phenol	100.0
130.	Phosphorus	100.0
131.	Phosphorus oxychloride	100.0
132.	Phosphorus pentasulphide	100.0
133.	Phosphorus trichloride	100.0
134.	Polychlorinated biphenyls	50.0
135.	Potassium permanganate	100.0
136.	Propargite	100.0
137.	Propionic acid	100.0
138.	Propionic anhydride	100.0
139.	Propylene dichloride	100.0
140.	Propylene oxide	100.0
141.	Pyrethrins	100.0
142.	Quinoline	100.0
143.	Resorcinol	100.0
144.	Silver nitrate	100.0
145.	Sodium bisulphite	100.0
146.	Sodium dodecylbenzene sulphonate (branched chain)	100.0
147.	Sodium hydrogen sulphite	100.0
148.	Sodium hydrosulphide	100.0
149.	Sodium methylate	100.0
150.	Sodium phosphate, dibasic	100.0
151.	Sodium phosphate, tribasic	100.0
152.	Strychnine or Strychnine mixtures	100.0
153.	Strychnine salts or Strychnine salt mixtures	100.0
154.	Styrene	100.0
155.	Sulphur monochloride	100.0
156.	Tetrachloroethane	100.0
157.	Tetraethyl Pyrophosphate	100.0
158.	Thallium sulphate	100.0
159.	Thiram	100.0
160.	Titanium sulphate	100.0
161.	Toluene	100.0
162.	Triazine Pesticides	100.0
163.	Trichlorphon	100.0
164.	Triethylamine	100.0
165.	Trimethylamine	100.0
166.	Vanadium pentoxide, non-fused form	100.0
167.	Vanadyl sulphate	100.0
168.	Vinyl acetate	100.0
169.	Xylenes	100.0
170.	Xylenols	100.0
171.	Zinc acetate	100.0
172.	Zinc ammonium chloride	100.0
173.	Zinc carbonate	100.0
174.	Zinc chloride	100.0
175.	Zinc formate	100.0
176.	Zinc phenolsulphonate	100.0
177.	Zinc phosphide	100.0
178.	Zinc sulphate	100.0
179.	Zirconium sulphate	100.0

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 6  
(Paragraphs 1(1)(e) and 2(1)(e) and subparagraphs 2(2)(e)(ii) and 8(j)(v))

HAZARDOUS CONSTITUENTS CONTROLLED UNDER LEACHATE TEST AND REGULATED LIMITS

Column 1		Column 2	Column 3
Item	Hazardous Constituent Code No.	Hazardous Constituents (synonyms and descriptors)	Concentration (mg/L)
1.	L32	Aldicarb	0.900
2.	L3	Aldrin + Dieldrin	0.070
3.	L4	Arsenic	2.500
4.	L33	Atrazine + N-dealkylated metabolites	0.500
5.	L34	Azinphos-methyl	2.000
6.	L5	Barium	100.000
7.	L35	Bendiocarb	4.000
8.	L36	Benzene	0.500
9.	L37	Benzo(a)pyrene	0.001
10.	L6	Boron	500.000
11.	L38	Bromoxynil	0.500
12.	L7	Cadmium	0.500
13.	L8	Carbaryl/Sevin/1-Naphthyl-N methyl carbamate	9.000
14.	L39	Carbofuran	9.000
15.	L40	Carbon tetrachloride (Tetrachloromethane)	0.500
16.	L41	Chloramines	300.000
17.	L9	Chlordane	0.700
18.	L42	Chlorobenzene (Monochlorobenzene)	8.000
19.	L43	Chloroform	10.000
20.	L44	Chlorpyrifos	9.000
21.	L10	Chromium	5.000
22.	L45	Cresol (Mixture — total of all isomers, when isomers cannot be differentiated)	200.000
23.	L46	m-Cresol	200.000
24.	L47	o-Cresol	200.000
25.	L48	p-Cresol	200.000
26.	L49	Cyanazine	1.000
27.	L11	Cyanide	20.000
28.	L2	2,4-D / (2,4-Dichlorophenoxy)acetic acid	10.000
29.	L50	2,4-DCP / (2,4-Dichlorophenol)	90.000
30.	L12	DDT (total isomers)	3.000
31.	L13	Diazinon/Phosphordithioic acid, o,o-diethyl o-(2-isopropyl 6-methyl-4-pyrimidinyl) ester	2.000
32.	L51	Dicamba	12.000
33.	L52	1,2-Dichlorobenzene (o-Dichlorobenzene)	20.00
34.	L53	1,4-Dichlorobenzene (p-Dichlorobenzene)	0.50
35.	L54	1,2-Dichloroethane (Ethylene dichloride)	5.0
36.	L55	1,1-Dichloroethylene (Vinylidene chloride)	1.40
37.	L56	Dichloromethane (also see — methylene chloride)	5.00
38.	L57	Diclofop-methyl	0.90
39.	L58	Dimethoate	2.00
40.	L59	2,4-Dinitrotoluene	0.13
41.	L60	Dinoseb	1.00
42.	L70	Diquat	7.00
43.	L71	Diuron	15.00
44.	L14	Endrin	0.02
45.	L15	Fluoride	150.00
46.	L72	Glyphosate	28.00
47.	L16	Heptachlor + Heptachlor epoxide	0.30
48.	L73	Hexachlorobenzene	0.13
49.	L74	Hexachlorobutadiene	0.50
50.	L75	Hexachloroethane	3.00
51.	L17	Lead	5.00
52.	L18	Lindane	0.40
53.	L76	Malathion	19.00
54.	L19	Mercury	0.10
55.	L20	Methoxychlor/1,1,1-Trichloro-2,2-bis(p-methoxyphenyl) ethane	90.00

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 6 — Continued

HAZARDOUS CONSTITUENTS CONTROLLED UNDER LEACHATE TEST AND REGULATED LIMITS — Continued

Column 1		Column 2	Column 3
Item	Hazardous Constituent Code No.	Hazardous Constituents (synonyms and descriptors)	Concentration (mg/L)
56.	L77	Methyl ethyl ketone / Ethyl methyl ketone	200.00
57.	L21	Methyl Parathion	0.70
58.	L78	Methylene chloride / Dichloromethane	5.00
59.	L79	Metolachlor	5.00
60.	L80	Metribuzin	8.00
61.	L81	Nitrate	4500.00
62.	L22	Nitrate + Nitrite	1000.00
63.	L23	Nitritotriacetic acid (NTA)	40.00
64.	L24	Nitrite	320.00
65.	L82	Nitrobenzene	2.00
66.	L83	Paraquat	1.00
67.	L26	Parathion	5.00
68.	L84	Pentachlorophenol	6.00
69.	L85	Phorate	0.20
70.	L86	Picloram	19.00
71.	L100	Polychlorinated dibenzo dioxins and furans	0.0000015 TEQ
72.	L87	Pyridine	5.00
73.	L27	Selenium	1.00
74.	L88	Simazine	1.00
75.	L89	2,4,5-T (2,4,5-Trichlorophenoxyacetic acid)	28.00
76.	L1	2,4,5-TP/ Silvex/ 2-(2,4,5-Trichlorophenoxy)propionic acid	1.00
77.	L90	Temephos	28.00
78.	L91	Terbufos	0.10
79.	L92	Tetrachloroethylene	3.00
80.	L93	2,3,4,6-Tetrachlorophenol / (2,3,4,6-TeCP)	10.00
81.	L29	Toxaphene	0.50
82.	L94	Triallate	23.00
83.	L95	Trichloroethylene	5.00
84.	L96	2,4,5-Trichlorophenol / (2,4,5-TCP)	400.00
85.	L97	2,4,6-Trichlorophenol / (2,4,6-TCP)	0.50
86.	L98	Trifluralin	4.50
87.	L30	Trihalomethanes — Total (also see — Chloroform)	10.00
88.	L31	Uranium	10.00
89.	L99	Vinyl chloride	0.20

SCHEDULE 7

(Paragraphs 1(1)(f) and 2(1)(f), subparagraphs 8(j)(v) and 38(1)(a)(iii) and Schedule 4)

PART 1

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
1.	P026	1-(o-Chlorophenyl)thiourea
2.	P081	1,2,3-Propanetriol, trinitrate
3.	P042	1,2-Benzenediol, 4-[1-hydroxy-2-(methylamino)ethyl]-
4.	P067	1,2-Propylenimine
5.	P185	1,3-Dithiolane-2-carboxaldehyde, 2,4-dimethyl-, O-[(methylamino)-carbonyl]oxime
6.	P004	1,4,5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexa-chloro-1,4,4a,5,8,8a,-hexahydro-, (1alpha,4alpha,4abeta,5alpha,8alpha,8abeta)-
7.	P060	1,4,5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexa-chloro-1,4,4a,5,8,8a-hexahydro-, (1alpha,4alpha,4abeta,5beta,8beta,8abeta)-
8.	P002	1-Acetyl-2-thiourea
9.	P048	2,4-Dinitrophenol

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
10.	P051	2,7:3,6-Dimethanonaphth[2,3-b]oxirene, 3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a,7,7a-octahydro-, (1aalpha,2beta,2abeta,3alpha,6alpha,6abeta,7beta,7aalpha)-, and metabolites
11.	P037	2,7:3,6-Dimethanonaphth[2,3-b]oxirene, 3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a,7,7a-octahydro-, (1aalpha,2beta,2aalpha,3beta,6beta,6aalpha,7beta,7aalpha)-[b]oxirene, 3,4,5,6,9,9-hexachloro-
12.	P045	2-Butanone, 3,3-dimethyl-1-methylthio-, O-[methylamino]carbonyl]oxime
13.	P034	2-Cyclohexyl-4,6-dinitrophenol
14.	P001	2H-1-Benzopyran-2-one, 4-hydroxy-3-(3-oxo-1-phenylbutyl)-, and salts, when present at concentrations greater than 0.3 %
15.	P069	2-Methylacetonitrile
16.	P017	2-Propanone, 1-bromo-
17.	P005	2-Propen-1-ol
18.	P003	2-Propenal
19.	P102	2-Propyn-1-ol
20.	P007	3(2H)-Isoxazolone, 5-(aminomethyl)-
21.	P027	3-Chloropropionitrile
22.	P202	3-Isopropylphenyl N-methylcarbamate
23.	P047	4,6-Dinitro-o-cresol, and salts
24.	P059	4,7-Methano-1H-indene, 1,4,5,6,7,8,8-heptachloro-3a,4,7,7a-tetrahydro-
25.	P008	4-Aminopyridine
26.	P008	4-Pyridinamine
27.	P007	5-(Aminomethyl)-3-isoxazolol
28.	P050	6,9-Methano-2,4,3-benzodioxathiepin, 6,7,8,9,10,10-hexachloro-1,5,5a,6,9,9a-hexahydro-, 3-oxide
29.	P127	7-Benzofuranol, 2,3-dihydro-2,2-dimethyl-, methylcarbamate
30.	P088	7-Oxabicyclo[2.2.1]heptane-2,3-dicarboxylic acid
31.	P023	Acetaldehyde, chloro-
32.	P057	Acetamide, 2-fluoro-
33.	P002	Acetamide, N-(aminothioxomethyl)-
34.	P058	Acetic acid, fluoro-, sodium salt
35.	P003	Acrolein
36.	P070	Aldicarb
37.	P203	Aldicarb sulfone
38.	P004	Aldrin
39.	P005	Allyl alcohol
40.	P046	alpha,a-Dimethylphenethylamine
41.	P072	alpha-Naphthylthiourea
42.	P006	Aluminum phosphide
43.	P009	Ammonium picrate
44.	P119	Ammonium vanadate
45.	P099	Argentate(1-), bis(cyano-C)-, potassium
46.	P010	Arsenic acid H <sub>3</sub> AsO <sub>4</sub>
47.	P012	Arsenic oxide As <sub>2</sub> O <sub>3</sub>
48.	P011	Arsenic oxide As <sub>2</sub> O <sub>5</sub>
49.	P011	Arsenic pentoxide
50.	P012	Arsenic trioxide
51.	P038	Arsine, diethyl-
52.	P036	Arsonous dichloride, phenyl-
53.	P054	Aziridine
54.	P067	Aziridine, 2-methyl-
55.	P013	Barium cyanide

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
56.	P024	Benzenamine, 4-chloro-
57.	P077	Benzenamine, 4-nitro-
58.	P028	Benzene, (chloromethyl)-
59.	P046	Benzenethanamine, alpha,alpha-dimethyl-
60.	P014	Benzenethiol
61.	P188	Benzoic acid, 2-hydroxy-, compd with (3a <i>S</i> -cis)-1,2,3,3a,8,8a-hexahydro-1,3a,8-trimethylpyrrolo[2,3- <i>b</i> ]indol-5-yl methylcarbamate ester (1:1)
62.	P028	Benzyl chloride
63.	P015	Beryllium powder
64.	P017	Bromoacetone
65.	P018	Brucine
66.	P021	Calcium cyanide
67.	P021	Calcium cyanide $\text{Ca}(\text{CN})_2$
68.	P189	Carbamic acid, [(dibutylamino)-thio]methyl-, 2,3-dihydro-2,2-dimethyl-7-benzofuranyl ester
69.	P191	Carbamic acid, dimethyl-, 1-[(dimethyl-amino)carbonyl]-5-methyl-1 <i>H</i> -pyrazol-3-yl ester
70.	P190	Carbamic acid, methyl-, 3-methylphenyl ester
71.	P192	Carbamic acid, dimethyl-, 3-methyl-1-(1-methylethyl)-1 <i>H</i> -pyrazol-5-yl ester
72.	P127	Carbofuran
73.	P022	Carbon disulfide
74.	P095	Carbonic dichloride
75.	P189	Carbosulfan
76.	P023	Chloroacetaldehyde
77.	P029	Copper cyanide
78.	P029	Copper cyanide $\text{Cu}(\text{CN})$
79.	P030	Cyanides (soluble cyanide salts), not otherwise specified
80.	P031	Cyanogen
81.	P033	Cyanogen chloride
82.	P033	Cyanogen chloride $(\text{CN})\text{Cl}$
83.	P016	Dichloromethyl ether
84.	P036	Dichlorophenylarsine
85.	P037	Dieldrin
86.	P038	Diethylarsine
87.	P041	Diethyl- <i>p</i> -nitrophenyl phosphate
88.	P043	Diisopropylfluorophosphate (DFP)
89.	P044	Dimethoate
90.	P191	Dimetilan
91.	P020	Dinoseb
92.	P085	Diphosphoramidate, octamethyl-
93.	P111	Diphosphoric acid, tetraethyl ester
94.	P039	Disulfoton
95.	P049	Dithiobiuret
96.	P050	Endosulfan
97.	P088	Endothall
98.	P051	Endrin
99.	P051	Endrin, and metabolites
100.	P042	Epinephrine
101.	P031	Ethanedinitrile

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
102.	P194	Ethanimidothioic acid, 2-(dimethylamino)-N-[[[(methylamino)carbonyl]oxy]-2-oxo-, methyl ester
103.	P066	Ethanimidothioic acid, N-[[[(methylamino)carbonyl]oxy]-, methyl ester
104.	P101	Ethyl cyanide
105.	P054	Ethyleneimine
106.	P097	Famphur
107.	P056	Fluorine
108.	P057	Fluoroacetamide
109.	P058	Fluoroacetic acid, sodium salt
110.	P198	Formetanate hydrochloride
111.	P197	Formparanate
112.	P065	Fulminic acid, mercury(2+) salt
113.	P059	Heptachlor
114.	P062	Hexaethyl tetraphosphate
115.	P068	Hydrazine, methyl-
116.	P116	Hydrazinecarbothioamide
117.	P063	Hydrocyanic acid
118.	P063	Hydrogen cyanide
119.	P096	Hydrogen phosphide
120.	P060	Isodrin
121.	P192	Isolan
122.	P196	Manganese, bis(dimethylcarbarnodithioato-S,S')-
123.	P196	Manganese dimethyl dithiocarbamate
124.	P202	M-Cumenyl methylcarbamate
125.	P065	Mercury fulminate
126.	P092	Mercury, (acetato-O)phenyl-
127.	P082	Methanamine, N-methyl-N-nitroso-
128.	P064	Methane, isocyanato-
129.	P016	Methane, oxybis(chloro-
130.	P112	Methane, tetranitro-
131.	P118	Methanethiol, trichloro-
132.	P197	Methanimidamide, N,N-dimethyl-N'-[2-methyl-4-[[[(methylamino)carbonyl]oxy]phenyl]-
133.	P198	Methanimidamide, N,N-dimethyl-N'-[3-[[[(methylamino)carbonyl]oxy]phenyl]-, monohydrochloride
134.	P199	Methiocarb
135.	P066	Methomyl
136.	P068	Methyl hydrazine
137.	P064	Methyl isocyanate
138.	P071	Methyl parathion
139.	P190	Metolcarb
140.	P128	Mexacarbate
141.	P073	Nickel carbonyl
142.	P073	Nickel carbonyl Ni(CO) <sub>4</sub> , (T-4)-
143.	P074	Nickel cyanide
144.	P074	Nickel cyanide Ni(CN) <sub>2</sub>
145.	P075	Nicotine, and salts
146.	P076	Nitric oxide
147.	P078	Nitrogen dioxide
148.	P076	Nitrogen oxide NO

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART I — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
149.	P078	Nitrogen oxide NO <sub>2</sub>
150.	P081	Nitroglycerine
151.	P082	N-Nitrosodimethylamine
152.	P084	N-Nitrosomethylvinylamine
153.	P040	O,O-Diethyl O-pyrazinyl phosphorothioate
154.	P085	Octamethylpyrophosphoramidate
155.	P087	Osmium oxide OsO <sub>4</sub> (T-4)
156.	P087	Osmium tetroxide
157.	P194	Oxamyl
158.	P089	Parathion
159.	P024	p-Chloroaniline
160.	P020	Phenol, 2-(1-methylpropyl)-4,6-dinitro-
161.	P009	Phenol, 2,4,6-trinitro-, ammonium salt
162.	P048	Phenol, 2,4-dinitro-
163.	P034	Phenol, 2-cyclohexyl-4,6-dinitro-
164.	P047	Phenol, 2-methyl-4,6-dinitro-, and salts
165.	P202	Phenol, 3-(1-methylethyl)-, methylcarbamate
166.	P201	Phenol, 3-methyl-5-(1-methylethyl)-, methylcarbamate
167.	P199	Phenol, (3,5-dimethyl-4-(methylthio)-, methylcarbamate
168.	P128	Phenol, 4-(dimethylamino)-3,5-dimethyl-, methylcarbamate (ester)
169.	P092	Phenylmercury acetate
170.	P093	Phenylthiourea
171.	P094	Phorate
172.	P095	Phosgene
173.	P096	Phosphine
174.	P041	Phosphoric acid, diethyl 4-nitrophenyl ester
175.	P094	Phosphorodithioic acid, O,O-diethyl S-[(ethylthio)methyl] ester
176.	P039	Phosphorodithioic acid, O,O-diethyl S-[2-(ethylthio)ethyl] ester
177.	P044	Phosphorodithioic acid, O,O-dimethyl S-[2-(methylamino)-2-oxoethyl] ester
178.	P043	Phosphorofluoridic acid, bis(1-methylethyl) ester
179.	P071	Phosphorothioic acid, O,O-dimethyl O-(4-nitrophenyl) ester
180.	P089	Phosphorothioic acid, O,O-diethyl O-(4-nitrophenyl) ester
181.	P040	Phosphorothioic acid, O,O-diethyl O-pyrazinyl ester
182.	P097	Phosphorothioic acid, O-[4-[(dimethylamino)sulfonyl]phenyl] O,O-r dimethyl ester
183.	P188	Physostigmine salicylate
184.	P204	Physostigmine
185.	P110	Plumbane, tetraethyl-
186.	P077	p-Nitroaniline
187.	P098	Potassium cyanide
188.	P098	Potassium cyanide K(CN)
189.	P099	Potassium silver cyanide
190.	P201	Promecarb
191.	P203	Propanal, 2-methyl-2-(methylsulfonyl)-, O-[(methylamino)carbonyl]oxime
192.	P070	Propanal, 2-methyl-2-(methylthio)-, O-[(methylamino)carbonyl]oxime
193.	P101	Propanenitrile
194.	P069	Propanenitrile, 2-hydroxy-2-methyl-
195.	P027	Propanenitrile, 3-chloro-
196.	P102	Propargyl alcohol
197.	P075	Pyridine, 3-(1-methyl-2-pyrrolidinyl)-, (S)-, and salts
198.	P204	Pyrrolo[2,3-b]indol-5-ol, 1,2,3,3a,8,8a-hexahydro-1,3a,8-trimethyl-, methylcarbamate (ester), (3aS-cis)-
199.	P114	Selenious acid, dihalium(1+) salt
200.	P103	Selenourea



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
201.	P104	Silver cyanide
202.	P104	Silver cyanide Ag(CN)
203.	P105	Sodium azide
204.	P106	Sodium cyanide
205.	P106	Sodium cyanide Na(CN)
206.	P108	Strychnidin-10-one, and salts
207.	P018	Strychnidin-10-one, 2,3-dimethoxy-
208.	P108	Strychnine, and salts
209.	P115	Sulfuric acid, diethallium(1+) salt
210.	P110	Tetraethyl lead
211.	P111	Tetraethyl pyrophosphate
212.	P109	Tetraethyldithiopyrophosphate
213.	P112	Tetranitromethane
214.	P062	Tetraphosphoric acid, hexaethyl ester
215.	P113	Thallic oxide
216.	P113	Thallium oxide $Tl_2O_3$
217.	P114	Thallium(I) selenite
218.	P115	Thallium(I) sulfate
219.	P109	Thiodiphosphoric acid, tetraethyl ester
220.	P045	Thiofanox
221.	P049	Thioimidodicarbonic diamide $[(H_2N)C(S)]_2NH$
222.	P014	Thiophenol
223.	P116	Thiosemicarbazide
224.	P026	Thiourea, (2-chlorophenyl)-
225.	P072	Thiourea, 1-naphthalenyl-
226.	P093	Thiourea, phenyl-
227.	P185	Tirpate
228.	P123	Toxaphene
229.	P118	Trichloromethanethiol
230.	P119	Vanadic acid, ammonium salt
231.	P120	Vanadium oxide $V_2O_5$
232.	P120	Vanadium pentoxide
233.	P084	Vinylamine, N-methyl-N-nitroso-
234.	P001	Warfarin, and salts, when present at concentrations greater than 0.3%
235.	P121	Zinc cyanide
236.	P121	Zinc cyanide $Zn(CN)_2$
237.	P122	Zinc phosphide $Zn_3P_2$ , when present at concentrations greater than 10%
238.	P205	Zinc, bis(dimethylcarbamodithioato-S,S')-
239.	P205	Ziram

PART 2

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
1.	U021	[1,1'-Biphenyl]-4,4'-diamine
2.	U073	[1,1'-Biphenyl]-4,4'-diamine, 3,3'-dichloro-
3.	U091	[1,1'-Biphenyl]-4,4'-diamine, 3,3'-dimethoxy-
4.	U095	[1,1'-Biphenyl]-4,4'-diamine, 3,3'-dimethyl-
5.	U208	1,1,1,2-Tetrachloroethane
6.	U209	1,1,1,2,2-Tetrachloroethane

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
7.	U227	1,1,2-Trichloroethane
8.	U078	1,1-Dichloroethylene
9.	U098	1,1-Dimethylhydrazine
10.	U207	1,2,4,5-Tetrachlorobenzene
11.	U085	1,2:3,4-Diepoxybutane
12.	U069	1,2-Benzenedicarboxylic acid, dibutyl ester
13.	U088	1,2-Benzenedicarboxylic acid, diethyl ester
14.	U102	1,2-Benzenedicarboxylic acid, dimethyl ester
15.	U107	1,2-Benzenedicarboxylic acid, dioctyl ester
16.	U028	1,2-Benzenedicarboxylic acid, bis(2-ethylhexyl) ester
17.	U202	1,2-Benzisothiazol-3(2H)-one, 1,1-dioxide, and salts
18.	U066	1,2-Dibromo-3-chloropropane
19.	U079	1,2-Dichloroethylene
20.	U099	1,2-Dimethylhydrazine
21.	U109	1,2-Diphenylhydrazine
22.	U155	1,2-Ethanediamine, N,N-dimethyl-N'-2-pyridinyl-N'-(2-thienylmethyl)-
23.	U193	1,2-Oxathiolane, 2,2-dioxide
24.	U142	1,3,4-Metheno-2H-cyclobuta[cd]pentalen-2-one, 1,1a,3,3a,4,5,5,5a,5b,6-decachlorooctahydro-
25.	U234	1,3,5-Trinitrobenzene
26.	U182	1,3,5-Trioxane, 2,4,6-trimethyl-
27.	U201	1,3-Benzenediol
28.	U364	1,3-Benzodioxol-4-ol, 2,2-dimethyl-,
29.	U278	1,3-Benzodioxol-4-ol, 2,2-dimethyl-, methyl carbamate
30.	U141	1,3-Benzodioxole, 5-(1-propenyl)-
31.	U203	1,3-Benzodioxole, 5-(2-propenyl)-
32.	U090	1,3-Benzodioxole, 5-propyl-
33.	U128	1,3-Butadiene, 1,1,2,3,4,4-hexachloro-
34.	U130	1,3-Cyclopentadiene, 1,2,3,4,5,5-hexachloro-
35.	U084	1,3-Dichloropropene
36.	U190	1,3-Isobenzofurandione
37.	U186	1,3-Pentadiene
38.	U193	1,3-Propane sultone
39.	U074	1,4-Dichloro-2-butene
40.	U108	1,4-Diethyleneoxide
41.	U108	1,4-Dioxane
42.	U166	1,4-Naphthalenedione
43.	U166	1,4-Naphthoquinone
44.	U172	1-Butanamine, N-butyl-N-nitroso-
45.	U031	1-Butanol
46.	U011	1H-1,2,4-Triazol-3-amine
47.	U186	1-Methylbutadiene
48.	U167	1-Naphthalenamine
49.	U279	1-Naphthalenol, methylcarbamate
50.	U194	1-Propanamine
51.	U111	1-Propanamine, N-nitroso-N-propyl-
52.	U110	1-Propanamine, N-propyl-
53.	U235	1-Propanol, 2,3-dibromo-, phosphate (3:1)
54.	U140	1-Propanol, 2-methyl-
55.	U243	1-Propene, 1,1,2,3,3,3-hexachloro-
56.	U084	1-Propene, 1,3-dichloro-
57.	U085	2,2-Bioxirane
58.	T140	2,3,4,6-Tetrachlorophenol
59.	U237	2,4-(1H,3H)-Pyrimidinedione, 5-[bis(2-chloroethyl)amino]-
60.	T140	2,4,5-T

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149SCHEDULE 7 — *Continued*PART 2 — *Continued*HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — *Continued*

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
61.	T140	2,4,5-Trichlorophenol
62.	U408	2,4,6-Tribromophenol
63.	T140	2,4,6-Trichlorophenol
64.	U240	2,4-D, salts and esters
65.	U081	2,4-Dichlorophenol
66.	U101	2,4-Dimethylphenol
67.	U105	2,4-Dinitrotoluene
68.	U197	2,5-Cyclohexadiene-1,4-dione
69.	U147	2,5-Furandione
70.	U082	2,6-Dichlorophenol
71.	U106	2,6-Dinitrotoluene
72.	U236	2,7-Naphthalenedisulfonic acid, 3,3'-[(3,3'-dimethyl[1,1'-biphenyl]-4,4'-diyl)bis(azo)bis[5-amino-4-hydroxy]-, tetrasodium salt
73.	U005	2-Acetylaminofluorene
74.	U159	2-Butanone
75.	U160	2-Butanone, peroxide
76.	U053	2-Butenal
77.	U074	2-Butene, 1,4-dichloro-
78.	U143	2-Butenoic acid, 2-methyl-, 7-[[[2,3-dihydroxy-2-(1-methoxyethyl)-3-methyl-1-oxobutoxy)methyl]-2,3,5,7a-tetrahydro-1H-pyrrolizin-1-yl] ester, [1S-[1alpha(Z), 7(2S*,3R*), 7aalpha]]-
79.	U042	2-Chloroethyl vinyl ether
80.	U125	2-Furancarboxaldehyde
81.	U058	2H-1,3,2-Oxazaphosphorin-2-amine, N,N-bis(2-chloroethyl)tetrahydro-, 2-oxide
82.	U248	2H-1-Benzopyran-2-one, 4-hydroxy-3-(3-oxo-1-phenyl-butyl)-, and salts, when present at concentrations of 0.3% or less
83.	U116	2-Imidazolidinethione
84.	U168	2-Naphthalenamine
85.	U171	2-Nitropropane
86.	U191	2-Picoline
87.	U002	2-Propanone
88.	U007	2-Propenamide
89.	U009	2-Propenenitrile
90.	U152	2-Propenenitrile, 2-methyl-
91.	U008	2-Propenoic acid
92.	U118	2-Propenoic acid, 2-methyl-, ethyl ester
93.	U162	2-Propenoic acid, 2-methyl-, methyl ester
94.	U113	2-Propenoic acid, ethyl ester
95.	U073	3,3'-Dichlorobenzidine
96.	U091	3,3'-Dimethoxybenzidine
97.	U095	3,3'-Dimethylbenzidine
98.	U148	3,6-Pyridazinedione, 1,2-dihydro-
99.	U157	3-Methylcholanthrene
100.	U164	4(1H)-Pyrimidinone, 2,3-dihydro-6-methyl-2-thioxo-
101.	U158	4,4'-Methylenebis(2-chloroaniline)
102.	U036	4,7-Methano-1H-indene, 1,2,4,5,6,7,8,8-octachloro-2,3,3a,4,7,7a-hexahydro-
103.	U030	4-Bromophenyl phenyl ether
104.	U049	4-Chloro-o-toluidine, hydrochloride
105.	U161	4-Methyl-2-pentanone
106.	U059	5,12-Naphthacenedione,8-acetyl-10-[(3-amino-2,3,6-trideoxy)-alpha-L-lyxo-hexopyranosyl)oxy]-7,8,9,10-tetrahydro-6,8,11-trihydroxy-1-methoxy-, (8S-cis)-
107.	U181	5-Nitro-o-toluidine
108.	U094	7,12-Dimethylbenz[a]anthracene
109.	U367	7-Benzofuranol, 2,3-dihydro-2,2-dimethyl-
110.	U394	A2213
111.	U001	Acetaldehyde
112.	U034	Acetaldehyde, trichloro-

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

## SCHEDULE 7 — Continued

## PART 2 — Continued

## HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
113.	U187	Acetamide, N-(4-ethoxyphenyl)-
114.	U005	Acetamide, N-9H-fluoren-2-yl-
115.	U112	Acetic acid ethyl ester
116.	T140	Acetic acid, (2,4,5-trichlorophenoxy)-
117.	U240	Acetic acid, (2,4-dichlorophenoxy)-, salts and esters
118.	U144	Acetic acid, lead(2+) salt
119.	U214	Acetic acid, thallium(1+) salt
120.	U002	Acetone
121.	U003	Acetonitrile
122.	U004	Acetophenone
123.	U006	Acetyl chloride
124.	U007	Acrylamide
125.	U008	Acrylic acid
126.	U009	Acrylonitrile
127.	U096	alpha, alpha-Dimethylbenzylhydroperoxide
128.	U167	alpha-Naphthylamine
129.	U011	Amitrole
130.	U012	Aniline
131.	U136	Arsinic acid, dimethyl-
132.	U014	Auramine
133.	U015	Azaserine
134.	U010	Azirino[2,3,3,4]pyrrolo[1,2-a]indole-4,7-dione, 6-amino-8-[[[aminocarbonyloxy]methyl]-1,1a,2,8,8a,8b-hexahydro-8a-methoxy-5-methyl-, [1aS-(1aalpha,8beta,8aalpha,8ba)pha]]-
135.	U280	Barban
136.	U278	Bendiocarb
137.	U364	Bendiocarb phenol
138.	U271	Benomyl
139.	U018	Benz[a]anthracene
140.	U094	Benz[a]anthracene, 7,12-dimethyl-
141.	U016	Benz[c]acridine
142.	U157	Benz[j]aceanthrylene, 1,2-dihydro-3-methyl-
143.	U017	Benzal chloride
144.	U192	Benzamide, 3,5-dichloro-N-(1,1-dimethyl-2-propynyl)-
145.	U012	Benzenamine
146.	U328	Benzenamine, 2-methyl-
147.	U222	Benzenamine, 2-methyl-, hydrochloride
148.	U181	Benzenamine, 2-methyl-5-nitro-
149.	U014	Benzenamine, 4,4-carbonimidoylbis[N,N-dimethyl-
150.	U158	Benzenamine, 4,4-methylenebis[2-chloro-
151.	U049	Benzenamine, 4-chloro-2-methyl-, hydrochloride
152.	U353	Benzenamine, 4-methyl-
153.	U093	Benzenamine, N,N-dimethyl-4-(phenylazo)-
154.	U019	Benzene
155.	U055	Benzene, (1-methylethyl)-
156.	U017	Benzene, (dichloromethyl)-
157.	U023	Benzene, (trichloromethyl)-
158.	U247	Benzene, 1,1-(2,2,2-trichloroethylidene)bis[4-methoxy-
159.	U207	Benzene, 1,2,4,5-tetrachloro-
160.	U070	Benzene, 1,2-dichloro-
161.	U234	Benzene, 1,3,5-trinitro-
162.	U071	Benzene, 1,3-dichloro-
163.	U223	Benzene, 1,3-diisocyanatomethyl-
164.	U072	Benzene, 1,4-dichloro-
165.	U030	Benzene, 1-bromo-4-phenoxy-

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

SCHEDULE 7 — *Continued*

PART 2 — *Continued*

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — *Continued*

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
166.	U105	Benzene, 1-methyl-2,4-dinitro-
167.	U106	Benzene, 2-methyl-1,3-dinitro-
168.	U037	Benzene, chloro-
169.	U239	Benzene, dimethyl-
170.	U127	Benzene, hexachloro-
171.	U056	Benzene, hexahydro-
172.	U220	Benzene, methyl-
173.	U169	Benzene, nitro-
174.	U183	Benzene, pentachloro-
175.	U185	Benzene, pentachloronitro-
176.	U061	Benzene, 1,1-(2,2,2-trichloroethylidene)bis[4-chloro-
177.	U060	Benzene, 1,1-(2,2-dichloroethylidene)bis[4-chloro-
178.	U038	Benzeneacetic acid, 4-chloro-alpha-(4-chlorophenyl)-alpha-hydroxy-, ethyl ester
179.	U035	Benzenebutanoic acid, 4-[bis(2-chloroethyl)amino]-
180.	U221	Benzenediamine, ar-methyl-
181.	U020	Benzenesulfonic acid chloride
182.	U020	Benzenesulfonyl chloride
183.	U021	Benzidine
184.	U022	Benzo[a]pyrene
185.	U064	Benzo[rs]pentaphene
186.	U023	Benzotrichloride
187.	U047	beta-Chloronaphthalene
188.	U168	beta-Naphthylamine
189.	U225	Bromoform
190.	U136	Cacodylic acid
191.	U032	Calcium chromate
192.	U280	Carbamic acid, (3-chlorophenyl)-, 4-chloro-2-butyryl ester
193.	U409	Carbamic acid, [1,2-phenylenebis (iminocarbonothioyl)]bis-, dimethyl ester
194.	U271	Carbamic acid, [1-[(butylamino)carbonyl]-1H-benzimidazol-2-yl]-, methyl ester
195.	U372	Carbamic acid, 1H-benzimidazol-2-yl,methyl ester
196.	U238	Carbamic acid, ethyl ester
197.	U178	Carbamic acid, methylnitroso-, ethyl ester
198.	U373	Carbamic acid, phenyl-, 1-methylethyl ester
199.	U097	Carbamic chloride, dimethyl-
200.	U114	Carbamodithioic acid, 1,2-ethanedithylbis-, salts and esters
201.	U389	Carbamothioic acid, bis(1-methylethyl)-, S-(2,3,3-trichloro-2-propenyl)ester
202.	U062	Carbamothioic acid, bis(1-methylethyl)-S-(2,3-dichloro-2-propenyl) ester
203.	U387	Carbamothioic acid, dipropyl-, S-(phenylmethyl) ester
204.	U279	Carbaryl
205.	U372	Carbendazim
206.	U367	Carbofuran phenol
207.	U033	Carbon oxyfluoride
208.	U211	Carbon tetrachloride
209.	U215	Carbonic acid, dithallium(1+) salt
210.	U033	Carbonic difluoride
211.	U156	Carbonochloridic acid, methyl ester
212.	U034	Chloral
213.	U035	Chlorambucil
214.	U036	Chlordane, alpha and gamma isomers
215.	U026	Chlormaphazin
216.	U037	Chlorobenzene
217.	U038	Chlorobenzilate
218.	U044	Chloroform
219.	U046	Chloromethyl methyl ether

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
220.	U032	Chromic acid $H_2CrO_4$ calcium salt
221.	U050	Chrysene
222.	U051	Creosote
223.	U052	Cresol (cresylic acid)
224.	U053	Crotonaldehyde
225.	U055	Cumene
226.	U246	Cyanogen bromide (CN)Br
227.	U056	Cyclohexane
228.	U129	Cyclohexane, 1,2,3,4,5,6-hexachloro-, (1alpha,2alpha,3beta,4alpha,5alpha,6beta)-
229.	U057	Cyclohexanone
230.	U058	Cyclophosphamide
231.	U059	Daunomycin
232.	U060	DDD
233.	U061	DDT
234.	U206	D-Glucose, 2-deoxy-2-[(methylnitrosoamino)-carbonyl]amino]-
235.	U062	Diallate
236.	U063	Dibenz[a,h]anthracene
237.	U064	Dibenzo[a,i]pyrene
238.	U069	Dibutyl phthalate
239.	U075	Dichlorodifluoromethane
240.	U025	Dichloromethyl ether
241.	U027	Dichloroisopropyl ether
242.	U024	Dichloromethoxy ethane
243.	U088	Diethyl phthalate
244.	U395	Diethylene glycol, dicarbamate
245.	U028	Diethylhexyl phthalate
246.	U089	Diethylstilbestrol
247.	U090	Dihydrosafrole
248.	U102	Dimethyl phthalate
249.	U103	Dimethyl sulfate
250.	U092	Dimethylamine
251.	U097	Dimethylcarbamoyl chloride
252.	U107	Di-n-octyl phthalate
253.	U111	Di-n-propylnitrosamine
254.	U110	Dipropylamine
255.	U041	Epichlorohydrin
256.	U001	Ethanal
257.	U404	Ethanamine, N,N-diethyl-
258.	U174	Ethanamine, N-ethyl-N-nitroso-
259.	U208	Ethane, 1,1,1,2-tetrachloro-
260.	U226	Ethane, 1,1,1-trichloro-
261.	U209	Ethane, 1,1,2,2-tetrachloro-
262.	U227	Ethane, 1,1,2-trichloro-
263.	U024	Ethane, 1,1'-[methylenebis(oxy)]bis[2-chloro-
264.	U076	Ethane, 1,1-dichloro-
265.	U117	Ethane, 1,1'-oxybis-
266.	U025	Ethane, 1,1'-oxybis[2-chloro-
267.	U067	Ethane, 1,2-dibromo-
268.	U077	Ethane, 1,2-dichloro-
269.	U131	Ethane, hexachloro-
270.	U184	Ethane, pentachloro-
271.	U218	Ethanethioamide
272.	U394	Ethanimidothioic acid, 2-(dimethylamino)-N-hydroxy-2-oxo-, methyl ester
273.	U410	Ethanimidothioic acid, N,N'-[thiobis[(methylimino)carbonyloxy]]bis-, dimethyl ester

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
274.	U173	Ethanol, 2,2'-(nitrosoimino)bis-
275.	U395	Ethanol, 2,2'-oxybis-, dicarbamate
276.	U359	Ethanol, 2-ethoxy-
277.	U004	Ethanone, 1-phenyl-
278.	U042	Ethene, (2-chloroethoxy)-
279.	U078	Ethene, 1,1-dichloro-
280.	U079	Ethene, 1,2-dichloro-, (E)-
281.	U043	Ethene, chloro-
282.	U210	Ethene, tetrachloro-
283.	U228	Ethene, trichloro-
284.	U112	Ethyl acetate
285.	U113	Ethyl acrylate
286.	U238	Ethyl carbamate (urethane)
287.	U117	Ethyl ether
288.	U118	Ethyl methacrylate
289.	U119	Ethyl methanesulfonate
290.	U067	Ethylene dibromide
291.	U077	Ethylene dichloride
292.	U359	Ethylene glycol monoethyl ether
293.	U115	Ethylene oxide
294.	U114	Ethylenebisdithiocarbamic acid, salts and esters
295.	U116	Ethylenethiourea
296.	U076	Ethylidene dichloride
297.	U120	Fluoranthene
298.	U122	Formaldehyde
299.	U123	Formic acid
300.	U124	Furan
301.	U213	Furan, tetrahydro-
302.	U125	Furfural
303.	U124	Furfuran
304.	U206	Glucopyranose, 2-deoxy-2-(3-methyl-3-nitrosoureido)-, D-
305.	U126	Glycidylaldehyde
306.	U163	Guanidine, N-methyl-N'-nitro-N-nitroso-
307.	U127	Hexachlorobenzene
308.	U128	Hexachlorobutadiene
309.	U130	Hexachlorocyclopentadiene
310.	U131	Hexachloroethane
311.	U132	Hexachlorophene
312.	U243	Hexachloropropene
313.	U133	Hydrazine
314.	U098	Hydrazine, 1,1-dimethyl-
315.	U086	Hydrazine, 1,2-diethyl-
316.	U099	Hydrazine, 1,2-dimethyl-
317.	U109	Hydrazine, 1,2-diphenyl-
318.	U134	Hydrofluoric acid
319.	U134	Hydrogen fluoride
320.	U135	Hydrogen sulfide
321.	U135	Hydrogen sulfide H <sub>2</sub> S
322.	U096	Hydroperoxide, 1-methyl-1-phenylethyl-
323.	U137	Indeno[1,2,3-cd]pyrene
324.	U140	Isobutyl alcohol
325.	U141	Isosafrole
326.	U142	Kepone
327.	U143	Lasiocarpine

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

SCHEDULE 7 — *Continued*

PART 2 — *Continued*

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — *Continued*

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
328.	U144	Lead acetate
329.	U145	Lead phosphate
330.	U146	Lead subacetate
331.	U146	Lead, bis(acetato-O)tetrahydroxytri-
332.	U129	Lindane
333.	U150	L-Phenylalanine, 4-[bis(2-chloroethyl)amino]-
334.	U015	L-Serine, diazoacetate (ester)
335.	U147	Maleic anhydride
336.	U148	Maleic hydrazide
337.	U149	Malononitrile
338.	U071	m-Dichlorobenzene
339.	U150	Melphalan
340.	U151	Mercury
341.	U152	Methacrylonitrile
342.	U092	Methanamine, N-methyl-
343.	U029	Methane, bromo-
344.	U045	Methane, chloro-
345.	U046	Methane, chloromethoxy-
346.	U068	Methane, dibromo-
347.	U080	Methane, dichloro-
348.	U075	Methane, dichlorodifluoro-
349.	U138	Methane, iodo-
350.	U211	Methane, tetrachloro-
351.	U225	Methane, tribromo-
352.	U044	Methane, trichloro-
353.	U121	Methane, trichlorofluoro-
354.	U119	Methanesulfonic acid, ethyl ester
355.	U153	Methanethiol
356.	U154	Methanol
357.	U155	Methapyrilene
358.	U247	Methoxychlor
359.	U154	Methyl alcohol
360.	U029	Methyl bromide
361.	U045	Methyl chloride
362.	U156	Methyl chlorocarbonate
363.	U226	Methyl chloroform
364.	U159	Methyl ethyl ketone (MEK)
365.	U160	Methyl ethyl ketone peroxide
366.	U138	Methyl iodide
367.	U161	Methyl isobutyl ketone
368.	U162	Methyl methacrylate
369.	U068	Methylene bromide
370.	U080	Methylene chloride
371.	U164	Methythiouracil
372.	U010	Mitomycin C
373.	U163	MNNG
374.	U086	N,N'-Diethylhydrazine
375.	U026	Naphthalenamine, N,N'-bis(2-chloroethyl)-
376.	U165	Naphthalene
377.	U047	Naphthalene, 2-chloro-
378.	U031	n-Butyl alcohol
379.	U217	Nitric acid, thallium(1+) salt
380.	U169	Nitrobenzene
381.	U173	N-Nitrosodiethanolamine



SCHEDULE 7 — *Continued*

PART 2 — *Continued*

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — *Continued*

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
382.	U174	N-Nitrosodiethylamine
383.	U172	N-Nitrosodi-n-butylamine
384.	U176	N-Nitroso-N-ethylurea
385.	U177	N-Nitroso-N-methylurea
386.	U178	N-Nitroso-N-methylurethane
387.	U179	N-Nitrosopiperidine
388.	U180	N-Nitrosopyrrolidine
389.	U194	n-Propylamine
390.	U087	O,O-Diethyl S-methyl dithiophosphate
391.	U048	o-Chlorophenol
392.	U070	o-Dichlorobenzene
393.	U328	o-Toluidine
394.	U222	o-Toluidine hydrochloride
395.	U115	Oxirane
396.	U041	Oxirane, (chloromethyl)-
397.	U126	Oxiranecarboxaldehyde
398.	U182	Paraldehyde
399.	U197	p-Benzoquinone
400.	U039	p-Chloro-m-cresol
401.	U072	p-Dichlorobenzene
402.	U093	p-Dimethylaminobenzene
403.	U183	Pentachlorobenzene
404.	U184	Pentachloroethane
405.	U185	Pentachloronitrobenzene (PCNB)
406.	T140	Pentachlorophenol
407.	U161	Pentanol, 4-methyl-
408.	U187	Phenacetin
409.	U188	Phenol
410.	U411	Phenol, 2-(1-methylethoxy)-, methylcarbamate
411.	T140	Phenol, 2,3,4,6-tetrachloro-
412.	T140	Phenol, 2,4,5-trichloro-
413.	T140	Phenol, 2,4,6-trichloro-
414.	U081	Phenol, 2,4-dichloro-
415.	U101	Phenol, 2,4-dimethyl-
416.	U082	Phenol, 2,6-dichloro-
417.	U048	Phenol, 2-chloro-
418.	U089	Phenol, 4,4'-(1,2-diethyl-1,2-ethenediyl)bis-, (E)-
419.	U039	Phenol, 4-chloro-3-methyl-
420.	U170	Phenol, 4-nitro-
421.	U052	Phenol, methyl-
422.	T140	Phenol, pentachloro-
423.	U132	Phenol, 2,2'-methylenebis[3,4,6-trichloro-
424.	U145	Phosphoric acid, lead(2+) salt (2:3)
425.	U087	Phosphorodithioic acid, O,O-diethyl S-methyl ester
426.	U189	Phosphorus sulfide
427.	U190	Phthalic anhydride
428.	U179	Piperidine, 1-nitroso-
429.	U170	p-Nitrophenol
430.	U192	Pronamide
431.	U066	Propane, 1,2-dibromo-3-chloro-
432.	U083	Propane, 1,2-dichloro-
433.	U027	Propane, 2,2'-oxybis[2-chloro-
434.	U171	Propane, 2-nitro-
435.	U149	Propanedinitrile

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
436.	T140	Propanoic acid, 2-(2,4,5-O (trichlorophenoxy)-
437.	U373	Propham
438.	U411	Propoxur
439.	U083	Propylene dichloride
440.	U387	Prosulfocarb
441.	U353	p-Toluidine
442.	U196	Pyridine
443.	U191	Pyridine, 2-methyl-
444.	U180	Pyrrolidine, 1-nitroso-
445.	U200	Reserpine
446.	U201	Resorcinol
447.	U202	Saccharin, and salts
448.	U203	Safrole
449.	U204	Selenious acid
450.	U204	Selenium dioxide
451.	U205	Selenium sulfide
452.	U205	Selenium sulfide SeS <sub>2</sub>
453.	T140	Silvex (2,4,5-TP)
454.	U206	Streptozotocin
455.	U189	Sulfur phosphide
456.	U103	Sulfuric acid, dimethyl ester
457.	U210	Tetrachloroethylene
458.	U213	Tetrahydrofuran
459.	U216	Thallium chloride TlCl
460.	U214	Thallium(I) acetate
461.	U215	Thallium(I) carbonate
462.	U216	Thallium(I) chloride
463.	U217	Thallium(I) nitrate
464.	U218	Thioacetamide
465.	U410	Thiodicarb
466.	U153	Thiomethanol
467.	U244	Thioperoxydicarbonic diamide[(H <sub>2</sub> N)C(S)] <sub>2</sub> S <sub>2</sub> , tetramethyl-
468.	U409	Thiophanate-methyl
469.	U219	Thiourea
470.	U244	Thiram
471.	U220	Toluene
472.	U223	Toluene diisocyanate
473.	U221	Toluenediamine
474.	U389	Triallate
475.	U228	Trichloroethylene
476.	U121	Trichloromonofluoromethane
477.	U404	Triethylamine
478.	U235	Tris(2,3-dibromopropyl) phosphate
479.	U236	Trypan blue
480.	U237	Uracil mustard
481.	U176	Urea, N-ethyl-N-nitroso-
482.	U177	Urea, N-methyl-N-nitroso-
483.	U043	Vinyl chloride
484.	U248	Warfarin, and salts, when present at concentrations of 0.3% or less
485.	U239	Xylene
486.	U200	Yohimban-16-carboxylic acid, 11,17-dimethoxy-18-[(3,4,5-trimethoxybenzoyl)oxy]-, methyl ester, (3beta,16beta,17alpha,18beta,20alpha)-
487.	U249	Zinc phosphide Zn <sub>3</sub> P <sub>2</sub> , when present at concentrations of 10% or less

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

SCHEDULE 8  
(Subparagraph 2(2)(e)(i))

EXCLUDED MATERIALS

Item	Description
1.	Slags, skimmings and dross containing precious metals, copper or zinc for further refining
2.	Platinum group metal (PGM) automobile catalysts
3.	Electronic scrap such as circuit boards, electronic components and wires that are suitable for base or precious metal recovery
4.	Brass in the form of turnings, borings and choppings

SCHEDULE 9  
(Section 4)  
MOVEMENT DOCUMENT

MOVEMENT DOCUMENT  
DOCUMENT DE MOUVEMENT

Movement Document Reference No.  
N° de référence du document de mouvement

<b>A Exporter / foreign exporter</b> <b>Exportateur / expéditeur étranger</b> Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial		<b>B Carrier</b> <b>Transporteur</b> Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial		Reference Note: if other movement document(s) used N° de référence des autres documents de mouvement utilisés																																																																												
Company name / Nom de l'entreprise		Company name / Nom de l'entreprise		<b>C Importer / foreign receiver</b> <b>Importateur / destinataire étranger</b> Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial  Importer / foreign receiver information same as in Part A Les renseignements sur l'importateur / le destinataire étranger sont les mêmes qu'à la partie A <input type="checkbox"/> Yes / Oui <input type="checkbox"/> No, complete the box below / Non, remplir la case ci-dessous																																																																												
Mailing address / Adresse postale City / Ville Province Postal code / Code postal		Mailing address / Adresse postale City / Ville Province Postal code / Code postal																																																																														
E-mail / Courriel électronique Tel. No. / N° de tél. ( )		E-mail / Courriel électronique Tel. No. / N° de tél. ( )																																																																														
Shipping site address / Adresse du lieu de l'expédition City / Ville Province Postal code / Code postal		Vehicle / Véhicule Registration No. / N° d'immatriculation Prov. Trailer - Rail car No. 1 1 <sup>re</sup> remorque - wagon Trailer - Rail car No. 2 2 <sup>e</sup> remorque - wagon																																																																														
Importer / foreign receiver Importateur / destinataire étranger Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial Mailing address / Adresse postale City / Ville Province Postal code / Code postal E-mail / Courriel électronique Tel. No. / N° de tél. ( ) Receiving site address / Adresse du lieu de destination City / Ville Province Postal code / Code postal		Port of entry Port d'entrée Port of exit Port de sortie Carrier certification: I certify that I have received waste or recyclable material from the exporter / foreign exporter for delivery to the importer / foreign receiver as set out in Part A and that the information contained in Part B is correct and complete. / Attestation du transporteur: J'affirme avoir reçu les déchets ou matériaux recyclables de l'exportateur / expéditeur étranger en vue de leur livraison à l'importateur / au destinataire étranger. Les infos figurent à la partie A et que les renseignements fournis à la partie B sont exacts et complets. Name of authorized person (print) Tel. No. / N° de tél. ( ) Nom de l'agent autorisé (caractères d'imprimerie)		Date received / Date de réception Year / Année Month / Mois Day / Jour Time / Heure <input type="checkbox"/> AM <input type="checkbox"/> PM If waste or recyclable material is to be transferred, specify intended company name / Si les déchets ou matériaux recyclables doivent être transférés, préciser le nom du destinataire																																																																												
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Special handling / Manipulation spéciale <input type="checkbox"/> Attached / Ci-joint <input type="checkbox"/> As follows / Ci-dessous						Date shipped / Date d'expédition Year / Année Month / Mois Day / Jour Time / Heure <input type="checkbox"/> AM <input type="checkbox"/> PM Scheduled arrival date / Date d'arrivée prévue Year / Année Month / Mois Day / Jour																																																																										

This is Exhibit B referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 6th day  
of September, 2011

[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Gordon F. Martin, a Commissioner, etc.,  
Province of Ontario, for B. Gordon F. Martin,  
Barrister and Solicitor.  
Expires April 6, 2012.

00116-A0079574 pages 1 - 4



Statement of:

Sr. Edward G. **WELLS** # 446  
Senior Investigator  
Environment Canada  
Environmental Enforcement

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I am a Senior Investigator employed by Environment Canada assigned to the Environmental Enforcement Division, Ontario Region. I am designated by the Minister of Environment as an Enforcement Officer under the Canadian Environmental Protection Act, 1999. I have been employed in this position since August 2000. I have twenty-eight years law enforcement experience. I attended the Ontario Police College and received training in general police duties, fraud investigations and criminal investigations. I have also attended the RCM Police College where I received general enforcement training for environmental enforcement. I have seventeen years experience conducting fraud investigations, twelve of which were leading major fraud investigations for the Government of Canada.

On September 16, 2005 I met with Bradley **MAY**, the Manager of the Investigation Section to discuss a potential file. During this meeting the following information was relayed to me:

1. Brad **SIMPSON** a Senior Inspector with Environment Canada's Environmental Enforcement Division Inspection Section had recommended a file for investigation.
2. This referral identified RPR Environmental Inc., of Stoney Creek, Ontario as the subject of the investigation.
3. That the company had failed to properly complete, by providing a notice number, and submit hazardous waste manifests as required by the *Export and Import of Hazardous Waste Regulations* ("EHW").
4. That this non-compliance had continued over several months.

On September 16, 2005, an investigation was assigned to me by Bradley **MAY** the Manager of the Investigation Section. The file was assigned through Environment Canada's case file system and issued identification number 3007-2005-09-16-001.

On October 11, 2005, I reviewed the files and noted that faxed copies of corrected manifest(s) had been sent to Jan **KROSE** of the Waste Movement Division and Bradley **SIMPSON** of the Environmental Enforcement Division, both of which are part of Environment Canada. These faxed documents were dated September 26, 2005.



Statement of:

**Sr. Edward G. WELLS # 446**  
**Senior Investigator**  
**Environment Canada**  
**Environmental Enforcement**

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During the review I also noted that Bradley **SIMPSON** had contacted RPR Environmental and informed them of the problem and they promised to correct the matter by September 23, 2005.

On **MAY 4, 2006** I tasked Investigator Edward N. **WELLS** to conduct a further review of the file, including putting together an investigative plan.

On June 25, 2007 I reviewed Investigator Edward N. **WELLS** search warrant, including his grounds to believe and his offence recommendations.

On July 9, 2007 in the company Investigator Edward N. **WELLS**, I attended the address of RPR Environmental Inc. 164 South Service Road, Stoney Creek. The purpose of this visit was to conduct passive observation of the business in preparation for the execution of a search warrant.

On July 18, 2007, in the company Investigator Edward N. **WELLS**, I attended the offices of Waste Management Division located in Gatineau, Quebec.

Well at the offices we met with Joe **WITTWER** and Jan **KROSE**.

Jan **KROSE** assisted in the identification of the non compliant manifests.

On August 2, 2007 in the company Investigator Edward N. **WELLS**, I attended the Hamilton Court for the purpose of applying for a search warrant.

On August 2, 2007 in the company Investigator Edward N. **WELLS**, I met with the Justice of the Peace. She informed us that she would not sign the warrant indicating that she felt it was too broad and sweeping.

On August 2, 2007 I tasked Investigator Edward N. **WELLS** to rewrite the warrant.

On August 3, 2007 I received a phone call from Investigator Edward N. **WELLS** that the rewritten warrant had been signed.



Statement of:

**Sr. Edward G. WELLS # 446**  
Senior Investigator  
Environment Canada  
Environmental Enforcement

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On August 8, 2007 I attended the Environmental Enforcements Burlington Office, where a briefing was conducted with the search warrant team. A package titled "RPR Environmental Instructions" was provided to each member.

On August 9, 2007 at 0910 a search warrant was executed at the offices of RPR Environmental located at 164-168 South Service Road.

Upon entry I spoke with Frances **SCANDINAVO**, senior company representative on site.

Frances **SCANDINAVO** was shown the original warrant and a copy was given to her.

Once the staff departed the offices the search team entered the building. Video was taken of the offices before the search began.

At 1755 the search was completed and I took custody of all seized evidence, where it was transported to my offices.

All evidence was locked away in evidence lockers 5 and 6.

On August 15, 2007 in the company Investigator Edward N. **WELLS**, a review of the seized evidence was conducted.

Bag # 22 contained a folder marked "Out Bound Manifests" "January 2005. All original manifests for the month were located.

Manifest number TT96113-2 (Exhibit # ) was completed correctly on the same date as manifest TT9623-7 which was done on the same date. I noted this **MAY** indicate the company new how to complete a manifest correctly.

Bag # 006 (Exhibit # ) indicated knowledge company was aware of the issues involving late manifest.

On August 16, 2007 in the company Investigator Edward N. **WELLS** a review of the evidence continued.





Statement of:

Sr. Edward G. **WELLS** # 446  
Senior Investigator  
Environment Canada  
Environmental Enforcement

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On August 17, 2007 in the company Investigator Edward N. **WELLS** a review of the evidence continued.


Bag # 057 (Exhibit # ) contents a letter dated 8-November-2004. The body of the letter shows the company had been informed that they may face prosecution if in violation of Export/Import Hazardous Waste Regulations.

Bag # 056 (Exhibit # ) contains the export permit for the period of 24-Novemeber-2004 to 23-November-2005 for UN 1993.

Bag # 055 (Exhibit # ) contains the export permit for the period of 27-October-27-October-2005 for UN 1992; UN 1263; UN1993.

Bag # 044 (Exhibit # ) contains downloaded version of the Export/Import Hazardous Waste Regulations. This indicates knowledge of the regulations.

THIS CONCLUDES THE EVIDENCE.

This is Exhibit C referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 6th day  
of September, 2011  


Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

2009-May-01 12:57 PM Environment Canada 416-739-5705

Environment Canada / Environnement Canada

06956-A0079108 pages 1 - 2

**PERFORMANCE MANAGEMENT AND COMMUNICATION / GESTION DU RENDEMENT ET COMMUNICATION**  
**OVERALL PERFORMANCE REVIEW FORM / FORMULE D'EXAMEN DU RENDEMENT GLOBAL**

(For all employees except Pay Performance Employees, Research Scientists and Management Trainees)  
(Pour tous les employés sauf les employés assujettis à la rémunération au rendement, les chercheurs scientifiques et les stagiaires en gestion)

<b>1. FEEDBACK LANGUAGE / LANGUE DE LA RÉTROACTION</b>		
To be completed by employees occupying bilingual positions in designated bilingual regions À remplir par les employés occupant des postes bilingues dans des régions désignées bilingues		
I request that this performance review be completed in the following official language : Je demande que cet examen du rendement soit rempli dans la langue officielle suivante :		
	English Anglais	French Français
To be completed by the MANAGER of the employee being evaluated if the latter has supervisory duties/ À remplir par le/la GESTIONNAIRE de l'employé(e) évalué(e) si ce dernier ou cette dernière a des fonctions de supervision		
This employee met his/her official languages obligations in his/her capacity of supervisor. Cet(te) employé(e) a respecté ses obligations touchant les langues officielles en sa qualité de superviseur.		
	Yes/Oui	No/Non
Manager's Initials / Initiales du (de la) gestionnaire		

<b>2. IDENTIFICATION</b>		
Employee Surname and Given Names / Nom et prénoms de l'employé(e) Edward Nicholas WELLS		Personal Record Identifier / Code d'identification du dossier personnel
Position title / Titre du poste Environmental Investigator		Position Group and Level/ Groupe et niveau du poste GT-02
Branch & Directorate / Direction et direction générale Environmental Enforcement Division (Ontario)		Location / Lieu de travail TORONTO
Manager's Name / Nom du (de la) gestionnaire Bradley MAY	Manager's Position Title / Titre du poste du (de la) gestionnaire Manager, Investigation Section	Review Period / Période visée From /Du : To /Au : April 01, 2005 to March 31, 2006

The Overall Performance Review Discussion should confirm the feedback exchanged throughout the review period and include a summary of the employee's performance and major achievements. /  
La discussion portant sur l'examen du rendement global devrait confirmer la rétroaction échangée tout au long de la période d'examen et inclure un résumé du rendement de l'employé(e) et de ses principales réalisations.

**3. PERFORMANCE MANAGEMENT AND COMMUNICATION CONFIRMATION /  
CONFIRMATION DE LA GESTION DU RENDEMENT ET DE LA COMMUNICATION**

We have exchanged sufficient feedback throughout the review period in accordance with previously agreed upon expectations and approach. /  
Nous avons échangé une rétroaction suffisante tout au long de la période d'examen conformément aux attentes et à l'approche sur lesquelles nous nous étions entendus.

  
Employee's Signature / Signature de l'employé(e)

21 July 2006  
Date

Yes/Oui

No/Non

  
Manager's Signature / Signature du (de la) gestionnaire

226/07/21  
Date

Yes/Oui

No/Non

Supporting documentation attached or Written Summary on reverse  
Documentation justificative jointe ou résumé écrit à l'endos

A Verbal Summary is sufficient.  
Un résumé verbal est suffisant.

**4. REVIEW / RÉVISION**

I would like to discuss the review of my performance with the Reviewing Officer/Review Committee.  
J'aimerais discuter de l'examen de mon rendement avec l'agent/le comité de révision.

Yes/Oui

No/Non

  
Employee's Signature /  
Signature de l'employé(e)

21 July 2006  
Date

  
Manager's Signature /  
Signature du (de la) gestionnaire

226/07/21  
Date

Reviewing Officer Signature/Signature de l'agent réviseur

Date

Environment Canada / Environnement Canada

Protected once completed/Protégé une fois rempli

**5. PERFORMANCE REVIEW SUMMARY** (This section, which can be written or verbal depending on the agreement made by both parties, is completed by the manager based on the feedback exchanged with the employee during the discussion of the overall performance.)  
**RÉSUMÉ DE L'EXAMEN DU RENDEMENT** (Cette partie, qui peut être écrite ou verbale suivant l'entente conclue par les deux parties, est remplie par le gestionnaire en fonction de la rétroaction échangée avec l'employé(e) pendant la discussion du rendement global.)

s.19(1) Review employee's performance against attached objectives, summarize his/her major achievements and discuss areas for improvement.  
Examiner le rendement de l'employé(e) en fonction des objectifs ci-joints, résumer ses principales réalisations et discuter des aspects à améliorer.

**6. LEARNING ACTIVITIES / ACTIVITÉS D'APPRENTISSAGE**

Identify on the job and technical training required by the employee to perform his/her current and evolving duties and discuss other related learning activities, such as assignments, mentoring, university courses, reading material, etc. / Indiquer la formation nécessaire à l'employé(e) pour s'acquitter de ses fonctions courantes et en évolution et discuter des autres activités d'apprentissage pertinentes, comme les affectations, les conférences, le mentorat, les cours universitaires, les lectures, etc.

Over the next assessment period, Edward will be attending the Department's « Basic Enforcement Training » course at Algonquin College, from May 16<sup>th</sup> – July 7<sup>th</sup>, 2008.

Important additional training includes:

s.19(1)

Forty Hour Health and Safety course (O2)  
Skid School driving course (T25)  
Emergency Vehicle course (T25)  
WHMIS on-line training (O2)

s.19(1)

**7. EMPLOYEE'S COMMENTS / COMMENTAIRES DE L'EMPLOYÉ(E)**

PERSONAL INFORMATION PROVIDED ON THIS FORM IS PROTECTED UNDER THE PROVISIONS OF THE PRIVACY ACT. /  
LES RENSEIGNEMENTS FOURNIS DANS LE PRÉSENT DOCUMENT SONT PROTÉGÉS EN VERTU DE LA LOI SUR LA PROTECTION DES RENSEIGNEMENTS PERSONNELS.

Overall Performance Review Form (Employees) / Formule d'examen du rendement global (employé) 006957

This is Exhibit D referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 24 day  
of September, 20 11  
[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

*Deborah Patricia Pignatelli, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.*



**COMPLIANCE AND ENFORCEMENT POLICY FOR THE  
*CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999 (CEPA, 1999)***

**MARCH 2001**

## Table of Contents

<b>Introduction .....</b>	<b>3</b>
<b>What are Compliance and Enforcement.....</b>	<b>4</b>
<b>Guiding Principles.....</b>	<b>5</b>
<b>Key Elements of the <i>Canadian Environmental Protection Act, 1999</i>.....</b>	<b>6</b>
Key Elements .....	6
Relationship between the Minister of Environment and the Minister of Health .....	7
Relationship with other government under CEPA, 1999 .....	8
<b>Authorities Responsible for the Implementation of the <i>Canadian Environmental Protection Act, 1999</i> .....</b>	<b>10</b>
Minister of Environment .....	10
Minister of Health .....	10
Enforcement Officers .....	10
Analysts .....	11
Review officers .....	11
Attorney General and Officials of the Department of the Attorney General .....	12
Courts .....	12
<b>Measures to Promote Compliance .....</b>	<b>13</b>
Education and Information .....	13
Technical Information .....	14
Consultation on Regulation Development and Review .....	15
Environmental Codes of Practice and Guidelines .....	16
Promotion of Environmental Audits .....	17
<b>Inspection and Investigation .....</b>	<b>18</b>
Inspection .....	18
Inspection Program .....	19
Investigation .....	19
<b>Responses to Alleged Violations.....</b>	<b>21</b>
Criteria for Responses to Alleged Violations.....	21
Responses to Alleged Violations.....	21
Warnings .....	22
Directions in the Event of Releases.....	23
Tickets .....	24
Ministerial Orders .....	25
Detention Orders for Ships.....	27
Environmental Protection Compliance Orders .....	27
Injunctions .....	28
Prosecution .....	29
Environmental Protection Alternative Measures .....	30
Penalties and Court Orders Upon Conviction .....	32
Use of Court Orders Upon Conviction.....	33
Civil Suit by the Crown to Recover Costs .....	35
<b>For More Information .....</b>	<b>37</b>

## **Introduction**

Canadians expect their government to provide laws and regulations, in order to protect them and their society. However, it is not enough to adopt laws; legislation must be effectively enforced.

In the *Canadian Environmental Protection Act, 1999* (CEPA, 1999), Parliament has made it matter of law that enforcement of the Act must be fair, predictable and consistent.

In keeping with the duty to enforce imposed in the Act, this Compliance and Enforcement Policy establishes the principles for enforcement of CEPA, 1999 and tells everyone who shares a responsibility for protection of the environment — governments, industry, organized labour and individuals — what is expected of them. It also lets everyone know what to expect from Environment Canada and the officers who enforce the *Canadian Environmental Protection Act, 1999* and its regulations. The policy has been developed in co-operation with the Department of Justice.

This document is intended to provide guidance only. It is not a substitute for the *Canadian Environmental Protection Act, 1999*. In the event of an inconsistency between this document and the Act, the statute prevails.



## **What are Compliance and Enforcement?**

The terms "compliance" and "enforcement" are used many times throughout the Compliance and Enforcement Policy for the Act. It is therefore useful to make their meanings clear.

Compliance means the state of conformity with the law. Environment Canada will secure compliance with the *Canadian Environmental Protection Act, 1999* through two types of activity: promotion and enforcement.

Measures to promote compliance include communication and publication of information, consultation with parties affected by the Act.

Enforcement activities include:

- inspection to verify compliance;
- investigations of violations;
- measures to compel compliance without resorting to formal court action, such as directions by the Minister or enforcement officers, ticketing, and environmental protection compliance orders by enforcement officers; and
- measures to compel compliance through court action, such as injunctions, prosecution, court orders upon conviction, and civil suit for recovery of costs.

## **Guiding Principles**

The following general principles govern the application of the Act:

- Compliance with the Act and its regulations is mandatory.
- Enforcement officers throughout Canada will apply the Act in a manner that is fair, predictable and consistent. They will use rules, sanctions and processes securely founded in law.
- Enforcement officers will administer the Act with an emphasis on prevention of damage to the environment.
- Enforcement officers will examine every suspected violation of which they have knowledge, and will take action consistent with this Compliance and Enforcement Policy.
- Enforcement officers will encourage the reporting of suspected violations of the Act.

## **Key Elements of the *Canadian Environmental Protection Act, 1999***

The full title of the legislation is "An Act respecting the protection of the environment and of human health in order to contribute to sustainable development", which clearly defines the purpose of the statute. Also, the Declaration of the *Canadian Environmental Protection Act, 1999* states that "the protection of the environment is essential to the well-being of Canadians and the primary purpose of this Act is to contribute to sustainable development through pollution prevention". The Declaration underscores the importance placed by the Government of Canada on prevention of harm to the environment and its commitment to sustainable development.

### **Key Elements**

The *Canadian Environmental Protection Act, 1999* has the following elements:

- authority for the Minister to require submission of information on any subject covered by the Act;
- authority to control the introduction into Canadian commerce of substances that are new to Canada;
- authority to obtain information on and to require testing of both new substances and substances already existing in Canadian commerce;
- provisions to control all aspects of the life cycle of toxic substances from their development, manufacture or importation, transport, distribution, storage and use, their release into the environment as emissions at various phases of their life cycle, and their ultimate disposal as waste;
- provisions to create guidelines and codes for environmentally sound practices as well as objectives that set desirable levels of environmental quality;
- provisions to control nutrients, such as phosphates, in water conditioners or cleaning products, including detergents, which can interfere with the use of waters by humans, animals, fish or plants;
- provisions to issue permits to control disposal at sea from ships, barges, aircraft and structures (excluding normal discharges from off-shore facilities involved in exploration for, exploitation and processing of seabed mineral resources);
- authority to regulate fuels and components of fuels;

- authority to control emissions from motors that power automobiles, trucks and other equipment such as lawnmowers, outboard motors and all-terrain vehicles;
- authority to control the export, import and transit through Canada, as well as shipments within Canada which cross internal provincial or territorial borders, of hazardous waste and hazardous recyclable material;
- authority to identify, by regulation, specific non-hazardous waste which may be exported, imported or travel through Canada in transit to another destination, where that non-hazardous waste is destined for final disposal, and authority to impose controls on those shipments;
- provisions to control sources of air or water pollution in Canada where a violation of an international agreement would otherwise result, or where the air or water pollution caused in Canada affects another country;
- authority to deal with environmental emergencies, where no other federal Act does so in a manner that protects the environment and human health;
- authority to regulate activities of federal departments, boards, agencies and Crown corporations to ensure that those activities have as little as possible negative impact on the environment;
- provisions to regulate federal works, undertakings and to regulate activities on federal land and aboriginal land, where no other federal legislation and/or regulations are in force and, in the opinion of the Governor in Council, provide sufficient protection to the environment and human health;
- authority to sign agreements with a provincial, territorial or aboriginal government or aboriginal people regarding administration of the Act;
- authority to sign agreements that recognize that legislation or regulations adopted by a provincial, territorial or aboriginal government are equivalent to CEPA regulations and will apply instead of the CEPA requirements; and
- provisions setting out the powers that may be exercised by the Minister, enforcement officers and CEPA analysts in enforcing the legislation.

### **Relationship between the Minister of Environment and the Minister of Health**

The Minister of Health has responsibility under the Act to provide advice in relation to human health aspects to the Minister of Environment. Among the subjects on which the Minister of Health may give advice are the toxicity of substances, the ability of the substance to become incorporated into and to accumulate in human tissue, and the ability of the substance to cause biological change, as well as the human health effects of

emissions and discharges from Canadian sources of international air or international water pollution. In addition, jointly with the Minister of Environment, the Minister of Health recommends regulatory actions for toxic substances to the Governor in Council.

### **Relationships with other governments under CEPA, 1999**

#### **(a) Administrative Agreements**

Protection of the environment is a responsibility shared by all levels of government as well as by industry, organized labour and individuals. For this reason, the *Canadian Environmental Protection Act, 1999* gives the Minister of Environment the authority to conclude, with the approval of the Governor in Council, agreements with a provincial, territorial or aboriginal government or aboriginal people concerning the administration of the Act.

#### **(b) Equivalency Agreements**

In addition, the legislation allows the Governor in Council, upon recommendation of the Minister of Environment, to make an order recognizing that requirements imposed by a provincial, territorial or aboriginal government are equivalent to regulations under the *Canadian Environmental Protection Act, 1999*. This means that the province, territory or aboriginal government will apply its equivalent requirements, rather than the regulation made under the federal Act.

The areas of CEPA, 1999 which are open to an order by the Governor in Council declaring the requirements of another government to be equivalent to those developed under CEPA, 1999 are:

- regulations dealing with toxic substances;
- regulations dealing with Canadian sources of international air or international water pollution;
- regulations dealing with environmental emergencies; and
- regulations respecting the practices of federal departments, boards, agencies, commissions, federal Crown corporations, federal works or undertakings, or respecting federal land or aboriginal land and persons on that land or whose activities involve that land.

For the recommendation to the Governor in Council, specific criteria will be used to determine equivalency. The factors to establish equivalency will include:

- equal level of control as sanctioned by law;
- comparable compliance measurement techniques;
- comparable penalties; and

- comparable rights for an individual, resident in Canada, to require investigation of a suspected offence and to receive a report of the findings.

In the annual report to Parliament on administration of the *Canadian Environmental Protection Act, 1999*, the Minister is required to include a specific accounting of activities conducted under equivalency agreements with provincial, territorial and aboriginal governments. The same requirement is imposed on the Minister for activities that take place under administrative agreements with provincial, territorial and aboriginal governments and those concluded with aboriginal people for implementation of the Act. Agreements will ensure that provinces, territories, aboriginal governments or aboriginal people enforcing all or any part of the statute, do so in a manner consistent with this policy. In addition, the agreements will spell out procedures for measuring performance.

## **Authorities Responsible for the Implementation of the *Canadian Environmental Protection Act, 1999***

The following authorities are responsible for implementation of the *Canadian Environmental Protection Act, 1999*.

### **Minister of Environment**

The Minister of Environment has responsibility for the administration of the Act. The Minister must act in accordance with the legislation and is accountable to Parliament for his or her actions.

### **Minister of Health**

Under the Act, the Minister of Health provides advice in relation to human health aspects and, jointly with the Minister of Environment, recommends regulatory actions for toxic substances. The Minister of Health also advises on the human health effects of emissions and discharges from Canadian sources of international air or international water pollution. However, the Minister of Health has no direct enforcement responsibility.

### **Enforcement Officers**

Enforcement officers are individuals with that designation under the *Canadian Environmental Protection Act, 1999*.

They can:

- carry out inspections to verify compliance with the law;
- direct that corrective measures be taken, where there is danger to the environment, human life or health, caused when the illegal release of a regulated substance has occurred or is about to occur;
- direct that conveyances, such as cars, trucks, trains and other means of transport be stopped and moved to a location suitable for inspection; and
- conduct investigations of suspected violations.

The powers of enforcement officers including entry, search, seizure and detention of items related to the enforcement of the *Canadian Environmental Protection Act, 1999* and the power to require the production of documents and electronically stored data as well as the power to issue tickets, directions and orders are detailed in the statute. In addition to these powers, a CEPA enforcement officer has the powers of a peace officer. At the time that the Minister designates a qualified individual to be an enforcement officer, the Minister has the authority, under CEPA, 1999, to specify limits on the peace officer powers that the enforcement officer may exercise.

### **Analysts**

CEPA, 1999 provides authority for the Minister to designate individuals to act as analysts for the purpose of any part or all of the Act. An analyst may be any qualified person, such as a laboratory technician, a toxicologist, a computer systems analyst, an engineer with expertise in a particular area such as metal finishing or the use of organic substances in industrial processes, or a forensic accountant.

CEPA analysts have the following powers:

- to enter any place or premises to which the Act or its regulations apply;
- to open receptacles;
- to take samples;
- to conduct tests and/or measurements;
- to require documents and/or data to be provided to them and take copies as necessary.

Analysts can only exercise those powers when they accompany an enforcement officer to a site.

CEPA analysts who carry out laboratory testing or analysis may have their evidence presented in court in the form of a certificate rather than in person.

### **Review Officers**

Review officers are appointed by the Minister of Environment. Their function is to review an environmental protection compliance order (EPCO), if the person subject to the order applies for a review. EPCOs are orders that enforcement officers are able to issue to prevent a violation from occurring, to stop a violation that is ongoing, or to order that a person carry out required conduct that they have omitted or refused to do. EPCOs are discussed in detail later in this policy, in the chapter entitled "Responses to Alleged Violations".

While review officers are appointed by the Minister of Environment, their salary is set by Governor in Council, in order to ensure an arm's length relationship from the Minister. The Minister chooses one of the review officers as Chief Review Officer. It is the Chief



who puts in place the procedures for reviews of EPCOs, and who assigns the various cases to his or her fellow review officers.

Decisions by review officers may be appealed to the Federal Court by the person subject to the EPCO or the Minister of Environment as described under the heading "Courts".

### **Attorney General and Officials of the Department of the Attorney General**

The Minister of Justice is the Attorney General for Canada. The Attorney General has responsibility for all litigation relating to the *Canadian Environmental Protection Act, 1999*. The Attorney General, the officials of the Department of the Attorney General and Crown prosecutors may also provide advice to CEPA enforcement officers respecting the preparation of :

- warnings, directions or environmental protection compliance orders, which are enforcement measures that are discussed in the chapter of this policy entitled "Responses to alleged Violations"; or
- documents to lay charges, or to secure inspection warrants or search warrants.

While enforcement officers may lay charges for offences under the Act, the ultimate decision on whether to proceed with prosecution of the charges rests with the Attorney General. With respect to an application for an injunction or a civil suit for recovery of costs in the various circumstances in which such recovery is allowed under the Act, enforcement officers will recommend these civil actions to officials of the Attorney General. The legal counsel of the office of the Attorney General will then have the ultimate decision on proceeding with the injunction or suit for cost recovery.

When considering litigative action under the Act, the Attorney General or Crown prosecutors acting on his or her behalf will have regard to this policy.

### **Courts**

The courts make the final decisions regarding prosecutions, injunction applications and civil suits under the *Canadian Environmental Protection Act, 1999*, including what penalty to impose or what remedy to order.

The Federal Court of Canada has a role regarding appeals which that Court may receive when a person subject to an environmental protection compliance order or the Minister of Environment is dissatisfied with the outcome of a review of the order conducted by a review officer under CEPA, 1999. The Federal Court of Canada would receive the appeal and decide whether to hear the case. If the Federal Court hears the case, it would render a decision, which would itself be appealable to the Federal Court of Appeal and to the Supreme Court of Canada.

## **Measures to Promote Compliance**

Environment Canada believes that promotion of compliance through information, education and other means is an effective tool in securing conformity with the law. Accordingly, Environment Canada will undertake public education and information transfer measures, as described in this chapter.

In addition, the department will meet as required with other federal departments and agencies, provinces, territories, aboriginal governments and aboriginal people, industry, environmental groups and other interested parties, so that information and concerns can be exchanged about the *Canadian Environmental Protection Act, 1999*, enforcement practices and compliance.

One of the roles of Environment Canada engineers, biologists, chemists, geologists and experts in environmental sciences is to promote compliance through various means that are described below. However, due to the nature of their responsibilities to verify compliance with CEPA, 1999 and to investigate suspected violations, enforcement officers and CEPA analysts will limit their compliance promotion activities to providing copies of CEPA, 1999, its regulations and this policy. For further information, scientific personnel and enforcement officers and analysts may also refer the public to Environment Canada's website at <http://www.ec.gc.ca>, called the "Green Lane".

Among the icons they will find at that site are the following: one with the title "CEPA Environmental Registry" and one with the title "Environmental Law Enforcement". The Registry, which CEPA, 1999 requires the Minister of Environment to create, contains the text of the Act itself, plus information about all aspects of the legislation, including environmental quality guidelines and objectives, release guidelines and codes of practice, existing and proposed regulations, assessments of substances indicating whether or not they are toxic under CEPA, 1999 and many other matters. The "Environmental Law Enforcement" icon provides access to information on enforcement under the Act, including any charges laid for CEPA violations..

### **Education and Information**

As stated above, under CEPA, 1999, the Minister of Environment is required to create an Environmental Registry. The registry is not a listing of document titles; it is rather a collection of all documents that are required to be published under the Act and its regulations, as well as those that the Minister, in his or her discretion, decides to publish even in the absence of an obligation to do so.

CEPA, 1999 also allows the Minister to give notice of the availability of a document. In cases where a document is very lengthy or has complicated drawings, industrial plans or specifications, it is possible that the registry will contain only notice of the availability of

the document, as well as a contact name or address from which the document may be obtained.

Through the Registry, Environment Canada will either provide or give notice of the availability of the following materials:

- copies of the *Canadian Environmental Protection Act, 1999* and its regulations;
- environmental quality guidelines and objectives, release guidelines, and environmental codes of practice, developed under the Act;
- the Compliance and Enforcement Policy for the Act;
- a list of court actions arising from enforcement of the *Canadian Environmental Protection Act, 1999*, such as:
  - injunctions, indicating the name of the individual, company or government agency, who is the subject of the injunction, the action required under the injunction, and the time schedule to complete the action,
  - convictions under the Act, indicating the identity of the offender, the nature of the offence, and the sentence imposed by the court,
  - court orders following conviction for an offence under the Act, indicating the identity of the offender and a summary of the contents of the order,
  - civil suits instituted by the Crown, such as those to recover reasonable costs of clean-up or those incurred to remedy damage to the environment, and
  - forfeitures of items seized under the Act;
- information on precedent-setting cases under the Act.

In addition, the department may use media releases distributed to newspapers, radio and television stations, to publicize situations where charges have been laid and/or prosecutions have been successful. Law enforcement agencies in Canada and throughout the world recognize that publicizing the laying of charges and the results of prosecutions is an effective means of deterring potential offenders.

### Technical Information

As explained above, enforcement officers and CEPA analysts will not be involved in providing technical information to other federal departments, agencies and federal Crown corporations, the private sector, provinces, territories, aboriginal governments and municipalities. This will be an area of endeavour reserved for Environment Canada

personnel who may be engineers, biologists, chemists, geologists or experts in environmental sciences. They may provide technical information on:

- pollution prevention, as well as pollution control;
- measures to prevent releases of substances into the environment; and
- methods for analysis and monitoring.

The department will also use other means to communicate technical information, including:

- publications, such as technical reports and newsletters intended to promote exchange of information between governments and industry nation-wide;
- seminars and conferences;
- training materials; and
- licensing of research developments by Environment Canada to the private sector.

### **Consultation on Regulation Development and Review**

Environment Canada believes that consultation on regulation development and amendment with both the parties to be regulated as well as the beneficiaries of regulation, results in better and more effective regulations for protection of the environment. Environment Canada also recognizes that compliance with regulations is more likely when there has been involvement by those parties in their development or amendment.

Environment Canada scientists and engineers who are responsible for the development of regulations will consult with affected parties at the stage of determining whether a problem exists that requires resolution, as well as during the development of any eventual regulation. In addition, CEPA, 1999 requires the Minister to seek advice or offer to consult on specific regulations. Under CEPA, 1999, the Minister must set up a National Advisory Committee, composed of one representative for each of the federal Ministers of Environment and Health, one representative from each province and territory, and one representative of aboriginal governments for each of the following regions: Atlantic (Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick); Quebec; Ontario; Prairie and Northern (Manitoba, Saskatchewan, Alberta, Northwest Territories and Nunavut); Pacific and Yukon (British Columbia and the Yukon Territory).

Proposed regulations will also be published in the *Canada Gazette* as well as in the CEPA Environmental Registry, at which time affected parties and members of the public have a minimum time of 60 days to comment on the text.

## **Environmental Codes of Practice and Guidelines**

While codes of practice and guidelines are not regulations and do not have the force of law, they can help achieve the objective of the *Canadian Environmental Protection Act, 1999*, namely the protection of the environment. The statute requires the Minister of the Environment to create environmental codes of practice, environmental quality guidelines and release guidelines. Environment Canada will develop these in consultation with interested parties, including provinces, territories, aboriginal governments and aboriginal people, industry and environmental groups. The personnel involved in the development of these guidance documents may be engineers, biologists, chemists, geologists or experts in environmental sciences.

Codes of practice as well as environmental quality and release guidelines can assist the putting in place of management practices that will result in better protection for the environment. Codes focus on substances and the processes and techniques related to their production and use, including activities such as handling, packaging, distribution, transport, and disposal. Environment Canada will base codes of practice on available and practicable technology.

Codes will contain technological information on alternatives to achieve protection of the environment. They may detail procedures, practices or release limits relating to works and undertakings during any phase of development or operation, including siting, design, construction, start-up, closure, and dismantling.

Environmental quality guidelines and release guidelines focus on the ambient environment. Environmental quality guidelines recommend acceptable levels of a particular substance in air, water or soil, to protect a specific use of that component of the environment. These guidelines will serve as:

- “yardsticks” to determine whether the environment and human health are being sufficiently protected; and
- targets for pollution prevention or pollution control programs by industry and government agencies.

Release guidelines will recommend limits for the release of substances into the environment. These guidelines, like codes of practice, will be based on what is acceptable environmental practice, founded on available and practicable technology.

As is the case with proposed regulations, the Minister of Environment is required by CEPA, 1999 to offer to consult on proposed environmental quality guidelines and objectives, release guidelines, and codes of practice. Comments from provincial, territorial and aboriginal governments, those who may use the objectives, guidelines and codes of practice in their manufacturing, commercial or other operations, environmental and labour groups and the public at large help Environment Canada produce useful information. In addition, under the *Canadian Environmental Protection Act, 1999*, the

Minister of Environment is required to publish, in the *Canada Gazette* and in the Environmental Registry, either notice of the availability of codes and guidelines developed under the Act, or the texts themselves.

### **Promotion of Environmental Audits**

Environmental audits are internal evaluations by companies and government agencies, to verify their compliance with legal requirements as well as their own internal policies and standards. They are conducted by companies, government agencies and others on a voluntary basis, and are carried out by either outside consultants or employees of the company or facility from outside the work unit being audited. Audits can identify compliance problems, weaknesses in management systems, or areas of risk. The findings are documented in a written report.

Environment Canada recognizes the power and effectiveness of environmental audits as a management tool for companies and government agencies, and intends to promote their use by industry and others.

To encourage the practice of environmental auditing, inspections and investigations under the *Canadian Environmental Protection Act, 1999* will be conducted in a manner which will not inhibit the practice or quality of auditing. Enforcement officers and CEPA analysts will not request environmental audit reports during routine inspections to verify compliance with the Act.

Access to environmental audit reports may be required when enforcement officers have reasonable grounds to believe that:

- an offence has been committed;
- the audit's findings will be relevant to the particular violation, necessary to its investigation and required as evidence;
- the information being sought through the audit cannot be obtained from other sources through the exercise of the enforcement officer's powers.

In particular reference to the latter criterion, environmental audit reports must not be used to shelter monitoring, compliance or other information that would otherwise be accessible to enforcement officers or analysts under the *Canadian Environmental Protection Act, 1999*.

Any demand for access to environmental audit reports during investigations will be made under the authority of a search warrant. The only exception to the use of a search warrant is exigent circumstances, that is, when the delay necessary to obtain a warrant would likely result in danger to the environment or human life, or the loss or destruction of evidence.

## **Inspection and Investigation**

Enforcement officers appointed under the *Canadian Environmental Protection Act, 1999* carry out two categories of enforcement activity: inspection and investigation. A general discussion of these two types of activity follows.

### **Inspection**

The purpose of an inspection is to verify compliance with the *Canadian Environmental Protection Act, 1999* and its regulations. To conduct an inspection of premises other than a private dwelling, an enforcement officer must have reasonable grounds to believe that, on the premises that he or she intends to enter and inspect, there are activities, materials, substances, records, books, electronic data or other documents that are subject to the Act or relevant to its administration.

Sometimes, an enforcement officer may be refused entry to premises where there are activities, materials, substances, records, etc. that are relevant to the Act. The officer may also find premises that are locked or abandoned. Those premises could be factories, distribution centres or the offices of private companies or federal institutions. For such cases, an enforcement officer may seek an inspection warrant from a justice of the peace. In the inspection warrant, the justice may name any person to accompany the enforcement officer or authorize, in the inspection warrant, the use of any power that the justice deems required, including the use of force to break locks or force open a locked door.

In the case of a private dwelling which the enforcement officer has reasonable and probable grounds to believe may be subject to inspection under CEPA, 1999 or any of its regulations, the officer is required to seek the consent of the occupant, in order to carry out the inspection. Where consent is refused, the officer must obtain an inspection warrant, and can seek, from a justice, authorization for persons to accompany him or her or to use force as described in the previous paragraph.

In the course of an inspection, an enforcement officer may examine substances or products, open and examine receptacles, containers or packages, and take samples. The officer may also examine books, records or electronic data and make copies of them.

If, during an inspection, an enforcement officer must shift to the investigative role, he or she will so indicate to the individual, company or government agency. The enforcement officer will act similarly if, in an emergency, he or she must direct or cause action to be taken following an unauthorized release or to prevent such a release.

If, as described above, an enforcement officer discovers a violation during an inspection, the officer may determine that circumstances are exigent and that he or she must take action on the spot. In exigent circumstances, namely, when the delay necessary to obtain a warrant would likely result in danger to the environment or human life or in the loss or

destruction of evidence, the enforcement officer will begin an investigation immediately and, where necessary, exercise the power to search without a warrant, and to seize and detain items. In all other circumstances, where the enforcement officer has determined that further investigation is required, this will be done under the authority of a search warrant. Investigation of violations is discussed below. The possible responses to violations discovered by enforcement officers are discussed in detail in the chapter of this policy entitled "Responses to Alleged Violations".

### **Inspection Program**

There will be a program of inspections, complemented by spot checks. The schedule of inspections will be determined by the risk that the substance or activity presents to the environment or to human health, and by the compliance record of the individual, company or government agency. In addition, it is generally the case that, when new regulations are brought into effect, they are identified as priorities within Environment Canada's inspection program under CEPA, 1999. Inspection schedules will also be established to verify adherence to:

- warnings;
- directions by enforcement officers;
- Ministerial orders;
- environmental protection compliance orders;
- injunctions;
- environmental alternative measures; and
- court orders upon conviction of an offender.

Ministerial orders as well as directions by enforcement officers, environmental protection compliance orders and environmental protection alternative measures will be discussed in the chapter entitled "Responses to Alleged Violations".

If information or complaints have been brought to the attention of enforcement officers, additional inspections will be carried out as required. In addition, enforcement officers may develop a special inspection schedule when companies or facilities undertake expansion or alteration of a process.

### **Investigation**

An investigation involves gathering, from a variety of sources, evidence and information relevant to a suspected violation. A search is a component of an investigation, and the search power may be used by enforcement officers when fulfilling their duties under the *Canadian Environmental Protection Act, 1999*.



There are two instances in which an enforcement officer will conduct an investigation:

- when he or she has reasonable grounds to believe that an offence has been committed under the Act; or
- when an individual of at least 18 years of age, resident in Canada, petitions the Minister to investigate an alleged violation of the Act.

The only occasion when an enforcement officer will not seek a search warrant is in exigent circumstances as stated above.

During the course of a search with or without a warrant, enforcement officers may seize and detain anything which they reasonably believe was used to commit an offence under the Act, is related to the commission of an offence or will provide evidence of an offence. Enforcement officers will use their powers of seizure and detention, when they believe that the seizure is necessary and in the public interest. Reasons for seizure and detention may include:

- the need to take possession of a substance, equipment or any other thing to prevent danger to the environment, human life or health;
- the need to prevent distribution of a prohibited substance, products containing a prohibited substance, or substances new to Canada, for which the required information has not been provided to the Minister under the Act;
- the need to prevent the export of a substance for which notice of export to the receiving country is required, when that notice has not been provided to the receiving country or to the Minister within the prescribed time;
- the need to prevent further violation of the Act; or
- the need to prevent loss or destruction of evidence.

The enforcement officer may also move the seized substance, product, equipment or thing to a secure location when he or she believes that it is necessary and in the public interest.

## Responses to Alleged Violations

Enforcement officers will examine every suspected violation of which they have knowledge. If, after that examination, they determine that there is insufficient evidence to prove the alleged violation or that the alleged violation did not, in fact, occur, they will take no further enforcement action. If they are able to substantiate that a violation took place and there is sufficient evidence to proceed, they will take action consistent with the criteria in this chapter, and will choose the appropriate response among the different types reviewed here.

### Criteria for Responses to Alleged Violations

Whenever an alleged violation of the *Canadian Environmental Protection Act, 1999* is discovered, enforcement officers will apply the following factors when deciding what enforcement action to take:

- **Nature of the alleged violation** - This includes consideration of the seriousness of the harm or potential harm, the intent of the alleged violator, whether this is a repeated occurrence and whether there are attempts to conceal information or otherwise subvert the objectives and requirements of the Act.
- **Effectiveness in achieving the desired result with the violator** - The desired result is compliance with the Act, within the shortest possible time and with no further occurrence of violation. Factors to be considered include the violator's history of compliance with the Act and, if applicable, with regulations by a provincial, territorial or aboriginal government that are deemed, by Order in Council, to be equivalent to those under CEPA, 1999, willingness to co-operate with enforcement officers, evidence of corrective action already taken, and the existence of enforcement actions under other statutes by other federal authorities or by provincial, territorial or aboriginal governments as a result of the same activity.
- **Consistency in enforcement** - Enforcement officers intend to achieve consistency in their responses to alleged violations. Accordingly, officers will consider how similar situations were handled when deciding what enforcement action to take.

### Responses to Alleged Violations

The following responses are available to deal with alleged violations of the *Canadian Environmental Protection Act, 1999* and its regulations: warnings, directions by enforcement officers, tickets, Ministerial orders, environmental protection compliance orders, detention orders for ships, injunctions, prosecution, environmental protection alternative measures, court orders following conviction, and civil suits by the Crown to recover costs.

While each fact situation will be different in relation to alleged violations of CEPA, 1999, probably the most important factor in determining an enforcement response is the effectiveness of the response in securing compliance as quickly as possible with no recurrence of violation. Therefore, except in circumstances where prosecution will always be pursued as described later in this chapter, the enforcement officer will give first consideration to an enforcement response among warnings, directions, Ministerial orders, detention orders for ships and environmental protection compliance orders, as these do not require a court proceeding, and compliance may be restored in a shorter time frame that would be possible through a court prosecution. A ticket will also be among the measures given first consideration as an enforcement response in the circumstances described at the heading "Tickets". However, a court hearing is always an option that can be elected by an accused who receives a ticket and who wishes to plead not guilty.

Nevertheless, it is important to remember that, where the severity of the environmental harm or risk of environmental harm, the factual circumstances of the alleged offence or the compliance history of the offender are such that prosecution or other court action would provide the most effective deterrent to the violator, the enforcement officer will choose a court proceeding.

### **Warnings**

Enforcement officers may use warnings:

- when they believe that a violation of the Act is continuing or has occurred; and
- when the degree of harm or potential harm to the environment, human life or health appears to be minimal.

When deciding whether to use warnings or more severe enforcement action, enforcement officers may also consider:

- whether the individual, company or government agency has a good history of compliance with the *Canadian Environmental Protection Act, 1999* and with provincial, territorial or aboriginal government regulations deemed, by Order in Council, to be equivalent to those under the federal Act; and
- whether the individual, company or government agency has made reasonable efforts to remedy or mitigate the consequences of the alleged offence or further offences.

Warnings will always be given in writing. When necessary, however, enforcement officers may initially give a warning orally. This is to be followed as soon as possible by a written warning.

The written warning will contain the following information:

- the section of the Act or regulations involved;
- a description of the alleged offence; and
- a statement that, if the alleged violator does not take necessary action, the enforcement officer will consider taking other steps.

When an enforcement officer uses a warning, it brings an alleged violation to the attention of an alleged violator, in order to promote any necessary action by that person. Warnings do not have the legal force of an order. Furthermore, they are not a finding of guilt or civil liability. Warnings and the circumstances to which they refer will form part of the records of Environment Canada. In addition, warnings will be taken into account in future responses to alleged violations, and may influence the frequency of inspection.

When an alleged violator receives a warning, the individual, company or government entity may wish to provide written comments to the enforcement officer who signed the warning. The enforcement officer will take the comments into consideration and, where appropriate, will respond to the alleged violator who received the warning. The comments and any response to them will be attached to the warning. Both the comments and response will then be placed in the compliance history file of the individual, company or government entity.

### **Directions in the Event of Releases**

Where there is a release of a substance in contravention of regulations under the *Canadian Environmental Protection Act, 1999* or the likelihood of such a release, an enforcement officer may give directions to the person, company or government agency that owns the substance or that has or had charge, management, or control of the substance at the relevant time, or that caused or contributed to the release, to take all reasonable emergency measures:

- to prevent the release if it has not already occurred;
- to remedy any dangerous condition; or
- to reduce any danger to the environment or human life or health that results from the release of the substance or may reasonably be expected to result from the release of the substance.

As the Act already imposes on individuals, companies and government agencies the obligation to take such measures, an enforcement officer will not ordinarily issue such directions unless these obligations are not being met. The directions will be given in

writing, but, during the initial response to an emergency, directions may be given orally and later confirmed in writing.

Failure to comply with a direction by an enforcement officer will lead to prosecution of the individual, company or government agency for this failure. Also, in the event of failure or inability to comply with an enforcement officer's direction, the officer is empowered under the Act to take the action him or herself or to hire qualified experts to take the emergency measures.

### **Tickets**

Tickets are available for offences under CEPA, 1999 where there is minimal or no threat to the environment or human life or health. Where an offence is designated as ticketable, enforcement officers will always issue a ticket, unless they have determined that, in accordance with the criteria of this policy, a warning is the appropriate response. In cases where an alleged ticketable offence continues for more than one day, enforcement officers are able to issue a ticket for every day that the alleged offence continues.

Ticketing regulations to identify which CEPA, 1999 offences are punishable by ticket, the associated fine and procedures for individuals, companies, and government agencies to respond to tickets have been developed under the federal *Contraventions Act*. Examples of ticketable CEPA offences are the failure to provide information or a report as required by regulations made under CEPA, 1999, or the failure to provide information or documents within the stipulated time limit.

Upon being issued a ticket by a CEPA enforcement officer, the accused may, within the time limit stated on the ticket:

- plead guilty and pay the fine to the appropriate court as prescribed on the ticket without making a formal court appearance;
- plead guilty with an explanation and appear in court to request a lesser fine or additional time to pay the fine; or
- submit a plea of not guilty, resulting in formal court proceedings.

If the accused fails to choose an option within the stated time limit, he or she, the company or the government agency involved has waived the right to challenge the ticket. A conviction is then entered against the accused, and provincial or territorial authorities will take measures to collect the outstanding fine in accordance with the applicable provincial or territorial law.

Effectiveness in restoring a violator to compliance is an important criterion in determining the appropriate response to a violation. Consequently, if an enforcement officer has already issued a ticket for an alleged offence – whether it is a single ticket or

several tickets to cover the number of days that an alleged offence continues – and if the same offender commits the same violation under a different fact situation, this is an indication that issuance of a ticket by the enforcement officer was not effective in restoring compliance. Under those circumstances, the enforcement officer will issue an environmental protection compliance order, or consider prosecution for the alleged offence, both of which are described later in this chapter.

### **Ministerial Orders**

The Minister of Environment may issue three types of order under the *Canadian Environmental Protection Act, 1999*. These are orders that:

- prohibit activities involving substances new to Canadian commerce;
- compel the recall, from the marketplace, of a substance, a product containing the substance, a nutrient, a fuel or a vehicle whose emissions are regulated under CEPA, 1999;
- require more information on, or testing of, substances suspected of being toxic, and to prohibit their manufacture or importation, or to limit these two activities, until expiry of the assessment period to determine the risk that they present to the environment.

Only the first two Ministerial orders are for use in response to alleged violations. They are measures for prompt and immediate action to prevent unlawful manufacture, importation, distribution or sale of a substance or a product containing that substance, or to recall the substance, product, nutrient, fuel or motor vehicle from the marketplace. They may be used as responses to alleged violations in themselves or in conjunction with prosecution.

#### ***Prohibition Orders involving Substances New to Canadian Commerce***

The Minister is empowered to prohibit, in writing, any activity involving a substance new to Canadian commerce, when he or she has reasonable grounds to believe that the substance has been manufactured in or imported into Canada in violation of the Act.

The prohibition will remain in effect until expiry of the period prescribed for assessing the substance.

In addition to the prohibition issued by the Minister, if the offence giving rise to the prohibition meets the criteria for prosecution as listed below, charges will be laid by an enforcement officer for the offence of illegal manufacture or importation of the substance.

### ***Recall Orders***

The Minister of Environment is empowered:

- to issue orders to recall a substance or product from the marketplace, where there is a contravention of the provisions of the Act or its regulations governing substances or products, including toxic substances or products containing same; and
- to direct those orders to manufacturers, processors, importers, distributors or retailers.

The Minister has this same power where there is a contravention of the provisions of the Act or its regulations governing nutrients, cleaning products, water conditioners, or fuels. In the case of nutrients, the Minister may direct the order to importers and/or manufacturers; in the case of fuels, the order could be directed to any or all of the following: a producer, processor, importer, retailer or distributor.

The recall order may direct the person named in the document to do any or all of the following:

- give public notice of any danger to the environment, human life or health;
- mail this notice to:
  - manufacturers, distributors or retailers of the substance or product;
  - manufacturers, processors, distributors or retailers of the nutrient, cleaning product or water conditioner;
  - producers, processor, importer, retailer or distributor of the fuel; as well as
  - every individual, company or government agency to whom the substance, product, nutrient or fuel is known to have been delivered or sold.
- replace the item by one that does not pose a danger to the environment, human life or health;
- accept the return of the item and reimburse the purchase price to the purchaser;
- undertake any other measures appropriate for the protection of the environment or human life or health.

The Ministerial order will be issued to ensure removal of the substance or other item listed above from the marketplace. Further, if the alleged offence giving rise to the order meets the criteria for prosecution as listed below, charges for the alleged offence will be laid by an enforcement officer.

## **Detention Orders for Ships**

Enforcement officers have authority under CEPA, 1999 to issue an order directing detention of a ship, where the officer has reasonable grounds to believe that:

- the owner or master of a ship has committed an offence under the Act, and
- the ship was used in connection with the commission of the violation.

An example of those reasonable grounds could be where a ship has been used to import into Canada a substance that is new to Canadian commerce, and the Minister of Environment has not received notification of the import of the substance. In this example, in view of the failure to notify, the Minister has not assessed the new substance to determine whether or not it is toxic within the meaning of CEPA, 1999 or whether the Minister should impose a condition related to its import, use or required reporting in the case of any significant new activity involving the substance. Another example could be an import of a hazardous waste that violates the Act or its regulations. Another example could be a ship that is seeking to dispose of waste at sea and is about to do so, either in the absence of an ocean disposal permit or in violation of the conditions of a permit which has been granted under CEPA, 1999.

Before issuing a detention order for a ship, the enforcement officer will consider whether or not:

- there is a risk of flight by the ship;
- there is a risk of loss or destruction of evidence; or
- off-loading of the cargo that is suspected to be in violation of the Act would require detention of the ship for a period of days.

Also, before issuing such a detention order, the enforcement officer will ensure that the action is in accordance with international and Canadian maritime law.

## **Environmental Protection Compliance Orders**

An enforcement officer is empowered to issue an environmental protection compliance order to:

- prevent a violation from occurring;
- stop or correct one that is occurring or continuing over a period of time; or
- correct an omission where conduct is required by CEPA, 1999 or one of its regulations, and that conduct is not occurring.



It is possible to issue compliance orders to deal with any offence under CEPA, 1999. They are a means to secure an alleged violator's return to compliance, without use of the court system. Examples of instances where an enforcement officer may use an environmental protection compliance order are:

1. previously, the enforcement officer had issued the offender a warning or ticket for the particular offence, but the offender did not return to compliance;
2. in the case of a previous release of a substance in contravention of CEPA regulations, the officer had issued a direction, but the circumstances that resulted in the earlier release continue and a subsequent illegal release is likely;
3. required conduct is not being carried out; for instance, a system required, by regulation, for the continuous or automatic monitoring of emissions is turned off;
4. improper containers required for storage of a toxic substance are being used or proper containers are being used, but they are not labelled as required; or
5. an individual, company or government agency that was required to prepare and implement a pollution prevention plan or an environmental emergency plan failed to do so.

The environmental protection compliance order will direct the alleged violator to take the measures required to return to compliance. The order imposes no financial or other penalty. As noted under the heading "Prosecutions", failure to comply with the EPCO is an offence for which prosecution will be undertaken.

### **Injunctions**

Under the *Canadian Environmental Protection Act, 1999*, the Minister has the authority to seek an injunction, in order to stop or prevent a violation of the legislation. Where a violation has already occurred, in addition to seeking an injunction, and where appropriate under this Compliance and Enforcement Policy, the Minister will pursue prosecution or civil action for recovery of the costs of preventive or corrective measures taken by the Minister.

Enforcement officers will carry out inspections to ensure that the individual, company or government agency cited in the injunction is complying with the terms of the injunction. If the individual, firm or government agency does not comply with the injunction, the Minister will return to the court to seek:

- a contempt of court ruling;

- instruction by the court for the individual, company or government agency to comply within the stated time limit with the injunction; and
- any additional penalty, such as a fine or imprisonment, that the court may see fit to impose in its contempt of court ruling.

### **Prosecution**

Enforcement officers will lay a charge for every alleged violation of the *Canadian Environmental Protection Act, 1999*, except where, in accordance with this policy, they determine that one of the following responses is sufficient and appropriate;

- a warning;
- a ticket under the ticketing regulations of the federal *Contraventions Act*;
- a direction by an enforcement officer;
- an order by the Minister of Environment prohibiting activities involving a substance new to Canadian commerce or a recall order by the Minister; or
- an environmental protection compliance order.

Prosecution will **always** be pursued when:

- there is death of or bodily harm to a person;
- there is serious harm or risk to the environment, human life or health;
- the alleged violator knowingly provided false or misleading information, or made a false or misleading test of a substance in purported compliance with the Act;
- the alleged violator obstructed the enforcement officer or CEPA analyst in the carrying out of his or her duties and responsibilities under the Act;
- the alleged violator interfered with a substance seized by an enforcement officer under the Act;
- the alleged violator concealed or attempted to conceal information after the offence occurred;
- the alleged violator did not take all reasonable measures to comply with:
  - a direction by an enforcement officer;

an order by the Minister prohibiting activities involving substances new to Canadian commerce, manufactured in or imported into Canada in contravention of the Act;

a recall order imposed by the Minister;

an order by the Minister to the individual, company or government agency that provided information on a substance that the Minister of Environment and the Minister of Health suspect is toxic, and

- requiring additional information on or testing of the substance, or
- prohibiting manufacture or importation of the substance, until expiry of the assessment period;

an environmental protection compliance order; or

environmental protection alternative measures.

The Act stipulates that certain offences are to be prosecuted by summary conviction and others, by way of indictment. Other offences under the Act may be prosecuted by either means. In cases where prosecution may take place by either means, it is up to the Crown prosecutor to decide whether to prosecute by way of summary conviction or by way of indictment.

### **Environmental Protection Alternative Measures**

Environmental protection alternative measures are similar to provisions in the *Criminal Code* and in the *Young Offenders Act*, which allow for a negotiated return to compliance without a court trial. Alternative measures under those other two federal Acts are available for individuals but not offenders which are corporations or government bodies. CEPA, 1999 provides for alternative measures that can be applied whether the violator is a corporation, government body or individual.

The choice to use environmental protection alternative measures in a particular case is made by the Attorney General of Canada or an agent of the Attorney General. In practical terms, that means a Crown prosecutor authorizes the use of alternative measures, after consultation with the Minister of Environment who will be represented in such cases by an enforcement officer.

Alternative measures can be used for most offences under CEPA, 1999, except for violations involving:

- injury or death or risk of injury or death;

- a disaster leading to loss of use of the environment;
- knowingly providing false or misleading information to the Minister of Environment, an enforcement officer or a CEPA analyst;
- manufacture, import or use of substances new to Canadian commerce, before the Minister has been notified of them and before they have been assessed to determine whether or not they are toxic or capable of becoming toxic ;
- harassment, discipline, demotion, suspension or dismissal by an employer of an employee who reported a CEPA violation or who refused to carry out an action that would violate CEPA, 1999;
- failure to comply with a recall imposed by the Minister;
- failure to give all reasonable assistance to an enforcement officer or CEPA analyst;
- obstruction of an enforcement officer or CEPA analyst in their conduct of their duties; and
- failure to comply with the conditions of a negotiated environmental protection alternative measures program.

There are pre-requisites to participation by an offender in an environmental protection alternative measures program. First, a charge for the alleged offence must be laid. Then, the Crown prosecutor, after consulting with the enforcement officer responsible for the case, must be satisfied that:

- protection of the environment and human life and health will be satisfied by the use of alternative measures; and
- the accused's compliance history makes it likely that the accused will abide by the negotiated alternative measures and return to compliance with CEPA, 1999.

In addition, the Crown prosecutor will examine whether or not the accused took any corrective action after the violation or preventive measures to ensure that the alleged offence does not occur again, and whether or not the accused was co-operative or attempted to conceal information. The prosecutor will rely upon the enforcement officer to recommend whether or not the two criteria related to protection of the environment and human life or health and the accused's compliance history are met, and to provide evidence of the degree of co-operation and the extent of corrective or preventive measures taken by the violator following commission of the alleged offence.

The accused is not required to plead guilty to the violation, but must, nevertheless, accept responsibility for the offence. The accused and the Crown prosecutor have only 180 days

from the date of the first disclosure of evidence by the Crown to the accused, in which to negotiate environmental protection alternative measures.

If an accused meets all the pre-requisites and agrees to negotiate, but the Crown prosecutor and the accused cannot successfully negotiate alternative measures within the 180 days, the court prosecution will proceed.

If an environmental protection alternative measures agreement is successfully negotiated, it is filed with the court and is a public document. The agreement must also appear in the CEPA Environmental Registry that the Minister of Environment is required to create under s.12 of the Act.

Upon fulfillment of the conditions of the negotiated alternative measures, the court will dismiss the charges against the accused. However, if the accused fails to comply with the negotiated environment protection alternative measures, this is an offence under CEPA, 1999, and, as noted under the heading "Prosecutions", prosecution for the failure to comply will be undertaken.

### **Penalties and Court Orders Upon Conviction**

Upon conviction of an offender for a violation of the *Canadian Environmental Protection Act, 1999*, enforcement officials will, on behalf of the Minister, recommend that Crown prosecutors request penalties that are proportionate to the nature and gravity of the offence. Penalties provided under the Act include fines or imprisonment or both, court orders to accompany a fine or imprisonment, and court orders governing conditional discharge of the offender.

Criteria to guide the courts when imposing penalties or court orders are included in CEPA, 1999. The decision to provide sentencing guidelines in the Act was based on the recommendations of the 1987 Report of the Canadian Sentencing Commission, and is consistent with case law, such as *R. v. United Keno Mines*. Nevertheless, this is guidance only. The courts are not compelled by the Act to follow the CEPA sentencing principles.

Following a conviction, it is a regular occurrence for Crown prosecutors, after consultation with enforcement officers, to recommend a sentence in each case. When making a recommendation to Crown prosecutors with respect to sentencing, enforcement officers will apply the criteria found in CEPA, 1999. Examples of those criteria are:

- the harm or risk of harm caused by the commission of the offence;
- an estimate of the total costs to remedy or reduce the negative effect of any damage caused by commission of the offence;
- whether or not any corrective or preventive action has been taken or proposed by the offender;

- whether the offence was committed intentionally, recklessly or inadvertently;
- whether there was negligence or a lack of concern on the part of the offender;
- what profits or benefits the offender earned as a result of the commission of the offence;
- the offender's compliance history; and
- in the case of an aboriginal offender, any particular circumstances of the aboriginal offender.

In addition to considering the criteria for sentencing found in CEPA, 1999, enforcement officers will recommend a penalty and/or court order that will, in their view, be effective in deterring others from the committing the same or other violations of the Act.

#### **Use of Court Orders Upon Conviction**

Upon conviction of an offender, the enforcement officer responsible for the case may request that, in their sentence, courts include one or more of the orders provided under the statute. The following list is not exhaustive but gives some examples. Orders may be requested to:

- a) prohibit the offender from doing any activity that may result in continuation or repetition of the offence;
- b) direct the offender to correct resulting harm to the environment or to take measures to avoid potential harm;
- c) require the offender to prepare and implement a pollution prevention plan or environmental emergency plan;
- d) direct the offender to carry out environmental effects monitoring or to pay the costs of such monitoring;
- e) require the offender to perform community service;
- f) direct that the offender pay money to environmental, health or other groups that work in the community where the offence was committed; or
- g) require the offender to pay funds to an educational institution for scholarships for students enrolled in environmental studies.

The type of order requested by the enforcement officer will depend on the violation.

Enforcement officers will request orders of type a), when there is likelihood of the offence being repeated by the offender. Type b) court orders will be requested when the damage to the environment is correctable or when the individual, company or government agency convicted of the offence needs to take measures to avoid future harm.

Type c) orders should lead to prevention of further pollution, or implementation of environmental emergency plans when there are sudden and controlled but illegal releases. Enforcement officers will request type d) orders in instances where the offence may have caused serious, negative environmental effects, and it is necessary to monitor what is happening in the receiving environment to determine whether or not it returns to health and, if it does, how long that process takes.

The type e) order directing the offender to perform community service will be requested by enforcement officials when the harm affected a community at large.

As far as type f) orders are concerned, enforcement officers may request payment of funds to further the work of community environmental, health or other groups, in order to increase awareness of the need to protect the environment or to increase knowledge of wildlife or of the need to protect its habitat. Type g) orders focus on the future contributions that students educated on environmental matters may make to the protection of the environment or the prevention of pollution.

Enforcement officials may request more than one order where appropriate. For instance, if a substance was new to Canadian commerce and manufactured in contravention of the Act, and if releases and wastes during the manufacturing process led to environmental damage, enforcement officials may, in addition to any fine or imprisonment imposed, request that the court issue a type a) order directing that the offender cease manufacturing activities that contravene the Act until after the substance has been assessed as required under the statute, as well as a type b) order directing the offender to correct the resulting environmental damage.

Failure to comply with a court order issued under the Act is a violation of the statute. Enforcement officials have three options when choosing a response to this violation: prosecution, civil suit for recovery of monies, and contempt of court proceedings.

In most instances, where a court order is not complied with, enforcement officials will lay charges. A separate offence is committed for each day that the failure to comply continues. In addition, the option of civil suit or contempt of court proceedings may be appropriate.

A civil suit can be used where the court order imposes a financial penalty which the offender fails to pay. Examples are where the offender is directed to compensate the Minister for the cost of preventive or corrective measures that the Minister was obliged to

take as a result of the offence, or where the offender is directed to pay monies to an educational institution for scholarships and fails to do so.

Contempt of court is a procedure by which the courts enforce compliance with their orders. Contempt of court proceedings may be appropriate where failure to comply with the order imposed on the offender would lead to continuing risk or harm to the environment, human life or health. Examples are where the court directs that the offender:

- refrain from any activity that may result in the continuation or repetition of the violation; or
- take specified action to correct harm to the environment, or to avoid future harm.

#### **Civil Suit by the Crown to Recover Costs**

The *Canadian Environmental Protection Act, 1999* empowers the Crown to recover costs by civil suit when:

- a) an enforcement officer was required to carry out clean-up or hire qualified experts to do so, because of the unauthorized release of a regulated substance into the environment that resulted in jeopardy to public safety or a danger to the environment, human life or health;
- b) an enforcement officer was obliged to take measures to prevent the unauthorized release of a regulated substance;
- c) an enforcement officer was obliged to take measures where any person fails to comply with an environmental protection compliance order;
- d) the Minister incurs publication costs when he or she publishes the facts related to an offence, because the offender was required by court order to publish these facts, and did not comply with the order;
- e) the Minister is owed compensation, because the offender was required by court order to pay part or all of the costs for preventive or corrective measures (including clean-up) taken by the Minister as a result of the offence, and did not comply with the order.

It is possible to recover costs in cases a), b) and c) when:

- there was no prosecution;
- there was a prosecution, but an order for recovery of such costs was not obtained; or



- prosecution did not result in a conviction.

The defendant would be the individual, company or government agency that owned or had charge of a substance immediately before its initial release into the environment, or that caused or contributed to that release.

In cases d) and e), the offender is clearly identifiable, and the matter of an offence has been proven. These costs arise from court orders upon conviction for a violation of the Act.

Enforcement officers will attempt to obtain recovery of the costs through negotiation. Failing an out of court settlement, the Crown will initiate or proceed with civil action under the legislation.

## **For More Information**

Anyone who has questions about the Compliance and Enforcement Policy or who wishes further information about enforcement procedures should contact one of the following:

### **Environment Canada Headquarters**

Director, Enforcement Branch  
National Programs Directorate  
Environmental Protection Service  
Environment Canada  
Ottawa, Ontario K1A 0H3

### **Regional Offices**

For residents of Newfoundland, Prince Edward Island, Nova Scotia and New Brunswick:

Director, Environmental Protection - Atlantic  
Environment Canada  
45 Alderney Drive  
Dartmouth, Nova Scotia B2Y 2N6

For residents of Quebec:

Director, Environmental Protection - Quebec  
Environment Canada  
105 McGill, 4th Floor  
Montreal, Quebec H2Y 2E7

For residents of Ontario:

Director, Environmental Protection - Ontario  
Environment Canada  
4905 Dufferin Street  
Downsview, Ontario M3H 5T4

For residents of Manitoba, Alberta, Saskatchewan, the Northwest Territories and Nunavut:

Director, Environmental Protection - Prairie and Northern  
Environment Canada  
4999 - 98th Avenue  
Edmonton, Alberta T6B 2X3

For residents of British Columbia and the Yukon:

Director, Environmental Protection - Pacific and Yukon  
Environment Canada  
224 West Esplanade  
North Vancouver, British Columbia V7M 3H7

## Notes

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This is Exhibit E referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 6th day  
of September, 20 11

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

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## **The Canadian Environmental Protection Act (CEPA 1999) and Enforcement**

### **A duty to enforce the law**

Canadians expect their government to provide laws and regulations in order to protect them and their society, and these laws must be effectively enforced. The Parliament of Canada has ensured that CEPA 1999 is enforced by stipulating the Government of Canada's duty of enforcement directly in the Act.

### **The role of enforcement under CEPA 1999**

When regulations are developed under CEPA 1999, stakeholders provide input and comment at various stages. Compliance is easier when those being regulated understand the purpose of regulations and have input into their creation. Environment Canada promotes compliance through fact sheets, manuals, guidelines and technical assistance.

Enforcement is part of the compliance continuum, and part of the goal in achieving the highest level of environmental quality for all Canadians, a goal stated in the Preamble of CEPA 1999. Usually, the first stage of enforcement is inspection by site visit or review of submitted reports as a means of verifying compliance with the Act and its regulations. An effective approach by Environment Canada in providing opportunities for input to the creation of regulations and in compliance promotion should result in a high rate of compliance. In cases of non-compliance, enforcement officers will investigate. If a violation is confirmed, action will be taken using one or more of the enforcement tools available under CEPA 1999.

### **Principles of CEPA enforcement**

Enforcement of CEPA 1999 follows Environment Canada's Compliance and Enforcement Policy. Enforcement respects the following principles:

- Compliance with CEPA 1999 and its regulations is mandatory;
- CEPA enforcement officers apply the Act in a manner that is fair, predictable and consistent.
- CEPA enforcement officers use rules, sanctions and processes securely founded in law.
- CEPA enforcement officers enforce the Act with an emphasis on preventing harm to the environment.
- CEPA enforcement officers examine every suspected violation of which they have knowledge, and take action consistent with the Compliance and Enforcement Policy.
- CEPA enforcement officers encourage Canadians to report CEPA violations to them.

### **Powers of enforcement officers**

Enforcement officers are peace officers for the purposes of enforcing the Act. They also have powers similar to those contained in many other federal statutes that provide for inspections to verify compliance. These include the right to:

- enter premises;
- open containers and examine contents;
- take samples; and
- conduct tests and measurements, and obtain access to information (including data stored on computers).

### **Powers of CEPA analysts**

CEPA analysts can be chemists, biologists, engineers, forensic accountants, or laboratory personnel. They are entitled to accompany enforcement officers on inspections, and they have the power to enter premises, open containers, take samples, conduct tests and measurements, and gain access to information. However, they may not use enforcement tools such as warnings, directions, tickets, or environmental protection compliance orders.

## **Enforcement tools**

CEPA enforcement officers have the following enforcement tools at their disposal:

- warnings to indicate the existence of a violation, so that the alleged offender can take notice and return to compliance;
- directions that enforcement officers may issue to deal with or to prevent illegal releases of regulated substances;
- tickets for offences such as failure to submit written reports;
- environmental protection compliance orders to put an immediate stop to illegal activity, to prevent a violation from occurring or to require action to be taken;
- Environmental Protection Alternative Measures
- prosecution under the authority of a Crown prosecutor.

## **The future of enforcement**

The CEPA 1999 Compliance and Enforcement Policy guides application of the Act by enforcement officers. The achievement of CEPA's goals of protection of the environment and human health through pollution prevention is dependent in large part on effective enforcement of the Act and its regulations.

---

## **Further information:**

### **Internet:**

Additional information on the Canadian Environmental Protection Act, 1999 is available on Environment Canada's Green Lane on the Internet at: [www.ec.gc.ca/CEPARRegistry](http://www.ec.gc.ca/CEPARRegistry)

### **Inquiry Centre:**

351 St. Joseph Boulevard  
Hull, Quebec K1A 0H3  
Telephone: (819) 997-2800  
toll-free 1 800 668-6767  
Fax: (819) 953-2225  
E-mail: [enviroinfo@ec.gc.ca](mailto:enviroinfo@ec.gc.ca)



This is Exhibit F referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 15th day  
of September, 20 11

[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

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# ABSOLUTE DISCHARGE UNDER CEPA

by Dianne Saxe on February 7, 2009



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You were searching for "[absolute discharge under cepa](#)". See posts relating to your search »

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On Thursday, an Ontario company received an absolute discharge for unwittingly breaching Section 36 of the *Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations*, under the *Canadian Environmental Protection Act 1999*. 0 tweet 0

This section requires those exporting hazardous waste from Canada to submit confirmation of destruction, within 30 days after the foreign receiver disposes of the waste. No specific format is prescribed. Like many others, RPR Environmental believed that Environment Canada was content to accept Copy 3 of the completed manifest as adequate proof of destruction, especially where the receiver promptly disposed of the waste.

For reasons best known to Environment Canada, they did not communicate their dissatisfaction with this interpretation to the waste industry. Environment Canada could, and should, have written to each of the (highly regulated) professional waste brokers, requesting separate confirmations of destruction. At a minimum, they could have clearly communicated this through industry associations or newsletters.

Instead, they acted like bullies. RPR's first indication of any problem was the arrival of 17 officers in flack jackets with a search warrant. Investigators ransacked their offices (twice), seized hundreds of documents, copied computer disks, terrified employees, left files in a shambles, laid three different sets of charges, and caused years of upheaval. And what the matter ultimately came down to was legitimate confusion about the interpretation of s.36. After all the drama, and much wasted expense (public and private), the company made a \$5,000 donation to a local charity, conducted a training course, and received an absolute discharge with no fine. This is another sad example of cruel and inappropriate enforcement by Environment Canada. As in *Gemtec*, a small, hardworking company had an honest and reasonable understanding of a complex law. It turned out that Environment Canada disagreed with its interpretation. But instead of giving an explanation, or a warning, Environment Canada responded with a sledgehammer. This is like beating a child for breaking an unspoken rule; it's unfair, it's counterproductive, and it's bad public policy.

No question, we need environmental enforcement. But we need it to be fair, and proportional to the real fault involved. Environment Canada urgently needs to re-examine its approach to compliance and enforcement. Fundamentally, serious punishment should be reserved for those who had some reason to know that what they were doing was wrong. In areas of disputed interpretation of the law, Environment Canada should explain what it means and give people an opportunity to comply, before it throws the book at them.

Tagged as: [bad public policy](#), [inappropriate enforcement](#)

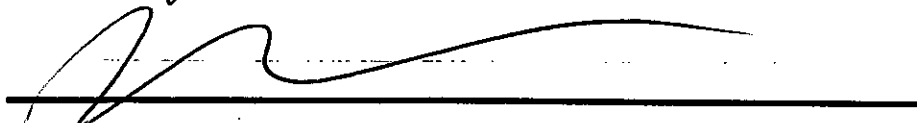
[Login](#)

- [This blog post](#)
- [All blog posts](#)

This is Exhibit G referred to in the Affidavit  
of Patrick Whitty

sworn before me on this 4th day

of September, 2011



Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

05220-A0079112 pages 67-68



## ENFORCEMENT ACTION BRIEFING NOTE

### PROTECTED LAW ENFORCEMENT

**EAB Date:** 2008/03/25

**EAB Update #** 002

- |   |  |  |
|---|--|--|
| <input type="checkbox"/> Initiate Investigation                                     | <input type="checkbox"/> Recommend Prosecution | <input type="checkbox"/> Use of Force        |
| <input type="checkbox"/> Written Warning  | <input type="checkbox"/> Charges Laid          | <input type="checkbox"/> Arrest              |
| <input type="checkbox"/> Direction / EPCO   | <input type="checkbox"/> Court Appearance      | <input type="checkbox"/> Disposition of Case |
| XX Search Warrant   | <input type="checkbox"/> Sentencing            | <input type="checkbox"/> Other _____         |
| <input type="checkbox"/> Justice Canada - Federal Prosecution Service / Issue _____ |  |  |

<b>File Name:</b>	RPR Environmental - Export Complaints, EIHWHRM, EW	<b>NEMISIS File Number:</b>	3007-2007-12-19-014
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<b>Company/Agency /Individual(s) Name:</b>	RPR Environmental Services Inc. / Patrick WHITTY		
<b>Address/Location:</b>	164-166 South Service Rd.		
<b>City:</b>	Stoney Creek	<b>Province/Terr.:</b>	Ontario

<b>Act(s):</b>	CEPA 1999 - CANADIAN ENVIRONMENTAL PROTECTION ACT						
<b>Regulation(s):</b>	Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations						
<b>Section(s):</b>	11(1)	11(3)(a)	11(6)(a)	36(1)			

<b>Date(s) of incident(s):</b>	14 December 2007		
<b>Location(s) of incident(s):</b>	164-166 South Service Rd. Stoney Creek	<b>Province/Terr.:</b>	Ontario

#### COMPLIANCE HISTORY:

- RPR Environmental has been under investigation in the past for EIHWR alleged violations. See file 300720020924001, 300720020416006 & 300720050916001.
- RPR Environmental was inspected and given verbal warning for a similar alleged violation during a border spot inspection in May 2003. See file 300720030724004.
- RPR Environmental has been given 2 warning letters. See file 300720001123001 and 300720070606003
- Facility appears to have a non-compliance history dealing with EIHWR and EIHWHRM regulated activities.

#### DESCRIPTION OF INCIDENT(S):

005307

s.23

**ENFORCEMENT ACTION / STATUS**

s.23

- On January 10<sup>th</sup>, 2007 a total of 44 charges were laid in the city of Hamilton against RPR Environmental for violations of the EIHWHRM with a scheduled first appearance date of February 28, 2008.
- On February 13, 2008 summons was served on Frances Scandinavo, representative for the company and Patrick Whitty, in relation to the alleged violation set to be heard on February 28, 2008.
- On February 26, 2008 an additional 20 charges were laid in the city of Hamilton against the company and Patrick Whitty for alleged violations of the EIHWHRM with a scheduled first appearance date of February 28, 2008.
- On February 28, 2008 first appearance was remanded to April 17, 2008.
- On March 25, 2008 a Search Warrant was authorized by the Hamilton courts. It is to be executed on Thursday March 27, 2008.

**SENSITIVITIES:** the cross border movement of hazardous waste is a high profile issue and the Program has consistently remained a National Inspection Plan priority.

**MEDIA/PUBLIC AWARENESS:** none known.

**RECOMMENDATION:** per normal procedures this file should not be discussed outside of EC Enforcement, EC Legal Services or the PPSC. Investigation files may involve search warrants, which can take place at any time. Senior management will be advised as soon as possible prior to their execution.

<b>Court Type and Location:</b>	Hamilton, Ontario		<b>Court Case/File Number:</b>	
<b>Originator:</b>	Wells. Ed	<b>Phone:</b>	(416) 739-5902	<b>Region/Division:</b> Ontario

**ATTACHMENT(S):**

**INITIAL REGIONAL DISTRIBUTION:**      **INFORMED**      **APPROVAL**      **DATE**

Regional Enforcement Manager/Supervisor	_____	2008-03-26	_____
EP-RD	_____	_____	_____
RDG	_____	_____	_____
EB - Regional Support Division	_____	_____	_____
Other (Insert Title)	_____	_____	_____

**HQ DISTRIBUTION:**

005308

This is Exhibit H referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 10th day  
of September, 2011  
[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, O.S.,  
Province of Ontario, for D. Gordon F. Morlan,  
Barrister and Solicitor.  
Expires April 6, 2012.

*Original*  
~~CONFIDENTIAL~~ (VF)  
CEPA, 1999  
Section 220

**WARRANT TO SEARCH**  
(Canadian Environmental Protection Act, 1999)

CANADA  
PROVINCE OF ONTARIO  
HAMILTON REGION

TO the Enforcement Officers  
in the said region and in the  
Province of Ontario.

WHEREAS it appears on the information of;  
Edward Nicholas Wells badge #551 of Toronto  
(Enforcement Officer) (Municipality)  
that there are reasonable and probable grounds to believe that there are in;  
the buildings and offices of RPR Environmental Inc.  
(place)

Located at;  
162 South Service Road, Stoney Creek, ON., L8E 3H6  
(address or location of place)

herein called the premises, certain things, namely:  
See Appendix "B" To Warrant To Search And Information To Obtain A Search Warrant

That are being sought as evidence in respect to the commission of an offence against the  
Canadian Environmental Protection Act, 1999 namely:  
See Appendix "C" To Warrant To Search And Information To Obtain A Search Warrant

THEREFORE, this is to authorize and require you to enter into the said place on the date  
of March 27<sup>th</sup>, 2008 between the hours of 08:00 hours and 21:00 hours to receive and  
seize the above things in order that they may be dealt with according to law.

DATED this 25<sup>th</sup> day of March, 2008  
at Hamilton Ontario



(Provincial Judge or Justice of the Peace in and for Ontario)

*Issued at 12:45 p.m.  
March 25/08  
(VF) [Signature]*

This is Exhibit I referred to in the Affidavit  
of Patrick Whitty

sworn before me on this 15th day

of September, 2011

[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.



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de la Loi sur l'accès à l'information.

07032-A0079110 pages 1 - 3

## ENFORCEMENT ACTION BRIEFING NOTE

### PROTECTED LAW ENFORCEMENT

**EAB Date:** 2008/03/26

**EAB Update #** 001

☒ **XX Initiate Investigation**

☐ **Recommend Prosecution**

☐ **Use of Force**

☐ **Written Warning**

☐ **Charges Laid**

☐ **Arrest**

☐ **Direction / EPCO**

☐ **Court Appearance**

☐ **Disposition of Case**

☒ **Search Warrant**

☐ **Sentencing**

☐ **Other** \_\_\_\_\_

☐ **Justice Canada - Federal Prosecution Service / Issue:** \_\_\_\_\_

<b>File Name:</b>	RPR Environmental, Stoney Creek, ON - Section 17 Request- CEPA 14 Dec 2007, EGW RPR Environmental, Stoney Creek, ON RPR Environmental TMB Complaint	<b>NEMISIS File Number:</b>	3007-2008-01-17-002 3007-2007-12-19-014 3007-2005-09-16-001 3007-2002-04-16-006
-------------------	--	-----------------------------	--

<b>Company/Agency /Individual(s) Name:</b>	RPR Environmental Services Inc./ Patrick WHITTY/ Bailey MYLLEVILLE		
<b>Address/Location:</b>	164-166 South Service Rd.		
<b>City:</b>	Stoney Creek	<b>Province/Terr.:</b>	Ontario

<b>Date(s) of incident(s):</b>	2000/01/01		
<b>Location(s) of incident(s):</b>	Stoney Creek	<b>Province/Terr.:</b>	Ontario

**COMPLIANCE HISTORY:**

- RPR Environmental has been under investigation in the past for EIHWR alleged violations. See files 300720020416006, 300720050916001 and 300720071219014.
- RPR Environmental was inspected and given verbal warning for a similar alleged violation during a border spot inspection in May 2003. See file 300720030724004.
- Facility appears to have a non-compliance history dealing with EIHWR regulated activities.

**DESCRIPTION OF INCIDENT(S):**

20 December 2007 – a request for investigation was received pursuant to section 17 of CEPA related to alleged violations of the EIHWR during 2000 and 2001. It is alleged that waste generated in the U.S.A. by a furniture manufacturer was transported to Alberta passing through the sites of two Canadian waste brokers, Custom Environmental Services Ltd. (CESL), and 876947 Ontario Ltd., carrying on business under the name of RPR Environmental. The furniture waste was ultimately delivered to an incinerator facility in Wainwright, Alberta. Shortly after the arrival of the waste a fire occurred caused by the ignition of the flammable portion of the furniture waste. It is alleged that the importer of the waste, RPR Environmental reclassified the waste when it was received and misled the Alberta receiver CESL regarding the waste type, resulting in the incinerator fire. It is further alleged that RPR Environmental did not have an import permit for the

007032

002199

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de la Loi sur l'accès à l'information.

waste and improperly classified it on the movement document to transport it from Ontario to Alberta.

**ENFORCEMENT ACTION / STATUS**

**3007-2002-04-16-006 RPR Environmental**

Transboundary Movement Branch (TMB) alleged that RPR Environmental had been exporting various wastes, including UN1992 (waste flammable liquids, poisonous) into the USA without having any valid permits on file for the 2001 calendar year.

Based on a preliminary review of the above requested documents, it was concluded that a site visit had to be scheduled in order to diligently verify this alleged violation.

Inspection result:

Two separate shipments of UN1992 were exported: the first manifested shipment described as "Fuel/Varsol", discovered by myself, indicated a waste flammable liquid with the word "poisonous" rubbed out and "UN1993" appeared to be a 1992 with the number 3 written overtop. This shipment of 100 Litres was traced back to the Generating company (Algonquin College). The original manifest from Algonquin College to RPR indicated that 100 Litres of UN1992 class 3(6.1) was loaded onto the truck.

RPR's "inventory manifest" indicated 100 Litres of UN1992 class 3(6.1), however the manifest concerning the export indicated 100 Litres of UN1993 class 3. It should be noted that RPR did not have a Permit to export UN1992, however they did have a permit to export UN1993.

**3007-2005-09-16-001 RPR Environmental TMB Complaint**

JP indicated the warrant was too sweeping. Task Investigator Edward N. Wells with the rewrite.

Re apply for warrant based on rewritten document. Warrant approved.

Search Warrant executed at 164-168 South Service Road. Number of items seized for evidence.

After approval charges laid against RPR Environmental and the President Patrick WHITTY. First Appearance date November 1, 2007.

Evidence seized during Search Warrant executed on August 9, 2008 documentation returned to RPR Environmental Office Manager France Scandivano.

**3007-2007-12-19-014 RPR Environmental, Stoney Creek, ON**

Investigators attended at WMD that same week and discovered approximately 567 alleged violations in calendar years 2005, 2006, and 2007.

s.23

It has been determined that a search warrant will be required to collect further evidence in relation to the violations of EIHWHRMR. Requests by Crown to RPR Environmental Inc. For informed consent release of the required documentation has been denied.

Information laid against Patrick Whitty and RPR Environmental Inc. For violations of EIHWHRM related to movement documents. First appearance scheduled for February 28, 2008.

Summons served on RPR Environmental Inc. Representative Frances Scandinavo regarding current charges before the courts against Patrick Whitty and RPR Environmental Inc. To be heard on February 28, 2008.

Case remanded to April 17, 2008 and Disclosure has been requested

s.23

3007-2008-01-17-002 RPR Environmental, Stoney Creek, ON - Section 17 Request- CEPA 14 Dec 2007

Report received from PYR and currently being reviewed.

On March 25, 2008 file #3007-2005-09-16-001 RPR Environmental TMB Complaint was closed as file was opened under file #3007-2007-12-19-014 & file #3007-2008-01-17-002.

**SENSITIVITIES:** the complainant has requested confidentiality and steps have been taken to ensure the request is honoured.

**MEDIA/PUBLIC AWARENESS:** the incident that generated the complaint (an incinerator fire in Alberta) has been widely publicized.

**RECOMMENDATION:** per normal procedures, this file should not be shared outside of EC enforcement, and the Public Prosecution Service of Canada. Investigation files may result in search warrants being granted at any time. Steps will be taken to advise senior management as soon as possible prior to their execution.

<b>Court Type and Location:</b>		<b>Court Case/File Number:</b>	
<b>Originator:</b>	Wells, Edward May, Bradley	<b>Phone:</b>	(416) 739-5902 (416) 739-5901
<b>Region/Division:</b>		Ontario	

**ATTACHMENT(S):**

<b>INITIAL REGIONAL DISTRIBUTION:</b>	<b>INFORMED</b>	<b>APPROVAL</b>	<b>DATE</b>
Regional Enforcement Manager/Supervisor	_____	_____	March 26, 2008
EP-RD	_____	_____	_____
RDG	_____	_____	_____
EB - Regional Support Division	_____	_____	_____
Other (Insert Title)	_____	_____	_____

**HQ DISTRIBUTION:**

This is Exhibit J referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 6th day  
of September, 20 11  
[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, O/A,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

04945-A0079618 pages 8 - 9

**Wells,Edward [Ontario]**

---

**From:** May,Bradley [Ontario]  
**Sent:** Monday, January 21, 2008 12:15 PM  
**To:** Wells,Edward [Ontario]  
**Subject:** FW: Teleconference re: Sec 17 Request for investigation

More

---

**From:** May,Bradley [Ontario]  
**Sent:** Monday, January 21, 2008 12:14 PM  
**To:** Adkin,Roger [Edm]  
**Subject:** RE: Teleconference re: Sec 17 Request for investigation

s.23

Thanks - one of the things from an investigative perspective is that the complainant says in his letter that "...EC personnel were made aware of the offences on March 31, 2006" (top of page 2).

is that is when the 2 year summary conviction timeline starts (leaving us only until March 31, 2008 to fully investigate and lay charges, if appropriate). Just an fyi at this time.

I will ask Ed to see if intell still has the file here in Ontario.

---

**From:** Adkin,Roger [Edm]  
**Sent:** Monday, January 21, 2008 11:58 AM  
**To:** May,Bradley [Ontario]  
**Subject:** RE: Teleconference re: Sec 17 Request for investigation

2001 I have not been able to find it or the hard copy, that was the period of time when we, intelligence hadn't started using NEMISIS full time. I will keep digging her. I do have pictures of the facility here that burnt after the explosion.

Mr. Roger Adkin  
Manager Intelligence Unit  
Environment Canada  
200-4999 98th Ave  
Edmonton, Alberta  
Canada  
T6B-2X3  
780-951-8751 office  
780-974-9511 cell  
780-495-2451 Fax

---

**From:** May,Bradley [Ontario]  
**Sent:** Monday, January 21, 2008 9:33 AM  
**To:** Adkin,Roger [Edm]  
**Subject:** RE: Teleconference re: Sec 17 Request for investigation

I don't suppose you have the NEMISIS number, eh? Let me check - about 2000 - 2001 ?

---

**From:** Adkin,Roger [Edm]  
**Sent:** Monday, January 21, 2008 11:14 AM  
**To:** May,Bradley [Ontario]  
**Subject:** RE: Teleconference re: Sec 17 Request for investigation

Brad in regards to this call. I had forwarded a Nemisis file to yourself and Mark P about three weeks after the explosion. I followed it up with a paper copy explaining what transpired, port of entry and who was the importer as well as the exporter. For some reason I have been unable to locate it. Do you still have it?

Mr. Roger Adkin

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de la Loi sur l'accès à l'information.

Manager Intelligence Unit  
Environment Canada  
200-4999 98th Ave  
Edmonton, Alberta  
Canada  
T6B-2X3  
780-951-8751 office  
780-974-9511 cell  
780-495-2451 Fax

---

**From:** May,Bradley [Ontario]  
**Sent:** Saturday, January 19, 2008 10:24 AM  
**To:** Desmarais,Daniel [NCR]; Adkin,Roger [Edm]; Labossiere,Mike [Edm]; Wells,Edward [Ontario]  
**Cc:** Levitt,Ryan [Edm]  
**Subject:** RE: Teleconference re: Sec 17 Request for investigation

Daniel - What sorts of things would you like to talk about? There's nothing really to update since last week.

---

**From:** Desmarais,Daniel [NCR]  
**Sent:** Friday, January 18, 2008 5:25 PM  
**To:** Adkin,Roger [Edm]; May,Bradley [Ontario]; Labossiere,Mike [Edm]; Wells,Edward [Ontario]  
**Subject:** Teleconference re: Sec 17 Request for investigation  
**When:** Monday, January 21, 2008 3:00 PM-3:30 PM (GMT-05:00) Eastern Time (US & Canada).  
**Where:**

Are you free for a teleconf. Concerning the above subject

15:00 hrs Ottawa time

Dial 1-866-646-2080 code 9940604

Please confirm

Daniel

This is Exhibit K referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 1st day  
of September, 20 11

[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

**From:** Horvath, Julie [NCR]  
**Sent:** September 26, 2008 11:06 AM  
**To:** Wells, Edward Nicholas [Ontario]  
**Subject:** FW: EAB RPR Environmental

05220-A0079112 page 74

**Attachments:** 3007-2007-12-19-014--2.doc

---

**From:** Frederick, Josee [NCR]  
**Sent:** Thursday, March 27, 2008 10:32 AM  
**To:** Cuillerier, Paul [NCR]; Benocci, Renzo [NCR]  
**Cc:** Tingley, Linda [NCR]; Bombardier, Manon [NCR]; Desmarais, Daniel [NCR]; Horvath, Julie [NCR]; Roussel, Julie [NCR]  
**Subject:** FW: EAB RPR Environmental

**PLEASE SHOW TO PAUL AND RENZO.**

Search Warrant is being executed as we speak.

Merci

*Josée Frederick  
Environmental Support Coordinator  
Coordonnatrice des activités  
Environmental Enforcement Directorate  
Dir. Application de la loi en environnement  
Phone/Tél: (819) 934-6930  
Fax: (819) 953-3459*

---

**From:** Vanderlaan, Mark [Ontario]  
**Sent:** Thursday, March 27, 2008 9:59 AM  
**To:** Green, Jeffrey [Ontario]; Bell, Michael [Ontario]; EPS - EB, EED; Epstein, Danny [Ontario]; Meaney, John [Ontario]; Vollmershausen, Jim [Ontario]  
**Subject:** EAB RPR Environmental



3007-2007-12-19-0  
14-2.doc (61...



This is Exhibit L referred to in the Affidavit  
of Patrick Whitty

sworn before me on this 14 day  
of September, 2011

[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, O.C.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

### **Canadian Manifesting Mechanism Will Say**

The Government of Canada is committed to protect human health and the environment and enforce environmental and conservation laws with tough standards and regulations concerning the import into and export out of Canada of hazardous wastes and hazardous recyclable materials.

Canada is a signatory to a number of international agreements which include:

1. the United Nations, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;
2. the OECD (Organization for Cooperation and Economic Development) Council Decision concerning the control of transfrontier movements of wastes destined for recovery operations; and
3. the Canada - USA Agreement on the Transboundary Movement of Hazardous Waste.

On August 28, 1992, Canada ratified the Basel Convention. The Basel Convention controls the transboundary movements of hazardous wastes and hazardous recyclable materials, and promotes their environmentally sound management. The Convention also restricts transboundary movements to take place between Basel Party countries only.

Since March 1992, the transboundary movements of hazardous wastes destined for recycling operations between Member countries of the Organization for Economic Cooperation and Development (OECD) have been supervised and controlled according to OECD Council Decision C(92)39/FINAL. The OECD Decision provides a framework to control transboundary movement of hazardous recyclable materials within the OECD area, in an environmentally sound and economically efficient manner. This Decision was subsequently revised and incorporated into the new OECD Council Decision C(2001)107/FINAL, which was adopted and came into force for OECD member countries in May 2001.

The Canada-U.S.A. Agreement, which came into effect in November 1986 and was later amended in 1992, is intended to ensure that hazardous waste and municipal solid waste destined for final disposal crossing the Canada-U.S. border comply with each country's domestic law and the provisions of the Agreement. It confirms basic principles recognized by both countries for the proper control of transboundary movements of hazardous wastes and other wastes, including a prior informed consent regime.

It should be noted that both the OECD Council Decision and the Canada-USA Agreement are recognized under Article 11 of the Basel Convention as multi-lateral and bilateral agreements which provide an equivalent level of control as required under the Convention itself. This is an important point, since the USA although signing the Convention has never ratified it and implemented the

requirements through its domestic legislation. Therefore, the USA is not a Party to the Convention. However, due to the recognition of the OECD Decision and the Canada-USA Agreement as Article 11 agreements has allowed the border to remain open to the transboundary movement of hazardous waste and hazardous recyclable materials with the United States.

In 1992, the Federal Canadian Government of Canada complied with its international obligations through the implementation of domestic legislation. The *Export and Import of Hazardous Wastes Regulations* (EIHWR)<sup>1</sup> pursuant to the Canadian Environmental Protection Act (CEPA 1988) were the means by which the conditions and articles set out in the international agreements to which Canada is a party were implemented domestically. These Regulations strictly controlled the international movement of hazardous waste and hazardous recyclable material into and out of Canada, including transits through Canadian territory.

The keystone of the EIHWR and the new *Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations* (EIHWHRMR) is the prior informed consent (PIC) mechanism which is also an essential component of all three of the international agreements to which Canada is a party.

The PIC provisions in the EIHWR require the Canadian importer to submit a notice for intended imports of hazardous waste or hazardous recyclable material destined for disposal or recycling/recovery operations respectively, before any movements can take place. The notice allows Environment Canada to determine who the parties are in the proposed transaction (generator/foreign exporter, carriers and importer/receiver), identify the hazardous waste(s)/hazardous recyclable(s) and ensure that the appropriate documentation is in place to cover the proposed shipments, such as contracts between the parties and evidence of sufficient insurance coverage in the event of an accident or mishap.

In Canada, the management of hazardous waste and hazardous recyclable materials is a shared responsibility. The Government of Canada regulates international movements of hazardous wastes and hazardous recyclable materials, while the provincial and territorial governments control generators, waste management/recycling facilities and transportation within their jurisdictions. The provinces and territories also have regulations that set out requirements for the licensing and the issuance of operating permits for waste management and recycling facilities.

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<sup>1</sup> The *Export and Import of Hazardous Wastes Regulations* (EIHWR) were in force from November 26, 1992 until November 1, 2005, at which time they were revoked and replaced by the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* (EIHWHRMR). Consequently, the text is written in the past tense with respect to the EIHWR, although the controls remain in force through the new Regulations.

In the case of imports, the PIC mechanism allows the provinces to review the import notice information and provide consent based on the strict controls that they have placed on the operational permits for the facility before the transportation of the hazardous wastes/recyclables. The provinces/territories also provide confirmation of the authorization of the carriers involved in the transaction within their jurisdictions. The entire review and consent process takes place before an import permit can be issued under CEPA 1999 and any movement can take place.

Exports of hazardous waste or hazardous recyclable materials out of Canada to a foreign country, including the United States are subject to the notification and permit conditions set out in CEPA 1999, and the Regulations.

The PIC provisions also apply to exports. Under the Act and Regulations, a Canadian export notice needs to be completed by the exporter and submitted to Environment Canada. Once the notice has been reviewed, as well as meeting the contract and insurance requirements, the notice is forwarded to the foreign competent authority for their consent. No permit will be issued until the authorities of the country of destination have authorized the movement and have confirmed that the final disposal or recycling of the hazardous waste or hazardous recyclable material is authorized.

The second keystone of the EIHWR and the EIHWRMR is the manifest movement tracking provisions. Both the Basel Convention and the OECD Council Decision require Parties to track the transboundary movements through a movement document which is signed by each person who takes charge of the hazardous waste or hazardous recyclable material upon receipt or delivery. The OECD Decision has set timelines for the distribution of the movement document. The Decision requires that the completed and signed movement document be returned by the importer to the competent authorities concerned and the exporter within three days of receipt of the hazardous recyclables by the authorized receiving facility.

In Canada, the EIHWR required the importer to ensure that a copy of the manifest, with Part A completed by the person who exported the hazardous waste from the country of export and Part B completed by the first authorized carrier, was sent, within three days after the manifest was provided to the first authorized carrier, to

- (a) the Minister; and
- (b) the authorities of the province of import.

In addition, the EIHWR required the importer, within three days after receiving the hazardous waste at the authorized facility, to complete and sign Part C of the manifest and send copies of the completed manifest to

- (a) the Minister;
- (b) the authorities of the province of import;

- (c) the person who exports the hazardous waste from the country of export; and
- (d) every carrier of the hazardous waste.

In the case of exports, the same responsibilities and timelines were placed on the Canadian exporter, in order to track the movements of hazardous waste or hazardous recyclable material out of Canada.

The notice and prior informed mechanism work in conjunction with the manifest/movement document tracking system. The notice is a means by which all affected competent authorities are provided the opportunity to review the proposed transactions and provide consent, before any movements take place. All of the review and confirmations are done up front through the notice. This affords the provinces and foreign competent authorities as proposed importing destinations to ensure that the receiving facilities are authorized to perform the disposal or recycling operations set out in the notice. The competent authorities can also ensure that the hazardous waste and hazardous recyclable materials can be disposed of, treated, or recovered and will be managed in a manner that is environmentally sound which protects human health and the environment. While the manifest/movement document is the check in the entire regime to ensure that the transaction actually has taken place as proposed and allowed in the permit.

Hazardous waste and hazardous recyclable material exhibit hazardous properties or contain hazardous constituents which can pose an immediate and acute hazard to the environment or human health. Other hazardous contaminants or constituents in the waste or recyclable may only be released into the environment or effect human health over a long period of time. In any case, if the hazardous waste or hazardous recyclable material is mismanaged or the disposal/recycling operations take place at a facility which is not authorized to perform those functions or does not have adequate environmental or emission controls in place, this could result in the release of the hazardous substances into the environment with a detrimental impact on human health and the natural environment.

The manifest tracking system does not eliminate nor remove the hazard characteristics of the waste or recyclable material. The manifest is a means of controlling the risk posed by the movement of the hazardous waste and hazardous recyclable material. In addition, the manifest/movement document is a means by which Environment Canada can take steps to ensure and verify that the hazardous waste or hazardous recyclable material was received at the authorized facility as was approved in the permit issued by the Minister.

The failure to return the manifest in the required time set out in the Regulations allows for a critical period of time to elapse during which the mismanagement of a hazardous waste or hazardous recyclable material can take place. During this


period of time, the impact to the environment or human health may occur and be acute.

Prolonged mismanagement, including improper storage, would allow for the introduction of the hazardous constituents into the environment, which may require increased clean-up costs to mitigate the damage depending on the length of time taken before the release can be halted. In the case, of chronic effects on human health, these effects may not manifest themselves for many years into the future. At that time, these chronic effects will put greater pressures on the healthcare system and will impact on the quality of life of Canadians.

In addition to the potential impacts on human health and the environment, failure to comply promptly with the manifest requirements will affect Canada's ability to comply with its international obligations.

Prepared by:  
Joachim Wittwer, BSc., CChem.  
Head, Operations Section  
Waste Management Division  
(formerly Transboundary Movement Branch)  
Environment Canada

Note: Other international companies do submit copies of the movement documents as required under the international instruments, such as the OECD Council Decision. For example, ENUSA Industrias Avandas, S.A. located in Salamanca, Spain forwarded copy 1 of OECD movement document to Environment Canada as an international shipment prepared to leave (E005965) for Canada. Although the OECD movement document is not a Canadian regulatory requirement, it is clear that companies can and do meet the submission requirements for the tracking of the hazardous waste or hazardous recyclable material movements internationally.

 18/07/07

This is Exhibit M referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 6th day  
of September, 2011

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as the case may be)

## Canada - U.S.A. Agreement

### Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste (consolidated text)

**In case of discrepancy between this webpage and the printed Agreement, the Agreement will prevail.**

The Government of Canada (Canada), and the Government of the United States of America (the United States), hereinafter called "The Parties":

**Recognizing** that severe health and environmental damage may result from the improper treatment, storage, and disposal of hazardous waste and other waste;

**Seeking** to ensure that the treatment, storage, and disposal of hazardous waste and other waste are conducted so as to reduce the risks to public health, property and environmental quality;

**Recognizing** that the close trading relationship and the long common border between the United States and Canada engender opportunities for a generator of hazardous waste and other waste to benefit from using the nearest appropriate disposal facility, which may involve the transboundary shipment of hazardous waste and other waste;

**Believing** that a bilateral agreement is needed to facilitate the control of transboundary shipments of hazardous waste and other waste between the United States and Canada;

**Reaffirming** Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm, which asserts that states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction;

**Taking** into account Organization for Economic Co-operation and Development (OECD) Council Decisions and Recommendations on transfrontier movements of hazardous wastes, the United Nations Environment Program Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Waste, and resolutions of the London Dumping Convention,

Have agreed as follows:

#### Article 1 - Definitions

For the purposes of this Agreement:

##### **Designated Authority**

means, in the case of the US Environmental Protection Agency (US EPA) and, in the case of Canada, the Department of the Environment.

##### **Hazardous Waste**

means with respect to Canada, hazardous waste, and with respect to the United States, hazardous waste subject to a manifest requirement in the United States, as defined by their respective national legislations and implementing regulations.

##### **Country of Export**

means the country from which the shipment of hazardous waste originated.

##### **Country of Import**

means the country to which hazardous waste and other waste is sent for the purpose of treatment, storage (with the exception of short-term storage incidental to transportation) or disposal.

##### **Country of Transit**



means the country which is neither the country of export nor the country of import, through whose land territory or internal waters hazardous waste and other waste is transported, or in whose ports such waste is unloaded for further transportation.

**Consignee**

means the treatment, storage (with the exception of short-term storage incidental to transportation) or disposal facility in the country of import and the name of the person operating the facility.

**Exporter**

means, in the case of the United States, the person defined as exporter, and in the case of Canada, the person defined as consignor, under their respective national laws and regulations governing hazardous waste and other waste.

**Other Waste**

means Municipal Solid Waste (MSW) that is sent for final disposal or for incineration with energy recovery, and residues arising from the incineration of such waste, as defined by the Parties' respective national legislation and implementing regulations, but excluding waste covered under paragraph (b) of this Article.

**Article 2 - General Obligation**

The parties shall permit the export, import, and transit of hazardous waste and other waste across their common border for treatment, storage, or disposal pursuant to the terms of their domestic laws, regulations and administrative practices, and the provisions of this Agreement.

**Article 3 - Notification to the Importing Country**

1. The designated authority of the country of export shall notify the designated authority of the country of import of proposed transboundary shipments of hazardous waste and other waste.
2. The notice referred to in paragraph (a) of this article may cover an individual shipment or a series of shipments extending over a twelve month or lesser period and shall contain the following information:
  1. The exporter's name, address and telephone number, and if required in the country of export, the identification number.
  2. for each hazardous waste and other waste type and for each consignee:
    1. A description of the hazardous waste and other waste to be exported, as identified by the waste identification number, the classification and the shipping name as required on the manifest in the country of export;
    2. The estimated frequency or rate at which such waste is to be exported and the period of time over which such waste is to be exported;
    3. The estimated total quantity of the hazardous waste and other waste in units as specified by the manifest required in the country of export;
    4. The point of entry into the country of import;
    5. The name and address of the transporter(s) and the means of transportation, such as the mode of transportation (air, highway, rail, water, etc.) and type(s) of container (drums, boxes, tanks, etc.);
    6. A description of the manner in which the waste will be treated, stored or disposed of in the importing country;
    7. The name and site address of the consignee;
    8. An approximate date of the first shipment to each consignee, if available.
3. The designated authority of the country of import shall have 30 days from the date of receipt of the notice provided pursuant to the date of receipt of the notice provided pursuant to paragraphs (a) and (b) of this article to respond to such notice, indicating its consent (conditional or not) or its objection to the export. Such response will be transmitted to the designated authority of the country of export. The date of receipt of the notice will be identified in an acknowledgement of receipt made immediately by the designated authority of the country of import to the country of export.
4. If no response is received by the designated authority of the country of export within the 30 day period referred to in paragraph (c) of this article, the country of import shall be considered as having no objection to the export of hazardous waste and other waste described in the notice and the export may take place conditional upon the persons

importing the hazardous waste and other waste complying with all the applicable laws of the country of import.

5. The country of import shall have the right to amend the terms of the proposed shipment(s) as described in the notice.
6. The consent of the country of import, whether express, tacit, or conditional, provided pursuant to paragraphs (c) and (d) of this article, may be withdrawn or modified for good cause. The Parties will withdraw or modify such consent insofar as possible at the most appropriate time for the persons concerned.
7. For the purposes of this Article and Article 5, manifest-related requirements may, with respect to other waste, be substituted by alternative tracking requirements.

#### **Article 4 - Notification to the Transit Country**

1. The designated authority of the country of export shall notify the designated authority of the country of transit of the proposed shipment of hazardous waste and other waste at least 7 days prior to the date of the shipment. The notice shall include the information specified in paragraph (b) of Article 3, with the following exceptions:
  1. The points of entry into and departure from the country of transit shall be provided in lieu of the entry point(s) into the country of import; and
  2. A description of the approximate length of time the hazardous waste and other waste will remain in the country of transit and the nature of its handling while there shall be submitted instead of a description of the treatment, storage, or disposal of the waste in the country of import.

#### **Article 5 - Cooperative Efforts**

1. The Parties will cooperate to ensure, to the extent possible, that all transboundary shipments of hazardous waste and other waste comply with the manifest requirements of both countries.
2. The Parties will cooperate in monitoring and spot-checking transboundary shipments of hazardous waste and other waste to ensure, to the extent possible, that such shipments conform to the requirements of the applicable legislation and of this Agreement.
3. To the extent any implementing laws and regulations are necessary to comply with this Agreement, the Parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the Parties will make best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The Parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such laws and regulations.

#### **Article 6 - Readmission of Exports**

The country of export shall readmit any shipment of hazardous waste and other waste that may be returned by the country of import or transit.

#### **Article 7 - Enforcement**

The Parties shall ensure, to the extent possible, that within their respective jurisdictions, their domestic laws and regulations are enforced with respect to the transportation, storage, treatment and disposal of transboundary shipments of hazardous waste and other waste.

#### **Article 8 - Protection of Confidential Information**

If the provision of technical information pursuant to articles 3 and 4 would require the disclosure of information covered by agreement(s) of confidentiality between a Party and an exporter, the country of export shall make every effort to obtain the consent of the concerned person for the purpose of conveying any such information to the country of import or transit. The country of import or transit shall make every effort to protect the confidentiality of such information conveyed.

#### **Article 9 - Insurance**

The Parties may require, as a condition of entry, that any transboundary movement of hazardous waste and other waste be covered by insurance or other financial guarantee in respect to damage

to third parties caused during the entire movement of hazardous waste and other waste, including loading and unloading.

#### **Article 10 - Effects on International Agreements**

Nothing in this Agreement shall be deemed to diminish the obligations of the Parties with respect to disposal of hazardous waste and other waste at sea contained in the 1972 London Dumping Convention.

#### **Article 11 - Domestic Law**

The provisions of this Agreement shall be subject to the applicable laws and regulations of the Parties.

#### **Article 12 - Amendment**

This Agreement may be amended by mutual written consent of the Parties or their authorized representatives.

#### **Article 13 - Entry into Force**

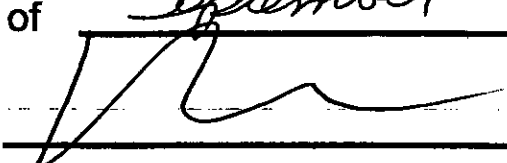
This Agreement shall enter into force on November 8, 1986 and continue in force for five years. It will automatically be renewed for additional five year periods unless either Party gives written notice of termination to the other at least three months prior to the expiration of any five year period. In any five year period, this Agreement may be terminated upon one year written notice given by one Party to the other.

**In witness where of**, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

**Done** at Ottawa, in duplicate, this 28th day of October, 1986, in the English and French languages, both texts being equally authentic.

Creation date: 2010-01-12  
Last updated : 2010-07-25  
Last reviewed: 2010-07-25

**URL of this page:** <http://www.ec.gc.ca/gdd-mw/default.asp?lang=En&n=C59BCC26-1&printerversion=true>

This is Exhibit N referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 25th day  
of September, 20 11  


Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Piquit, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.



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PPSC Careers
Links
Proactive Disclosure

### The Federal Prosecution Service DESKBOOK

[ [Previous](#) | [Table of Contents](#) | [Next](#) ]

## Part XII NEW POLICIES Chapter 56

### Table of Contents

#### 56 REGULATORY PROSECUTIONS

##### 56.1 BACKGROUND

##### 56.2 PURPOSE

##### 56.3 THE DECISION TO PROSECUTE IN THE REGULATORY OFFENCE CONTEXT

##### 56.4 THE ROLES AND RESPONSIBILITIES OF COUNSEL

###### 56.4.1 FPS Counsel

###### 56.4.2 Department Legal Services Counsel

###### 56.4.3 Legal Agents/Agent Supervisors

##### 56.5 SENTENCING IN REGULATORY PROSECUTIONS

### 56 REGULATORY PROSECUTIONS

#### 56.1 Background

In 1971, the Supreme Court of Canada recognized that there exists in Canadian law "a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public"<sup>1</sup>. Such offences are generally referred to as "regulatory" offences, and a study by the Law Reform Commission in 1986 estimated the number of such offences in federal legislation alone to be in excess of 97,000.<sup>2</sup>

The creation of regulatory offences is generally considered to be a desirable way of advancing governmental policy objectives. In *R. v. Wholesale Travel*<sup>3</sup>, Cory J. stated:

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

The fact that regulatory offences focus on the prevention of future harms requires that FPS counsel<sup>4</sup> pay particular attention to the policy objectives being pursued by the investigative agencies<sup>5</sup>. Departmental counsel from Legal Services ("LS counsel") are particularly sensitive to the nature, philosophy and objectives of the regulatory program, and FPS counsel are expected to work in partnership with them so that all counsel can take full advantage of their respective expertise.

## 56.2 Purpose

This policy has three main objectives:

- a. To further articulate the considerations relevant to the decision to prosecute in the regulatory offence context;
- b. To promote greater understanding of the respective roles and responsibilities of FPS counsel, LS counsel and investigators in regulatory Departments and agencies;
- c. To address special considerations relevant to sentencing in the regulatory offence context.

## 56.3 The Process of Risk Assessment

The Decision to Prosecute policy<sup>6</sup> requires a two part assessment of a case by FPS counsel: first, FPS counsel must consider whether the evidence is sufficient, and second, whether the public interest requires prosecution. That policy further notes that in the regulatory prosecution context, the "public interest" considerations include the regulatory goals of the legislation and stresses that consultation with the regulatory agency is necessary in determining those goals<sup>7</sup>.

It is more common in the regulatory context for FPS counsel to be able to apply the Decision to Prosecute policy before any charges have been laid. Indeed it is desirable because it can permit extensive consultation among FPS counsel, the investigative agency, LS counsel and others as to whether prosecution would in fact be the instrument of choice for dealing with alleged misconduct. Many federal departments have, within their governing legislation, a range of remedial options, from warnings to civil proceedings to administrative measures. It is important to bear in mind the admonition of the Supreme Court<sup>8</sup> that:

[t]he criminal law is, however, a weapon of last resort intended for use only in cases where the conduct is so inconsistent with the shared morality of society so as to warrant public condemnation and punishment.

The FPS approach is in accordance with these words, as has been noted:

[W]here preventative measures to promote compliance with a regulatory regime or a compliance program have failed, and non-compliance has occurred, referral for prosecution should not be automatic: it should only occur as a last resort. In fact, prosecution should only be considered at the end of the unsuccessful application of an Alternate Dispute Resolution strategy (ADR). And such alternative measures will be considered both before charges are laid and after they are laid.

Before charges are laid, measures such as warning and pre-charge diversion approach must be considered. ... After charges are laid, measures such as post-charge diversion are still available<sup>9</sup>.

This is not to suggest that most or all regulatory offences can be treated by some means other than prosecution<sup>10</sup>; in fact, in many circumstances, no effective alternative to prosecution may exist, or the available alternative (e.g. a warning) may be completely unsuitable. On occasion, the investigation will be of such a nature that it will require the early involvement of FPS counsel and require application of the

Megacase Management policy<sup>11</sup>. LS counsel may play an important role in identifying such investigations.

## 56.4 The Roles and Responsibilities of Counsel

Pursuant to the *Department of Justice Act*<sup>12</sup>, counsel acting on behalf of the Attorney General of Canada have the obligation to "advise the heads of the several departments of the Government on all matters of law connected with such departments" (s.5 (b)), and to "have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada" (s.5 (d)). While FPS counsel have responsibility for the eventual conduct of litigation, the advisory function is a shared responsibility among FPS counsel, LS counsel (sometimes more than one legal service) and others, such as counsel in the Human Rights Law Section.

Consultation is thus an essential feature of our approach to regulatory prosecutions. As a former Deputy Attorney General has stated:

In regulatory prosecutions, departments often have strong views about the enforcement of their regulatory schemes. They are entitled to know that we understand the rationale behind the relevant legislation. I would suggest as well that there is absolutely nothing improper or even questionable about the law enforcement arm of other departments wanting to influence the exercise of prosecutorial discretion, as long as no improper considerations of a political or other nature are brought to bear upon prosecutors. I would also argue that there is a lot of room for open communications between prosecutors and regulatory departments and agencies around the public interest in proceeding with particular prosecutions, with the views of the department responsible for the legislation given due weight by the Department of Justice<sup>13</sup>.

It is important to outline in a general way what the respective responsibilities are for counsel with respect to the prosecution function.

### 56.4.1 FPS Counsel

It is the responsibility of FPS counsel to:

- Provide legal advice as requested during the course of an investigation, or about matters of ongoing concern that may affect specific prosecutions, or prosecutions generally. This may commonly arise, for example, where advice is needed on subjects such as search and seizure or disclosure. In so doing, it will be important to consult with the investigator and/or LS counsel to determine whether legal advice on the same subject matter has already been given, and to attempt to ensure that the Department of Justice speaks with one voice on such matters as the legality of particular investigative techniques. Where legal advice is sought on an issue that will have general application to the investigative agency's enabling legislation, LS counsel must be consulted before the advice is given.
- Conduct the prosecution on behalf of the Crown. This includes making the final decision as to what charges will be prosecuted, whether to elect to proceed by indictment, what witnesses will be called, what sentence will be sought if the case results in conviction, and whether an appeal should be launched from acquittal or sentence. In exercising all of these functions FPS counsel are expected to consult in a timely way with the investigative agency, LS counsel and others as the need arises. Consultation is particularly important prior to making a decision not to prosecute a particular case<sup>14</sup>. It is good practice to document the reasons why a decision is made not to prosecute and to inform LS counsel and the investigative agency.

- Identify possible training needs for the investigative agency, and participate in training when requested. Consultation with LS counsel may help determine whether such training should be local or national. Training is a responsibility of the FPS as a whole, so FPS counsel will be expected to inform their managers and LS counsel as to what training may benefit the investigative agency (e.g., how to prepare a prosecution brief). FPS counsel should be particularly vigilant in identifying areas in which immediate training is desirable to ensure that the effectiveness of prosecutions is not compromised.

#### **56.4.2 Department Legal Services Counsel**

It is the responsibility of LS Counsel to:

- Assist investigators and agencies in developing alternatives to prosecution consistent with the client department's compliance and enforcement policies. LS counsel may also work with investigators and/or FPS counsel on such alternatives in specific cases.
- Be the primary point of contact for investigative agencies and FPS counsel for the provision of legal advice on matters relating to the agency's enabling legislation. Where the advice sought concerns general enforcement issues, LS counsel will be expected to exercise judgment as to when legal advice that may have broad implications for prosecutions (e.g., with respect to the legality of an investigative technique) will require consultation with the FPS, other legal services, the Human Rights Law Section or other parts of the Department of Justice before rendering the requested legal advice. Where the advice sought concerns an investigation likely to lead to a prosecution, as stated above, the advice should be obtained from FPS counsel.
- Assist investigators with the preparation of a prosecution brief, where appropriate.
- Consult with FPS counsel on prosecution issues, and facilitate communications between FPS counsel and the investigative agency. In some circumstances, such as where LS counsel has played a critical advisory role in a lengthy investigation, it may be appropriate for LS counsel to be part of the prosecution team.
- In consultation with FPS counsel, identify possible training needs for the investigative agency, and participate in such training when requested. As is true for FPS counsel, it is crucial that LS counsel identify areas in which training is necessary so that prosecutions are not compromised. It may be desirable for LS counsel to assist the investigative agency in the creation of policy or guidelines on enforcement issues.

#### **56.4.3 Legal Agents/Agent Supervisors**

FPS Agent Supervisors should ensure that legal agents adhere to their duties of consultation under this policy. In some circumstances, such as where there is a difference of opinion as to what legal advice should be given or where an agent has decided that a matter should not be prosecuted, the Agent Supervisor should be directly involved in dealings with the investigative agency and/or LS counsel.

#### **56.5 Sentencing in Regulatory Prosecutions**

Because, as emphasized above, the intrinsic goal of regulatory prosecutions is to procure compliance so as to prevent future harm, it is incumbent on FPS counsel to explore dispositions which may help achieve the regulator's goal. Fines and/or imprisonment, the usual dispositions in criminal matters, may be only part of a sentence that seeks to deter others, deter the particular offender(s), and to attempt to undo the harm caused. FPS counsel should explore with the investigative agency and/or LS counsel as appropriate a range of possible dispositions that may achieve the agency's goals of compliance and protection of the public where the statutory regime affords scope for such dispositions.



Fines are widely used in regulatory offences. Before recommending that a fine be imposed, FPS counsel should take every reasonable measure to ensure that the fine is an appropriate disposition, which will necessarily include forming an opinion as to whether an offender is capable of paying the fine<sup>15</sup>. Where possible, FPS counsel should, as part of the negotiations for resolving the file by way of a fine, arrange with the defence for the payment of the fine on the day of sentencing. If the money to pay is not immediately available, but will be in the near future, FPS counsel should seek to have the sentencing proceedings take place on that day.

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<sup>1</sup> *R. v. Pierce Fisheries*, [1971] S.C.R. 5 at 13

<sup>2</sup> Law Reform Commission, *Policy Implementation, Compliance and Administrative Law* (Working Paper #51), Ottawa: 1986, at 38. It should be emphasized, however that "regulatory" statutes may nevertheless include "criminal" offences: tax evasion under the *Income Tax Act* is one such example. See, in this regard, the comments of the Supreme Court in *R. v. Jarvis*, [2002] 3 S.C.R. 757 at para.63.

<sup>3</sup> [1991] 3 S.C.R. 154 at 219.

<sup>4</sup> In this chapter, the term "FPS Counsel" is used instead of "Crown counsel" to distinguish prosecutors from counsel working with Legal Services.

<sup>5</sup> The term "investigative agency" may include "regulatory agencies" in this chapter.

<sup>6</sup> Part V, Chapter 15

<sup>7</sup> It should be emphasized that in considering the public interest in regulatory matters, the "irrelevant criteria" identified in the Decision to Prosecute policy—e.g. race, political advantage—are equally irrelevant.

<sup>8</sup> *R. v. Hinchey*, [1996] 3 S.C.R. 1128 at para. 35

<sup>9</sup> Speech by D.A. Bellemare, Q.C., to the Instrument Choice Symposium, Ottawa, March 26, 2002.

<sup>10</sup> The specific context of "*R. v. R.*" prosecutions is dealt with in Chapter 32.

<sup>11</sup> See Chapter 54, "Megacase Management."

<sup>12</sup> R.S.C. 1985, c.J-2.

<sup>13</sup> Speech by Morris Rosenberg at the XXth annual FPS Conference, June 29, 2000, Mont Saint-Anne, Quebec.

<sup>14</sup> In this regard, see Chapter 15, "The Decision to Prosecute" in which the importance of consultation and communication in these circumstances is stressed.

<sup>15</sup> See also Part XII, c.57, "Fine Recovery."

[ [Previous](#) | [Table of Contents](#) | [Next](#) ]

Date Modified: 2008-12-24



Public Prosecution  
Service of Canada

Service des poursuites  
pénales du Canada

Canada

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About Us
The Attorney General
The Director of Public Prosecutions
Newsroom
Publications
Directive and Assignments
School for Prosecutors
Agent Affairs
Access to Information and Privacy (ATIP)
PPSC Careers
Links
Proactive Disclosure

### The Federal Prosecution Service DESKBOOK

[ [Previous](#) | [Table of Contents](#) | [Next](#) ]

## Part XII NEW POLICIES Chapter 56

### Table of Contents

#### 56 REGULATORY PROSECUTIONS

- 56.1 BACKGROUND
- 56.2 PURPOSE
- 56.3 THE DECISION TO PROSECUTE IN THE REGULATORY OFFENCE CONTEXT
- 56.4 THE ROLES AND RESPONSIBILITIES OF COUNSEL
  - 56.4.1 FPS Counsel
  - 56.4.2 Department Legal Services Counsel
  - 56.4.3 Legal Agents/Agent Supervisors
- 56.5 SENTENCING IN REGULATORY PROSECUTIONS

### 56 REGULATORY PROSECUTIONS

#### 56.1 Background

In 1971, the Supreme Court of Canada recognized that there exists in Canadian law "a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public"<sup>1</sup>. Such offences are generally referred to as "regulatory" offences, and a study by the Law Reform Commission in 1986 estimated the number of such offences in federal legislation alone to be in excess of 97,000.<sup>2</sup>

The creation of regulatory offences is generally considered to be a desirable way of advancing governmental policy objectives. In *R. v. Wholesale Travel*<sup>3</sup>, Cory J. stated:

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

The fact that regulatory offences focus on the prevention of future harms requires that FPS counsel<sup>4</sup> pay particular attention to the policy objectives being pursued by the investigative agencies<sup>5</sup>. Departmental counsel from Legal Services ("LS counsel") are particularly sensitive to the nature, philosophy and objectives of the regulatory program, and FPS counsel are expected to work in partnership with them so that all counsel can take full advantage of their respective expertise.

## 56.2 Purpose

This policy has three main objectives:

- a. To further articulate the considerations relevant to the decision to prosecute in the regulatory offence context;
- b. To promote greater understanding of the respective roles and responsibilities of FPS counsel, LS counsel and investigators in regulatory Departments and agencies;
- c. To address special considerations relevant to sentencing in the regulatory offence context.

## 56.3 The Process of Risk Assessment

The Decision to Prosecute policy<sup>6</sup> requires a two part assessment of a case by FPS counsel: first, FPS counsel must consider whether the evidence is sufficient, and second, whether the public interest requires prosecution. That policy further notes that in the regulatory prosecution context, the "public interest" considerations include the regulatory goals of the legislation and stresses that consultation with the regulatory agency is necessary in determining those goals<sup>7</sup>.

It is more common in the regulatory context for FPS counsel to be able to apply the Decision to Prosecute policy before any charges have been laid. Indeed it is desirable because it can permit extensive consultation among FPS counsel, the investigative agency, LS counsel and others as to whether prosecution would in fact be the instrument of choice for dealing with alleged misconduct. Many federal departments have, within their governing legislation, a range of remedial options, from warnings to civil proceedings to administrative measures. It is important to bear in mind the admonition of the Supreme Court<sup>8</sup> that:

[t]he criminal law is, however, a weapon of last resort intended for use only in cases where the conduct is so inconsistent with the shared morality of society so as to warrant public condemnation and punishment.

The FPS approach is in accordance with these words, as has been noted:

[W]here preventative measures to promote compliance with a regulatory regime or a compliance program have failed, and non-compliance has occurred, referral for prosecution should not be automatic: it should only occur as a last resort. In fact, prosecution should only be considered at the end of the unsuccessful application of an Alternate Dispute Resolution strategy (ADR). And such alternative measures will be considered both before charges are laid and after they are laid.

Before charges are laid, measures such as warning and pre-charge diversion approach must be considered. ... After charges are laid, measures such as post-charge diversion are still available<sup>9</sup>.

This is not to suggest that most or all regulatory offences can be treated by some means other than prosecution<sup>10</sup>; in fact, in many circumstances, no effective alternative to prosecution may exist, or the available alternative (e.g. a warning) may be completely unsuitable. On occasion, the investigation will be of such a nature that it will require the early involvement of FPS counsel and require application of the

Megacase Management policy<sup>11</sup>. LS counsel may play an important role in identifying such investigations.

## 56.4 The Roles and Responsibilities of Counsel

Pursuant to the *Department of Justice Act*<sup>12</sup>, counsel acting on behalf of the Attorney General of Canada have the obligation to "advise the heads of the several departments of the Government on all matters of law connected with such departments" (s.5 (b)), and to "have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada" (s.5 (d)). While FPS counsel have responsibility for the eventual conduct of litigation, the advisory function is a shared responsibility among FPS counsel, LS counsel (sometimes more than one legal service) and others, such as counsel in the Human Rights Law Section.

Consultation is thus an essential feature of our approach to regulatory prosecutions. As a former Deputy Attorney General has stated:

In regulatory prosecutions, departments often have strong views about the enforcement of their regulatory schemes. They are entitled to know that we understand the rationale behind the relevant legislation. I would suggest as well that there is absolutely nothing improper or even questionable about the law enforcement arm of other departments wanting to influence the exercise of prosecutorial discretion, as long as no improper considerations of a political or other nature are brought to bear upon prosecutors. I would also argue that there is a lot of room for open communications between prosecutors and regulatory departments and agencies around the public interest in proceeding with particular prosecutions, with the views of the department responsible for the legislation given due weight by the Department of Justice<sup>13</sup>.

It is important to outline in a general way what the respective responsibilities are for counsel with respect to the prosecution function.

### 56.4.1 FPS Counsel

It is the responsibility of FPS counsel to:

- Provide legal advice as requested during the course of an investigation, or about matters of ongoing concern that may affect specific prosecutions, or prosecutions generally. This may commonly arise, for example, where advice is needed on subjects such as search and seizure or disclosure. In so doing, it will be important to consult with the investigator and/or LS counsel to determine whether legal advice on the same subject matter has already been given, and to attempt to ensure that the Department of Justice speaks with one voice on such matters as the legality of particular investigative techniques. Where legal advice is sought on an issue that will have general application to the investigative agency's enabling legislation, LS counsel must be consulted before the advice is given.
- Conduct the prosecution on behalf of the Crown. This includes making the final decision as to what charges will be prosecuted, whether to elect to proceed by indictment, what witnesses will be called, what sentence will be sought if the case results in conviction, and whether an appeal should be launched from acquittal or sentence. In exercising all of these functions FPS counsel are expected to consult in a timely way with the investigative agency, LS counsel and others as the need arises. Consultation is particularly important prior to making a decision not to prosecute a particular case<sup>14</sup>. It is good practice to document the reasons why a decision is made not to prosecute and to inform LS counsel and the investigative agency.

- Identify possible training needs for the investigative agency, and participate in training when requested. Consultation with LS counsel may help determine whether such training should be local or national. Training is a responsibility of the FPS as a whole, so FPS counsel will be expected to inform their managers and LS counsel as to what training may benefit the investigative agency (e.g., how to prepare a prosecution brief). FPS counsel should be particularly vigilant in identifying areas in which immediate training is desirable to ensure that the effectiveness of prosecutions is not compromised.

#### **56.4.2 Department Legal Services Counsel**

It is the responsibility of LS Counsel to:

- Assist investigators and agencies in developing alternatives to prosecution consistent with the client department's compliance and enforcement policies. LS counsel may also work with investigators and/or FPS counsel on such alternatives in specific cases.
- Be the primary point of contact for investigative agencies and FPS counsel for the provision of legal advice on matters relating to the agency's enabling legislation. Where the advice sought concerns general enforcement issues, LS counsel will be expected to exercise judgment as to when legal advice that may have broad implications for prosecutions (e.g., with respect to the legality of an investigative technique) will require consultation with the FPS, other legal services, the Human Rights Law Section or other parts of the Department of Justice before rendering the requested legal advice. Where the advice sought concerns an investigation likely to lead to a prosecution, as stated above, the advice should be obtained from FPS counsel.
- Assist investigators with the preparation of a prosecution brief, where appropriate.
- Consult with FPS counsel on prosecution issues, and facilitate communications between FPS counsel and the investigative agency. In some circumstances, such as where LS counsel has played a critical advisory role in a lengthy investigation, it may be appropriate for LS counsel to be part of the prosecution team.
- In consultation with FPS counsel, identify possible training needs for the investigative agency, and participate in such training when requested. As is true for FPS counsel, it is crucial that LS counsel identify areas in which training is necessary so that prosecutions are not compromised. It may be desirable for LS counsel to assist the investigative agency in the creation of policy or guidelines on enforcement issues.

#### **56.4.3 Legal Agents/Agent Supervisors**

FPS Agent Supervisors should ensure that legal agents adhere to their duties of consultation under this policy. In some circumstances, such as where there is a difference of opinion as to what legal advice should be given or where an agent has decided that a matter should not be prosecuted, the Agent Supervisor should be directly involved in dealings with the investigative agency and/or LS counsel.

#### **56.5 Sentencing in Regulatory Prosecutions**

Because, as emphasized above, the intrinsic goal of regulatory prosecutions is to procure compliance so as to prevent future harm, it is incumbent on FPS counsel to explore dispositions which may help achieve the regulator's goal. Fines and/or imprisonment, the usual dispositions in criminal matters, may be only part of a sentence that seeks to deter others, deter the particular offender(s), and to attempt to undo the harm caused. FPS counsel should explore with the investigative agency and/or LS counsel as appropriate a range of possible dispositions that may achieve the agency's goals of compliance and protection of the public where the statutory regime affords scope for such dispositions.

Fines are widely used in regulatory offences. Before recommending that a fine be imposed, FPS counsel should take every reasonable measure to ensure that the fine is an appropriate disposition, which will necessarily include forming an opinion as to whether an offender is capable of paying the fine<sup>15</sup>. Where possible, FPS counsel should, as part of the negotiations for resolving the file by way of a fine, arrange with the defence for the payment of the fine on the day of sentencing. If the money to pay is not immediately available, but will be in the near future, FPS counsel should seek to have the sentencing proceedings take place on that day.

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<sup>1</sup> R. v. Pierce Fisheries, [1971] S.C.R. 5 at 13

<sup>2</sup> Law Reform Commission, *Policy Implementation, Compliance and Administrative Law* (Working Paper #51), Ottawa: 1986, at 38. It should be emphasized, however that "regulatory" statutes may nevertheless include "criminal" offences: tax evasion under the *Income Tax Act* is one such example. See, in this regard, the comments of the Supreme Court in R. v. Jarvis, [2002] 3 S.C.R. 757 at para.63.

<sup>3</sup> [1991] 3 S.C.R. 154 at 219.

<sup>4</sup> In this chapter, the term "FPS Counsel" is used instead of "Crown counsel" to distinguish prosecutors from counsel working with Legal Services.

<sup>5</sup> The term "investigative agency" may include "regulatory agencies" in this chapter.

<sup>6</sup> Part V, Chapter 15

<sup>7</sup> It should be emphasized that in considering the public interest in regulatory matters, the "irrelevant criteria" identified in the Decision to Prosecute policy—e.g. race, political advantage—are equally irrelevant.

<sup>8</sup> R. v. Hinchey, [1996] 3 S.C.R. 1128 at para. 35

<sup>9</sup> Speech by D.A. Bellemare, Q.C., to the Instrument Choice Symposium, Ottawa, March 26, 2002.

<sup>10</sup> The specific context of "R. v. R." prosecutions is dealt with in Chapter 32.

<sup>11</sup> See Chapter 54, "Megacase Management."

<sup>12</sup> R.S.C. 1985, c.J-2.

<sup>13</sup> Speech by Morris Rosenberg at the XXth annual FPS Conference, June 29, 2000, Mont Saint-Anne, Quebec.

<sup>14</sup> In this regard, see Chapter 15, "The Decision to Prosecute" in which the importance of consultation and communication in these circumstances is stressed.

<sup>15</sup> See also Part XII, c.57, "Fine Recovery."

[ [Previous](#) | [Table of Contents](#) | [Next](#) ]

Date Modified: 2008-12-24

This is Exhibit 0 referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 15 day  
of September, 2011  
[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

04731-A0079616 page 128

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**Wells,Edward [Ontario]**

**From:** Wells,Edward Nicholas [Ontario]  
**Sent:** Friday, March 14, 2008 11:38 AM  
**To:** 'Meaney, John'  
**Cc:** Wells,Edward [Ontario]  
**Subject:** Fyi: 3007-2007-12-19-014

John,

There is a planned Search Warrant execution on RPR Environmental Inc., located at 164-166 South Service Road, Stoney Creek, Ontario on March 27, 2008. This search warrant has been requested by the Crown and PPSC. The Crown has reviewed the Warrant and authorized it.

**Edward N. Wells #551**

Investigator  
Environmental Enforcement Division  
Environment Canada, Ontario Region  
Phone: (416) 739 5900  
Cell: (289) 259-4233  
Fax: (416) 739 4903

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*WHITTY - affidavit of Patrick Whitty*

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September 6, 2011

**Via Priority Mail**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-596385  
Patrick Whitty v. Attorney General of Canada et al  
Federal Court File No.: T-1295-11  
Your letter of March 30, 2011

Dear Mr. Sims,

On behalf of Patrick Whitty, I am forwarding his Affidavit and Exhibits as per *The Federal Court Rules*.

Yours truly,



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel: (289) 260-1153

T-1295-11

FORM 80A - Rule 80

**AFFIDAVIT**

FEDERAL COURT

BETWEEN:

PATRICK WHITTY

Applicant

and

ANTHONY BRATSCHITSCH

Intervenor

and

THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA AND THE ATTORNEY  
GENERAL OF CANADA

Respondents

**AFFIDAVIT OF PATRICK WHITTY**

I, Patrick Whitty, of the City of St. Catharines, in the Province of Ontario SWEAR  
THAT:

1. I am a Canadian citizen and a co-owner and director of three related companies including RPR Environmental Inc. (herein referred to as "RPR") of Stoney Creek, Ontario.
2. I am applying to the Federal Court for a remedy under the Canadian Charter of Rights and Freedoms (herein referred to as "The Charter").
3. I have been charged with violations under the Canadian Environmental Protection Act, 1999 (herein referred to as "CEPA 1999") and one of its regulations, the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* (herein referred to as "EIHWHRMR"), which was published in the Canada Gazette and is submitted as **Exhibit A**.

4. As a result of those charges, I suffered with the possibility of imprisonment.
5. Every day, I continue to suffer from the burden of that possibility being repeated.
6. My suffering included my companies being ravaged with the loss of reputation, key employees and substantial business revenue.
7. My suffering is the result of the actions of officials from the Enforcement Branch of Environment Canada (herein referred to as "ECE") with the co-operation of a Federal Crown Agent, Sandra Antionani (herein referred to as "*The Agent*"), in Hamilton, Ontario.
8. I am claiming that those charges against me were frivolous and vexatious.
9. The alleged violations under CEPA 1999 and EIHWHRMR were administrative in nature with no risk to human health or the environment.
10. I am also claiming – as stated in my Notice of Application – that I had and have no control over the cause of the alleged violations and that charges relating to those allegations are, essentially, constitutionally invalid.
11. In my opinion, those charges were laid against me as retaliation for my staunch but expensive legal defence of a previous set of charges which were based, as well, on alleged violations that were administrative in nature.
12. I am also alleging that both sets of charges were based on negligent ECE investigations that consisted of regulatory negligence, nepotism and cronyism.
13. My application for judicial review to the Federal Court and my request for a remedy under The Charter are absolutely necessary because the manner that ECE's officials conducted themselves.
14. This application is focused on the second investigation, ECE file No. 3007-2007-12-19-014.
15. The "Nepotism" is based on the fact that the two lead ECE investigators were a father and son team – Edward Glenn Wells and Edward Nicholas Wells – operating from the same enforcement branch in Burlington, Ontario.
16. I believe that enforcement officials have the responsibility of providing a duty of care to the public by ensuring each other's actions are compliant with rules, regulations and the law.

17. However, I do not believe that proper duty of care is likely to occur in the advent of father and son working together, especially on the same files.
18. The father – Edward Glenn Wells – originally assigned my file to his son – Edward Nicholas Wells – on May 4, 2006 for the purpose of *“putting together an investigative plan”*, as per paragraph 2 of page 2 of **Exhibit B**.
19. However, this was done before the son received Basic Enforcement Training, as per the lower part of page 2 of **Exhibit C**.
20. The “investigative plan” led to two search and seizure investigations.
21. In each case, the investigations consisted of eleven ECE officers arriving at RPR with warrants and occupying our location for the entire day with our employees being evacuated.
22. The ECE officers were accompanied by local police officers that sealed the entrances to our industrial mall with police cars with flashing lights on.
23. This was done in full view of the large volume of traffic on the Queen Elizabeth Highway (QEW) approximately 20 - 50 metres away.
24. Other businesses and their employees were denied entrance to their buildings in the industrial mall during those days.
25. The second investigation, the focus of this application, took place on March 27, 2008.
26. The charges that were laid against me and RPR from that second investigation were based on Section 36 of EIHWHRMR (see **page number 1220 of Exhibit A**).
27. I have provided substantial information on Section 36 in my Notice of Application along with the grounds of my application for judicial review.
28. However, the essence of my application is that I have no other recourse but to seek a remedy from the Federal Court because ECE “does not play by the rules”, in my opinion.
29. The following is a list of allegations that I am making against ECE concerning its “rule breaking”:

a. CEPA 1999 Provisions were ignored.

- i. Part 10 (Enforcement) of the Act provides for **Environmental Protection Compliance Orders (EPCOs)** to be written including in cases of alleged administrative errors. However, I suspect that ECE circumvented this procedure because there is a built-in review process that I could have applied to defend myself including appeals to the Federal Court.
- ii. ECE denied me the option of the **Environmental Protection Alternative Measure**. They went against their own guidelines in doing so because – if their allegations were correct – RPR would have qualified.

b. ECE Guidelines were also ignored.

Environment Canada's **Compliance and Enforcement Policy for the Canadian Environmental Protection Act, 1999 (CEPA, 1999)** (Exhibit D), herein referred to as "The Policy Manual", originally published March 2001, has stated its Guiding Principles on page 5.

They include:

- i. *"Enforcement officers throughout Canada will apply the Act in a manner that is fair, predictable and consistent. They will use rules, sanctions and processes securely founded in law."*
- ii. *"Enforcement officers will administer the Act with an emphasis on prevention of damage to the environment."*

In my opinion, surprise large-scale search and seizure investigations based on alleged administrative errors cannot be considered as *"fair, predictable and consistent"* – especially when alternative measures are encouraged as per 29. d.

None of the allegations against me and RPR indicated a threat to human health or the environment.

c. Search Warrant violation

The Policy Manual states in the last part of the 3rd paragraph on page 18 :

*"In the inspection warrant, the justice may name any person to accompany the enforcement officer or authorize, in the inspection warrant, the use of any power that the justice deems required, including the use of force to break locks or force open a locked door."*

However, after arriving at RPR, ECE contacted *Keymaster* of Hamilton, Ontario to cut locks on some of my filing cabinets without being named by the justice on the search warrant.

d. Misapplication of Enforcement Tools

I understand and agree that enforcement officers have the discretion to utilize their enforcement tools to best serve the purposes of CEPA 1999.

The Policy Manual itemizes the enforcement tools starting at page 19.

The attached Environment Canada publication *The Canadian Environmental Protection Act* (CEPA 1999) and Enforcement (**Exhibit E**), herein referred to as "The Publication", succinctly lists the available options available to enforcement officers on page 2 of the exhibit :

*CEPA 1999 enforcement officers have the following enforcement tools at their disposal:*

- *warnings to indicate the existence of an alleged violation, so that the alleged violator can take notice and return to compliance;*
- *directions that environmental officers may issue to deal with or prevent illegal releases of regulated substances;*
- *tickets for offences such as the failure to submit written reports;*
- *environmental protection compliance orders to put an immediate stop to illegal activity, to prevent a violation from occurring or to require action to be taken;*
- *Environmental Protection Alternative Measures*
- *prosecution under the authority of a Crown prosecutor, and*

In both search warrant investigations against RPR, ECE proceeded to the prosecution tool without undergoing any of the other tools at their disposal.

Considering the administrative nature of both sets of allegation, it is my belief that ECE has contravened the principles of CEPA 1999 and their own enforcement guidelines.

Regarding the 2<sup>nd</sup> search investigation, ECE Investigator Edward Nicholas Wells swore an information against me and RPR on January 10, 2008.

I was served with the summons on February 13, 2008.



Then, on February 26, 2008, ECE Investigator Edward Nicholas Wells swore another information against me and RPR.

As I wrote in my Notice of Application, page 7 :

*"If an American disposal facility, authorized to receive and dispose hazardous wastes from a Canadian exporter, is not able to, or chooses not to supply a Certificate of Destruction within the prescribed time period of Section 36 to the Canadian exporter, that same American facility has not violated any domestic law or international regulation that it is bound to.*

*Yet, in the case of the above, the provisions within Section 36 would place a Canadian exporter and any of its directors in the position of committing an offence under Sections 272(1), 272(2), 280(1) and 280.1(1) of CEPA 1999 which provide for the possibility of imprisonment.*

*Section 36 unfairly places the exporter and directors at fault for failing to submit the Certificates even though the exporter and directors have no provenance or Chain of Custody with those documents.*

*Canadian directors would then be subjected to the threat of their rights to liberty of persons as guaranteed by Section 7 of the "Charter". "*

I found myself in a position where I was facing imprisonment due to circumstances beyond my control.

I also found myself in the same position, for the second time, where all avenues of reasonable defence or alternative resolution measures were taken away from me by ECE and The Agent.

It is my opinion that both ECE and The Agent took this heavy-handed course of action to punish me, personally, as well as to exhaust my companies' limited financial resources.

Please refer to Counsel Dianne Saxe's internet blog (**Exhibit F**).

Another counsel appeared on my behalf at the Hamilton Court on February 28, 2008.

The 2<sup>nd</sup> search investigation was carried out on March 27, 2008.

On February 5, 2009, almost a full year after I was served with the summons, and approximately 1 ½ years after my substantial legal expenses commenced with ECE's first search investigation on August 9, 2007, I agreed to let RPR do a plea to avoid the possibility of my imprisonment.

At that time, my company was almost ruined, my reputation was tarnished and my finances were depleted.

To this day, I am adamant that I did not commit any violations, that the allegations were merely administrative in nature, that human health and the environment was never placed at risk, that the charges and investigations were heavy-handed measures, and that the public interest was not served – which is the intent of CEPA 1999.

Also, to this day, I fully believe that I carry the same burden of risk of being criminally charged and that my right to liberty under The Charter is continuously subject to violation by ECE.

e. Creation of Violations

On February 26, 2008, Investigator Edward Nicholas Wells swore information on alleged violations that included two "*movement documents*" (herein referred to as MDs).

The two MDs were part of the seized evidence taken during the first investigation conducted on August 9, 2007.

While he returned the balance of the seized evidence from that investigation on February 13, 2008, Investigator Wells held onto those two MDs without informing me.

By holding on to those MDs, Investigator Wells prevented me from requesting the Section 36 Certificates of Destruction from the American facility.

Whether by design or by error, Investigator Wells positioned me into violations of Section 36.

f. Culpable Conduct

After the summons was served to me on February 13, 2008, ECE launched the second search investigation on March 27, 2008.

From an information release obtained through the Access to Information Act that I received on July 5, 2010, I discovered that ECE added three additional files into the search warrant after the justice signed it.

Please refer to the following Exhibits :

EXHIBIT	DATE	DOCUMENT	NEMISIS FILE NOS.
G	March 25, 2008	Search Warrant EAB Note	3007-2007-12-19-014
H	March 25, 2008	Signed Search Warrant	
I	March 26, 2008	Search Warrant EAB Note	3007-2008-01-17-002 3007-2007-12-19-014 3007-2005-09-16-001 3007-2002-04-16-006

Note that ECE added three additional NEMISIS files into the search warrant one day after it was signed by the justice and one day before the search investigation took place at RPR on March 28, 2008.

The three additional files would have been time-barred if presented to a justice.

The top file listed in the March 26/08 EAB - 3007-2008-01-17-002 – is a matter that took place in December, 2000.

ECE had a discoverability date in early 2001 as indicated by **Exhibit J**.

The lower part of the exhibit's first page confirms that Environment Canada made ECE Manager Bradley May aware of the incident at the time when the applicable statute of limitations was six years.

The upper part of the same page shows that Mr. May decided to ignore that revelation – and the fact that limitation period expired - and to launch another investigation.

I have many other concerns about this particular investigation (Section 17 of CEPA 1999) and I have previously submitted another application for judicial review to the Federal Court (T-2176-10).

It is my belief that, since I was summonsed and charged with the Section 36 violations before the search and seizure investigation of March 27, 2008, that the search warrant was presented to the justice under false premises for the purpose of ECE conducting a search based on time-barred files.

It is my opinion that this demonstrates culpable conduct on ECE's part.

I also believes that this information is another example that supports my contention that ECE does not play by the rules and that I cannot expect them to enforce CEPA 1999's laws and regulations in a fair, consistent and predictable manner.

However, I do not believe that these actions are merely the work of the front-line investigators.

**Exhibit K** is an email indicating that the top officials of ECE's directorate were monitoring and directing the investigation.

I believe that this would indicate that such culpable conduct was encouraged as a matter of ECE policy.

Hence, my request for relief under The Charter.

30. Crown Agent

The following is an allegation that I am making against the Crown Agent, Sandra Antionani:

Unnecessary Prosecution

As I presented in my Notice of Application, the central issue of ECE's second investigation against me and RPR is the matter of allegedly missing Certificates of Destruction (herein referred to as "*Certificates*") that originated from American facilities.

There are no forms or format to the Certificates.

Mr. Joachim Wittwer, BSc., CChem., is the Head of the Operations Section of the Waste Management Division of Environment Canada.

He is the expert and Environment Canada's ultimate authority on the movement of hazardous wastes.

**Exhibit L** is his Will Say on the Canadian Manifesting Mechanism, which is critical to managing and monitoring hazardous waste movement, storage and compliance.

Mr. Wittwer's Will Say is initialed and dated 18/07/07, well after November 1, 2005, which is the date that Section 36 came into effect.

Yet, Mr. Wittwer's Will Say does not once mention the Certificates.

This emphasizes the triviality of ECE's charges against me and RPR.

Also, **Exhibit M** is the Canada – USA Agreement (herein referred to as "*The Bilateral Agreement*") that is central to Mr. Wittwer's Will Say and forms the basis for transboundary movement of hazardous materials.

The Bilateral Agreement also has no mention of the need for the Certificates.

I have never disregarded the requirement to comply with obtaining the Certificates, as required by the provisions of Section 36, from the Americans, to the best of my ability.

Yet, based on the lack of urgency expressed for the Certificates in Mr. Wittwer's Will Say and The Bilateral Agreement, I would equate the importance of obtaining the Certificates as equivalent to paying a speeding ticket on time.

While important, I would not expect to lose my driver's licence for not paying a ticket on time.

If I was to lose my licence for being chronically late in paying for speeding tickets, I would expect to have some warning and notice of time to correct the matter.

However, I would not expect to face imprisonment from such prosecution as I have received from The Agent who never approached me for pre-prosecution consultation to resolve the allegations.

Ms. Antionani was the Federal Crown Agent who prosecuted both investigations against me and RPR.

To the best of my knowledge, she made no effort to explore any other means other than prosecution to serve the public interest.

**Exhibit N** is an excerpt from The Federal Prosecution Service DESKBOOK.

The first indented paragraph on page 2 of the exhibit states :

[t]he criminal law is, however, a weapon of last resort intended for use only in cases where the conduct is so inconsistent with the shared morality of society so as to warrant public condemnation and punishment.

I do not believe that ECE's allegations against me concerning the Certificates would be considered as worthy of the above paragraph.

If so, how could The Agent think so?

The second indented paragraph on page 2 of the exhibit states :

[W]here preventative measures to promote compliance with a regulatory regime or a compliance program have failed, and non-compliance has occurred, referral for prosecution should not be automatic: it should only occur as a last resort. In fact, prosecution should only be considered at the end of the unsuccessful application of an Alternate Dispute Resolution strategy (ADR). And such alternative measures will be considered both before charges are laid and after they are laid.

The Agent has not complied to the above approach, as recommended in The Federal Prosecution Service DESKBOOK.

She made no effort to provide warnings or to conduct a pre-charge diversion approach.

Furthermore, on page 3 of the exhibit, Section 56.4.1 (FPS Counsel) provides descriptions of the following ways that Federal Prosecution Service Counsels provide services to regulatory agencies, such as :

- Legal advice
- Prosecution services
- Training

I have not read anywhere that Federal Prosecution Service Counsels can take the lead in launching investigations and in requesting search warrants.

I submit **Exhibit O** as one piece of evidence that The Agent did take a very active role in conducting, at least, the second investigation against me and RPR.

From the information release obtained through the Access to Information Act that I received on July 5, 2010, I read at least one email where the father-son team of investigators agreed to meet with The Agent at one of their residences in Dundas, Ontario where all three co-incidentally lived.

To me, this smacks of "cronyism" and, along with nepotism, does not seem to be a judicious way of dispensing justice.

Therefore, it is my belief that it was not reasonable for The Agent to prosecute criminal charges against me for such allegations that ECE had presented to her.

31. The ECE Section 36 investigation and prosecution of RPR is a matter of public information and is of significant concern to the industry, for the reasons including fairness, predictability and consistency. **Exhibit F** is an internet publication by a reknown environmental law practioner, Dr. Dianne Saxe, detailing the Section 36 violation and her own reaction to it.
32. Dr. Saxe's internet publication refers to ECE enforcement and compliance in this manner (last paragraph) :

***We need it to be fair, and proportional to the real fault involved.***

As explained in the Application, the Canadian exporter has no control over the issuance of confirmations, commonly described as Certificates of Destruction, from the United States.

As a result, there is a perception in the industry of, at least, unfairness in the enforcement of Section 36 on Canadian exporters.

It is also my belief that there is no real fault because American legislation does not require the issuance of those Certificates, as explained in the Application.

33. Section 2.(1)(o) of CEPA 1999 states

*2. (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),  
(o) apply and enforce this Act in a fair, predictable and consistent manner.*

I believe that EIHWHRMR is the Minister's regulation with good intent.


However, I also believe that ECE had taken upon themselves to bend or break the rules to accommodate their own objectives.

I have written in this Affidavit and my Notice about negligent investigation, regulatory negligence, nepotism and cronyism.

If any of the above is true in my case, CEPA 1999 has not been applied or enforced in a fair, predictable and consistent manner, as required by law.


34. My request for relief is within the jurisdiction of The Federal Court and would not provide for large scale changes.

However, it would provide assurances for me and other Canadians in a similar position that our rights under The Charter are protected.

  
\_\_\_\_\_  
Patrick Whitty  
(Signature of Deponent)

Sworn (or Affirmed) before me at the City of Hamilton in the Province of Ontario

on 26th day of September (date), 2011

  
\_\_\_\_\_  
Commissioner for Taking Affidavits Deborah Patricia Pigott, a Commissioner, etc.,  
(or as the case may be) Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

Exhibits :

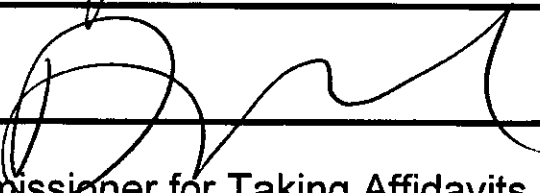
- A. Canada Gazette Part II, Volume 139, No. 11: *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*
- B. Will Say of Edward Glenn Wells
- C. Performance Review and Communication Record of Edward Nicholas Wells
- D. Compliance and Enforcement Policy for the *Canadian Environmental Protection Act, 1999* (CEPA 1999)
- E. The Canadian Environmental Protection Act (CEPA 1999) and Enforcement
- F. Internet publication by Dr. Dianne Saxe publishing information about concerns over the fairness of the enforcement of the Section 36 regulation
- G. Enforcement Action Briefing (EAB) Note, March 25, 2008
- H. Search Warrant signed March 25, 2008



- I. Enforcement Action Briefing (EAB) Note, March 26, 2008
- J. Email communication based on Section 17 discoverability
- K. Email communication to ECE Directorate
- L. *Canadian Manifesting Mechanism* Will Say of Joachim Wittwer, Head of Operations Section, Waste Management Division of Environment Canada
- M. *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992*
- N. Federal Prosecution Service DESKBOOK
- O. Email communication regarding Crown Agent authorization of search warrant

This is Exhibit A referred to in the Affidavit  
of Patrick Whitty

sworn before me on this 6th day  
of September, 2011

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

Vol. 139, No. 11

Vol. 139, n° 11

# Canada Gazette



# Gazette du Canada

## Part II

## Partie II

OTTAWA, WEDNESDAY, JUNE 1, 2005

OTTAWA, LE MERCREDI 1<sup>er</sup> JUIN 2005

Statutory Instruments 2005

Textes réglementaires 2005

SOR/2005-131 to 159 and SI/2005-43 to 53

DORS/2005-131 à 159 et TR/2005-43 à 53

Pages 1036 to 1356

Pages 1036 à 1356

### NOTICE TO READERS

The *Canada Gazette* Part II is published under authority of the *Statutory Instruments Act* on January 12, 2005, and at least every second Wednesday thereafter.

Part II of the *Canada Gazette* contains all "regulations" as defined in the *Statutory Instruments Act* and certain other classes of statutory instruments and documents required to be published therein. However, certain regulations and classes of regulations are exempted from publication by section 15 of the *Statutory Instruments Regulations* made pursuant to section 20 of the *Statutory Instruments Act*.

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### AVIS AU LECTEUR

La *Gazette du Canada* Partie II est publiée en vertu de la *Loi sur les textes réglementaires* le 12 janvier 2005, et au moins tous les deux mercredis par la suite.

La Partie II de la *Gazette du Canada* est le recueil des « règlements » définis comme tels dans la loi précitée et de certaines autres catégories de textes réglementaires et de documents qu'il est prescrit d'y publier. Cependant, certains règlements et catégories de règlements sont soustraits à la publication par l'article 15 du *Règlement sur les textes réglementaires*, établi en vertu de l'article 20 de la *Loi sur les textes réglementaires*.

On peut consulter la *Gazette du Canada* Partie II dans la plupart des bibliothèques.

Pour les résidents du Canada, le prix de l'abonnement annuel à la *Gazette du Canada* Partie II est de 67,50 \$ et le prix d'un exemplaire, de 3,50 \$. Pour les résidents d'autres pays, le prix de l'abonnement est de 67,50 \$US et le prix d'un exemplaire, de 3,50 \$US. Veuillez adresser les commandes à : Publications du gouvernement du Canada, Travaux publics et Services gouvernementaux Canada, Ottawa, Canada K1A 0S5.

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Des exemplaires des textes réglementaires enregistrés par le greffier du Conseil privé sont à la disposition du public, dans les deux langues officielles, pour examen et vente à la Pièce 418, Édifice Blackburn, 85, rue Sparks, Ottawa, Canada.

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

Registration  
SOR/2005-149 May 17, 2005

Enregistrement  
DORS/2005-149 Le 17 mai 2005

CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999

LOI CANADIENNE SUR LA PROTECTION DE  
L'ENVIRONNEMENT (1999)

**Export and Import of Hazardous Waste and  
Hazardous Recyclable Material Regulations**

**Règlement sur l'exportation et l'importation de  
déchets dangereux et de matières recyclables  
dangereuses**

P.C. 2005-930 May 17, 2005

C.P. 2005-930 Le 17 mai 2005

Whereas, pursuant to subsection 332(1)<sup>a</sup> of the *Canadian Environmental Protection Act, 1999*<sup>b</sup>, the Minister of the Environment published in the *Canada Gazette*, Part I, on March 20, 2004 a copy of the proposed *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, substantially in the annexed form, and persons were given an opportunity to file comments with respect to the proposed Regulations or to file a notice of objection requesting that a board of review be established and stating the reasons for the objection;

Attendu que, conformément au paragraphe 332(1)<sup>a</sup> de la *Loi canadienne sur la protection de l'environnement (1999)*<sup>b</sup>, le ministre de l'Environnement a fait publier dans la *Gazette du Canada* Partie I, le 20 mars 2004, le projet de règlement intitulé *Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuses*, conforme en substance au texte ci-après, et que les intéressés ont ainsi eu la possibilité de présenter leurs observations à cet égard ou un avis d'opposition motivé demandant la constitution d'une commission de révision,

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to section 191 of the *Canadian Environmental Protection Act, 1999*<sup>b</sup>, hereby makes the annexed *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*.

À ces causes, sur recommandation du ministre de l'Environnement et en vertu de l'article 191 de la *Loi canadienne sur la protection de l'environnement (1999)*<sup>b</sup>, Son Excellence la Gouverneure générale en conseil prend le *Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuses*, ci-après.

<sup>a</sup> S.C. 2004, c. 15, s. 31  
<sup>b</sup> S.C. 1999, c. 33

<sup>a</sup> L.C. 2004, ch. 15, art. 31  
<sup>b</sup> L.C. 1999, ch. 33

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

**EXPORT AND IMPORT OF HAZARDOUS WASTE  
AND HAZARDOUS RECYCLABLE  
MATERIAL REGULATIONS**

**TABLE OF CONTENTS**

**Interpretation**

- 1 Hazardous Waste
- 2 Hazardous Recyclable Material
- 3 *Transportation of Dangerous Goods Regulations*
- 4 Definitions

**PART 1**

**Notice**

- 5 Application
- 6-7 Notice Procedure
- 8 Content of Notice

**PART 2**

**Export**

- 9 Conditions
- 10-14 Movement Document

**PART 3**

**Import**

- 15 Department of National Defence Exemption
- 16 Conditions
- 17-21 Movement Document

**PART 4**

**Transit**

- 22 Conditions
- 23-27 Movement Document - Transits Through Canada
- 28-32 Movement Document - Transits Through a Country Other than Canada

**PART 5**

**Returns**

- 33 Application
- 34 Returns to Canada
- 35 Returns to the Country of Export

**PART 6**

**Miscellaneous Matters**

- 36 Confirmation of Disposal or Recycling
- 37 Liability Insurance
- 38 Export Reduction Plans
- 39 Environmentally Sound Management

**Consequential matters**

- 40 Consequential Amendment

**Repeal**

- 41 Repeal

**Coming into Force**

- 42 Coming into Force

**RÈGLEMENT SUR L'EXPORTATION ET  
L'IMPORTATION DE DÉCHETS DANGEREUX ET DE  
MATIÈRES RECYCLABLES DANGEREUSES**

**TABLE DES MATIÈRES**

**Définitions et interprétation**

- 1 Déchet dangereux
- 2 Matière recyclable dangereuse
- 3 *Règlement sur le transport des marchandises dangereuses*
- 4 Définitions

**PARTIE 1**

**Notification**

- 5 Champ d'application
- 6-7 Procédure de notification
- 8 Éléments de la notification

**PARTIE 2**

**Exportation**

- 9 Conditions
- 10-14 Document de mouvement

**PARTIE 3**

**Importations**

- 15 Exemption visant le ministère de la Défense nationale
- 16 Conditions
- 17-21 Document de mouvement

**PARTIE 4**

**Transit**

- 22 Conditions
- 23-27 Document de mouvement pour les transits au Canada
- 28-32 Document de mouvement pour les transits dans un pays autre que le Canada

**PARTIE 5**

**Renvois**

- 33 Champ d'application
- 34 Renvoi au Canada
- 35 Renvoi au pays d'exportation

**PARTIE 6**

**Dispositions générales**

- 36 Déclaration d'élimination ou de recyclage
- 37 Assurance responsabilité
- 38 Plans de réduction des exportations de déchets
- 39 Gestion écologiquement rationnelle

**Modification corrélative**

- 40 Modification corrélative

**Abrogation**

- 41 Abrogation

**Entrée en vigueur**

- 42 Entrée en vigueur

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

TABLE OF CONTENTS — *Continued*

TABLE DES MATIÈRES (*suite*)

Schedule 1	Disposal Operations for Hazardous Waste	Annexe 1	Opérations d'élimination des déchets dangereux
Schedule 2	Recycling Operations for Hazardous Recyclable Material	Annexe 2	Opérations de recyclage des matières recyclables dangereuses
Schedule 3	Hazardous Wastes and Hazardous Recyclable Materials	Annexe 3	Déchets dangereux et matières recyclables dangereuses
Schedule 4	Part 1 - Hazardous Wastes and Hazardous Recyclable Materials from Non-Specific Sources Part 2 - Hazardous Wastes and Hazardous Recyclable Materials from Specific Sources	Annexe 4	Partie 1 – Déchets dangereux et matières recyclables dangereuses de sources non spécifiques Partie 2 – Déchets dangereux et matières recyclables dangereuses de sources spécifiques
Schedule 5	Environmentally Hazardous Substances	Annexe 5	Matières dangereuses pour l'environnement
Schedule 6	Hazardous Constituents Controlled under Leachate Test and Regulated Limits	Annexe 6	Constituants dangereux faisant l'objet d'un contrôle au moyen de l'épreuve relative aux lixiviats et des limites réglementaires
Schedule 7	Part 1 - Acute Hazardous Waste and Hazardous Recyclable Material Chemicals Part 2 - Hazardous Waste and Hazardous Recyclable Material Chemicals	Annexe 7	Partie 1 – Déchets dangereux et matières recyclables dangereuses (substances chimiques aiguës) Partie 2 – Déchets dangereux et matières recyclables dangereuses (substances chimiques)
Schedule 8	Excluded Materials		
Schedule 9	Movement Document	Annexe 8	Matières exclues
Schedule 10	Persistent Organic Pollutants	Annexe 9	Document de mouvement
		Annexe 10	Substances polluantes organiques persistantes

# EXPORT AND IMPORT OF HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL REGULATIONS

## DEFINITIONS AND INTERPRETATION

Definition of  
"hazardous  
waste"

1. (1) In Division 8 of Part 7 and Part 10 of the Act and in these Regulations, "hazardous waste" means anything that is intended to be disposed of using one of the operations set out in Schedule 1 and that

- (a) is set out in column 2 of Schedule 3;
- (b) is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (c) is set out in column 2 of Schedule 4 and is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (d) is set out in column 1 of Schedule 5 in a concentration equal to or greater than the applicable concentration set out in column 2 of that Schedule;
- (e) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure*, July 1992, in *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, Third Edition, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3;
- (f) is set out in column 2 of Schedule 7, is pure or is the only active ingredient, and is unused; or
- (g) according to information that Canada has received from the United States or in accordance with the Convention, is considered or defined as hazardous under the legislation of the country receiving it and is prohibited by that country from being imported or conveyed in transit.

Exclusion

(2) The definition "hazardous waste" in subsection (1) does not include anything that is

- (a) exported, imported or conveyed in transit in a quantity of less than 5 kg or 5 L per shipment or, in the case of mercury, in a quantity of less than 50 mL per shipment, other than anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*;
- (b) collected from households in the course of regular municipal waste collection services; or
- (c) part of the exporter's or importer's personal effects or household effects not resulting from commercial use.

# RÈGLEMENT SUR L'EXPORTATION ET L'IMPORTATION DE DÉCHETS DANGEREUX ET DE MATIÈRES RECYCLABLES DANGEREUSES

## DÉFINITIONS ET INTERPRÉTATION

Définition de  
« déchet  
dangereux »

1. (1) Pour l'application de la section 8 de la partie 7 et de la partie 10 de la Loi et du présent règlement, « déchet dangereux » s'entend de toute chose qui est destinée à être éliminée selon une opération prévue à l'annexe 1 et qui répond à l'une ou l'autre des conditions suivantes :

- a) elle figure à la colonne 2 de l'annexe 3;
- b) elle est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- c) elle figure à la colonne 2 de l'annexe 4 et est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- d) elle figure à la colonne 1 de l'annexe 5 et se trouve dans une concentration égale ou supérieure à la concentration applicable prévue à la colonne 2 de cette annexe;
- e) produit un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de cette annexe, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, 3<sup>e</sup> édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3;
- f) elle figure à la colonne 2 de l'annexe 7, elle est pure ou est le seul ingrédient actif, et elle est inutilisée;
- g) selon les informations que le Canada a obtenues des États-Unis ou aux termes de la Convention, elle est considérée ou définie comme dangereuse par la législation du pays où elle est destinée et son importation ou son transit est interdit dans ce pays.

(2) Ne sont pas considérés comme des déchets dangereux :

Exceptions

- a) les déchets qui sont exportés ou importés ou qui transitent en une quantité inférieure à 5 kg ou 5 L par envoi ou, dans le cas de mercure, en une quantité inférieure à 50 mL par envoi, sauf ceux qui sont compris dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*;
- b) ceux qui sont enlevés dans le cours normal des services municipaux d'enlèvement des ordures ménagères;

Definition of  
"hazardous  
recyclable  
material"

2. (1) In Division 8 of Part 7 and Part 10 of the Act and in these Regulations, "hazardous recyclable material" means anything that is intended to be recycled using one of the operations set out in Schedule 2 and that

- (a) is set out in column 2 of Schedule 3;
- (b) is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (c) is set out in column 2 of Schedule 4 and is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (d) is set out in column 1 of Schedule 5 in a concentration equal to or greater than the applicable concentration set out in column 2 of that Schedule;
- (e) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure*, July 1992, in *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, Third Edition, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3;
- (f) is set out in column 2 of Schedule 7, is pure or is the only active ingredient, and is unused; or
- (g) according to information that Canada has received from the United States or in accordance with the Convention, is considered or defined as hazardous under the legislation of the country receiving it and is prohibited by that country from being imported or conveyed in transit.

Exclusion

(2) The definition "hazardous recyclable material" in subsection (1) does not include anything that is

- (a) exported, imported or conveyed in transit in a quantity of less than 5 kg or 5 L per shipment or, in the case of mercury, in a quantity of less than 50 mL per shipment, other than anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*;
- (b) collected from households in the course of regular municipal waste collection services;
- (c) part of the exporter's or importer's personal effects or household effects not resulting from commercial use;
- (d) exported to, imported from, or conveyed in transit through a country that is a party to OECD Decision C(2001)107/Final and that

c) ceux qui font partie des effets personnels ou des articles ménagers de l'exportateur ou de l'importateur et qui ne résultent pas d'un usage commercial.

2. (1) Pour l'application de la section 8 de la partie 7 et de la partie 10 de la Loi et du présent règlement, « matière recyclable dangereuse » s'entend de toute chose qui est destinée à être recyclée selon une opération prévue à l'annexe 2 et qui répond à l'une ou l'autre des conditions suivantes :

- a) elle figure à la colonne 2 de l'annexe 3;
- b) elle est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- c) elle figure à la colonne 2 de l'annexe 4 et est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- d) elle figure à la colonne 1 de l'annexe 5 et se trouve dans une concentration égale ou supérieure à la concentration applicable prévue à la colonne 2 de cette annexe;
- e) elle produit un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de cette annexe, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, 3<sup>e</sup> édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3;
- f) elle figure à la colonne 2 de l'annexe 7, elle est pure ou est le seul ingrédient actif, et elle est inutilisée;
- g) selon les informations que le Canada a obtenues des États-Unis ou aux termes de la Convention, elle est considérée ou définie comme dangereuse par la législation du pays où elle est destinée et son importation ou son transit est interdit dans ce pays.

Définition de  
« matière  
recyclable  
dangereuse »

(2) Ne sont pas considérées comme des matières recyclables dangereuses :

- a) les matières qui sont exportées ou importées ou qui transitent en une quantité inférieure à 5 kg ou 5 L par envoi ou, dans le cas de mercure, en une quantité inférieure à 50 mL par envoi, sauf celles qui sont comprises dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*;
- b) celles qui sont enlevées dans le cours normal des services municipaux d'enlèvement des ordures ménagères;
- c) celles qui font partie des effets personnels ou des articles ménagers de l'exportateur ou de l'importateur et qui ne résultent pas d'un usage commercial;

Exceptions



- (i) is in a quantity of 25 kg or 25 L or less,
  - (ii) is exported or imported for the purpose of conducting measurements, tests or research with respect to the recycling of that material,
  - (iii) is accompanied by a shipping document, as defined in section 1.4 of the *Transportation of Dangerous Goods Regulations*, that includes the name and address of the exporter or importer and the words "test samples" or "échantillons d'épreuve", and
  - (iv) is not and does not contain an infectious substance as defined in section 1.4 of the *Transportation of Dangerous Goods Regulations*; or
- (e) exported to, imported from, or conveyed in transit through a country that is a party to OECD Decision C(2001)107/Final and that

- (i) is set out in Schedule 8,
- (ii) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure*, July 1992, in *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods, Third Edition*, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3, and
- (iii) is intended to be recycled at an authorized facility in the country of import using one of the operations set out in Schedule 2.

d) celles qui sont exportées dans un pays partie à la décision C(2001)107/Final de l'OCDE, qui en sont importées ou qui y transitent, et qui, à la fois :

- (i) le sont en une quantité de 25 kg ou moins ou de 25 L ou moins,
- (ii) sont exportées ou importées aux fins d'évaluation, d'essai ou de recherche concernant leur recyclage,
- (iii) sont accompagnées d'un document d'expédition, au sens de l'article 1.4 du *Règlement sur le transport des marchandises dangereuses*, qui porte les nom et adresse de l'exportateur ou de l'importateur, selon le cas, et la mention « échantillons d'épreuve » ou « test samples »,
- (iv) ne sont pas des matières infectieuses au sens de l'article 1.4 du *Règlement sur le transport des marchandises dangereuses*, et n'en contiennent aucune;

e) celles qui sont exportées dans un pays partie à la décision C(2001)107/Final de l'OCDE, qui en sont importées ou qui y transitent, et qui, à la fois :

- (i) figurent à l'annexe 8,
- (ii) produisent un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de l'annexe 6, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, 3<sup>e</sup> édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3,
- (iii) sont destinées à être recyclées dans une installation agréée dans le pays d'importation selon une opération prévue à l'annexe 2.

*Transportation of Dangerous Goods Regulations*

3. For the purposes of sections 1 and 2, references to the *Transportation of Dangerous Goods Regulations* shall be read as follows:

- (a) the reference to "public safety" in subparagraph 2.43(b)(i) shall be read as a reference to "the environment and human health"; and
- (b) subparagraph 2.43(b)(i) shall be read without reference to "during transport".

Definitions

4. The following definitions apply in Division 8 of Part 7 of the Act and in these Regulations.

"Act"  
"Loi"

"Act" means the *Canadian Environmental Protection Act, 1999*.

"authorities of the country"  
"autorités du pays"

"authorities of the country" means the competent authorities designated in the *Compilation of Country Fact Sheets (CFS)*, Basel Convention

3. Pour l'application de la définition de « déchet dangereux » prévue à l'article 1 et de la définition de « matière recyclable dangereuse » prévue à l'article 2, le *Règlement sur le transport des marchandises dangereuses* se lit avec les adaptations suivantes :

- a) « la santé publique » est remplacé par « l'environnement et la santé humaine », au sous-alinéa 2.43b)(i);
- b) « pendant le transport » est supprimé au sous-alinéa 2.43b)(i).

4. Les définitions qui suivent s'appliquent à la section 8 de la partie 7 de la Loi et au présent règlement.

« accord Canada-États-Unis » L'Accord entre le gouvernement du Canada et le gouvernement des États-Unis d'Amérique concernant les déplacements transfrontaliers de déchets dangereux,

*Règlement sur le transport des marchandises dangereuses*

Définitions

« accord Canada-États-Unis »  
"Canada-USA Agreement"

	Series No. 01/04, as amended from time to time, and the United States Environmental Protection Agency.	entré en vigueur le 8 novembre 1986, avec ses modifications successives.	
"authorized carrier" « transporteur agréé »	"authorized carrier" means a carrier that is authorized by the authorities of the jurisdiction in which the waste or material is transported, to transport the hazardous waste or hazardous recyclable material that is to be exported, imported or conveyed in transit.	« autorités du pays » Les autorités compétentes mentionnées dans le <i>Compilation of Country Fact Sheets (CFS)</i> , <i>Basel Convention Series No. 01/04</i> , avec ses modifications successives, ou la United States Environmental Protection Agency.	« autorités du pays » "authorities of the country"
"authorized facility" « installation agréée »	"authorized facility" means a facility that is authorized by the authorities of the jurisdiction in which the facility is located to (a) dispose of the hazardous waste being exported or imported using an operation set out in Schedule 1; or (b) recycle the hazardous recyclable material being exported or imported using an operation set out in Schedule 2.	« Convention » La Convention de Bâle sur le contrôle des mouvements transfrontières de déchets dangereux et de leur élimination, entrée en vigueur le 5 mai 1992. « décision C(94)152/Final de l'OCDE » La décision C(88)90/Final de l'Organisation de coopération et de développement économiques intitulée <i>Décision du conseil sur les mouvements transfrontières de déchets dangereux</i> , en date du 27 mai 1988 et modifiée par la décision C(94)152/Final intitulée <i>Décision du conseil portant amendement à la décision sur les mouvements transfrontières de déchets dangereux</i> , en date du 28 juillet 1994. « décision C(2001)107/Final de l'OCDE » La décision C(2001)107/Final de l'Organisation de coopération et de développement économiques intitulée <i>Décision du conseil concernant la révision de la décision C(92)39/Final sur le contrôle des mouvements transfrontières de déchets destinés à des opérations de valorisation</i> , en date du 21 mai 2002.	« Convention » "Convention" « décision C(94)152/Final de l'OCDE » "OECD Decision C(94)152/Final" « décision C(2001)107/Final de l'OCDE » "OECD Decision C(2001)107/Final"
"Canada-USA Agreement" « accord Canada - États-Unis »	"Canada-USA Agreement" means the Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, which entered into force on November 8, 1986, as amended from time to time.		
"Convention" « Convention »	"Convention" means the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which entered into force on May 5, 1992.		
"foreign exporter" « expéditeur étranger »	"foreign exporter" means the person who exports hazardous waste or hazardous recyclable material from a country other than Canada.	« destinataire étranger » Toute personne qui importe des déchets dangereux ou des matières recyclables dangereuses dans un pays autre que le Canada.	« destinataire étranger » "foreign receiver"
"foreign receiver" « destinataire étranger »	"foreign receiver" means the person who imports hazardous waste or hazardous recyclable material into a country other than Canada.		
"movement document" « document de mouvement »	"movement document" means the form set out in Schedule 9.	« document de mouvement » Document établi en la forme prévue à l'annexe 9.	« document de mouvement » "movement document"
"notice" « notification »	"notice" means the notice of export, import or transit referred to in paragraph 185(1)(a) of the Act.	« expéditeur étranger » Toute personne qui exporte des déchets dangereux ou des matières recyclables dangereuses d'un pays autre que le Canada.	« expéditeur étranger » "foreign exporter"
"OECD Decision C(94)152/Final" « décision C(94)152/Final de l'OCDE »	"OECD Decision C(94)152/Final" means Decision C(88)90/Final of the Organization for Economic Co-operation and Development, <i>Decision of the Council on Transfrontier Movements of Hazardous Wastes</i> , dated May 27, 1988, as amended by Decision C(94)152/Final, <i>Decision of the Council Amending the Decision on Transfrontier Movements of Hazardous Wastes</i> , dated July 28, 1994.	« installation agréée » Installation qui est autorisée par les autorités du territoire où elle est située à, selon le cas : a) éliminer des déchets dangereux exportés ou importés selon une opération prévue à l'annexe 1; b) recycler des matières recyclables dangereuses exportées ou importées selon une opération prévue à l'annexe 2.	« installation agréée » "authorized facility"
"OECD Decision C(2001)107/Final" « décision C(2001)107/Final de l'OCDE »	"OECD Decision C(2001)107/Final" means Decision C(2001)107/Final of the Organization for Economic Co-operation and Development, <i>Decision of the Council Concerning the Revision of Decision C(92)39/FINAL on the Control of Transboundary Movements of Wastes Destined for Recovery Operations</i> , dated May 21, 2002.	« Loi » La Loi canadienne sur la protection de l'environnement (1999).	« Loi » "Act"
"permit" « permis »	"permit" means the export, import or transit permit referred to in paragraph 185(1)(b) of the Act.	« notification » La notification préalable visée à l'alinéa 185(1)a) de la Loi. « numéro d'immatriculation » Numéro qui est attribué par une province ou un pays et qui atteste du droit d'exercer une activité se rapportant aux déchets dangereux ou aux matières recyclables dangereuses.	« notification » "notice" « numéro d'immatriculation » "registration number"

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

"registration number"  
« numéro d'immatriculation »

"registration number" means the number assigned by a province or country indicating the authority to undertake an activity with respect to a hazardous waste or hazardous recyclable material.

« permis » Tout permis d'exportation, d'importation ou de transit visé à l'alinéa 185(1)b) de la Loi.

« permis »  
"permit"

« transporteur agréé » Transporteur autorisé, par les autorités du territoire où il effectue le transport, à transporter des déchets dangereux ou des matières recyclables dangereuses en vue de leur exportation, importation ou transit.

« transporteur agréé »  
"authorized carrier"

## PART I

### NOTICE

#### Application

Application

5. This Part applies to the export, import and transit of hazardous waste and hazardous recyclable material other than returns of that waste or material under Part 5.

#### Notice Procedure

Notice reference number

6. The Minister shall provide a notice reference number to any person who requests one for the purpose of submitting a notice.

Delivery of notice

7. (1) The person that proposes to export, import or convey in transit a hazardous waste or hazardous recyclable material must submit a notice to the Minister in writing within 12 months before the export, import or transit.

Separate notices

(2) In the case of an export or import, the notice must not include both hazardous waste and hazardous recyclable material.

Notice for multiple hazardous wastes or hazardous recyclable materials

(3) The notice may provide for more than one hazardous waste or more than one hazardous recyclable material, as the case may be, if they

(a) are to be shipped

(i) to the same authorized facility at the same location,

(ii) through the same port of exit or the same port of entry, and

(iii) within the same 12-month period;

(b) are to be reported to the same customs office;

(c) originate from the same person and the same facility; and

(d) in the case of an export or import, have essentially the same physical and chemical characteristics.

Language

(4) In the case of an export or a transit where the French or English language is not acceptable to the authorities of the country of import or transit, the person who submits the notice must submit it in the French or English language and in a language used by those authorities.

Application for permit

(5) The notice shall serve as an application for a permit.

New notice

(6) A person must submit a new notice to the Minister if there is a change to any of the information contained in the permit, except that the person

## PARTIE I

### NOTIFICATION

#### Champ d'application

5. La présente partie s'applique à l'exportation, à l'importation et au transit de déchets dangereux et de matières recyclables dangereuses, sauf s'il s'agit d'un renvoi visé à la partie 5.

Champ d'application

#### Procédure de notification

6. Le ministre attribue un numéro de référence à quiconque en fait la demande pour une notification.

Numéro de référence de la notification

7. (1) Quiconque projette d'exporter, d'importer ou de faire transiter des déchets dangereux ou des matières recyclables dangereuses doit présenter au ministre une notification écrite, dans les douze mois précédant l'exportation, l'importation ou le transit.

Notification

(2) Dans le cas d'une exportation ou d'une importation, la notification ne peut viser à la fois des déchets dangereux et des matières recyclables dangereuses.

Objet de la notification

(3) La notification peut viser plusieurs déchets dangereux ou matières recyclables dangereuses, selon le cas, s'ils satisfont aux conditions suivantes :

Notification visant plus d'un déchet ou d'une matière

a) ils seront expédiés, à la fois :

(i) à la même installation agréée et au même endroit,

(ii) par le même point de sortie ou d'entrée,

(iii) durant la même période de douze mois;

b) ils seront déclarés au même bureau de douane;

c) ils proviennent de la même personne et de la même installation;

d) dans le cas d'une exportation ou d'une importation, ils ont essentiellement les mêmes propriétés physiques et chimiques.

(4) Dans le cas d'une exportation ou d'un transit, si l'utilisation du français ou de l'anglais n'est pas jugée acceptable par les autorités du pays d'importation ou de transit, l'auteur de la notification rédige celle-ci en français ou en anglais et dans une langue utilisée par ces autorités.

Langue

(5) La notification tient lieu de demande de permis.

Demande de permis

(6) Une nouvelle notification doit être présentée en cas de modification d'un renseignement figurant au permis. Toutefois, la présentation au ministre

Nouvelle notification

who submitted the notice may advise the Minister in writing of a change to quantity of hazardous waste or hazardous recyclable material or the number of shipments, or may add authorized carriers, ports of exit or entry or customs offices.

#### Content of Notice

Content

8. The person who submits the notice must include the following information in the notice:

- (a) the notice reference number provided by the Minister under section 6;
- (b) the name, registration number, civic, mailing and electronic addresses and telephone and facsimile numbers of, and the name of the contact person for,
  - (i) the person submitting the notice,
  - (ii) the foreign receiver or the foreign exporter, as the case may be,
  - (iii) the facility from which the hazardous waste or hazardous recyclable material will be shipped,
  - (iv) the authorized carriers that will transport the hazardous waste or hazardous recyclable material, and
  - (v) all authorized facilities that will receive the hazardous waste or hazardous recyclable material;
- (c) all modes of transport that will be used;
- (d) the proposed number of shipments;
- (e) the port of exit or the port of entry through which the export or import will take place, as the case may be and, in the case of a transit, the port of exit and entry through which the transit will take place;
- (f) the customs office at which the hazardous waste or hazardous recyclable material is to be reported, if applicable;
- (g) the proposed date of the first and last shipments or, in the case of a transit, the proposed dates of entry of the first shipment and exit of the last shipment;
- (h) the name of each insurance company and the policy number for each insurance policy required under these Regulations;
- (i) the countries of transit through which the hazardous waste or hazardous recyclable material will be conveyed and the length of time it will be in each country of transit;
- (j) the following information with respect to each hazardous waste or hazardous recyclable material, namely,
  - (i) the International Waste Identification Code under OECD Decision C(94)152/Final, substituting the disposal or recycling code with the disposal or recycling code set out in column 1 of Schedule 1 or 2 to these Regulations for the applicable operation set out in column 2 of that Schedule and, if the hazardous waste or hazardous recyclable material is a gas, substituting the letter G for the letter L, P or S in the International Waste Identification Code,

d'un simple avis écrit suffit dans le cas d'une modification de la quantité de déchets ou de matières ou du nombre d'envois ou de l'ajout d'un transporteur agréé, d'un point de sortie ou d'entrée ou d'un bureau de douane.

#### Éléments de la notification

8. L'auteur de la notification doit y inscrire les renseignements suivants :

Éléments de la notification

- a) le numéro de référence attribué par le ministre aux termes de l'article 6;
- b) les nom, numéro d'immatriculation, adresses municipale, postale et électronique et numéros de téléphone et de télécopieur des personnes et installations ci-après, ainsi que le nom de leur personne-ressource :
  - (i) l'auteur de la notification,
  - (ii) le destinataire étranger ou l'expéditeur étranger, selon le cas,
  - (iii) l'installation d'où proviendront les déchets dangereux ou les matières recyclables dangereuses,
  - (iv) les transporteurs agréés qui effectueront le transport,
  - (v) toutes les installations agréées où les déchets ou les matières seront reçus;
- c) les moyens de transport qui seront utilisés;
- d) le nombre d'envois prévus;
- e) le point de sortie ou d'entrée prévu pour l'exportation ou l'importation, selon le cas, ou, dans le cas d'un transit, les points de sortie et d'entrée prévus;
- f) le bureau de douane où seront déclarés les déchets ou les matières, le cas échéant;
- g) la date prévue pour les premier et dernier envois ou, dans le cas d'un transit, la date d'entrée prévue pour le premier envoi et la date de sortie prévue pour le dernier envoi;
- h) le numéro de chaque police d'assurance exigée par le présent règlement, ainsi que le nom de l'assureur;
- i) tout pays de transit des déchets ou des matières, ainsi que la durée du transit dans chaque pays;
- j) relativement à chaque déchet ou matière :
  - (i) le code international d'identification des déchets applicable selon la décision C(94)152/Final de l'OCDE, sauf que son code d'élimination ou de recyclage est remplacé par celui prévu à la colonne 1 des annexes 1 ou 2 du présent règlement pour l'opération applicable figurant à la colonne 2, et que les lettres « L », « P » ou « S » sont remplacées par la lettre « G » si le déchet ou la matière est un gaz,
  - (ii) si le pays d'importation, d'exportation ou de transit n'est pas partie à la décision C(2001)107/Final de l'OCDE, le code applicable figurant à la liste A de l'annexe VIII de la Convention, avec ses modifications successives,

- (ii) for hazardous waste, or for hazardous recyclable material that will be exported to, imported from or transited through a country that is not a party to OECD Decision C(2001)107/Final, the applicable code set out in List A of Annex VIII of the Convention, as amended from time to time,
- (iii) for hazardous recyclable material that will be exported to, imported from or transited through a country that is a party to OECD Decision C(2001)107/Final, the applicable code set out in Part II of Appendix 4 to that Decision,
- (iv) the tariff item and the statistical suffix set out in the *Customs Tariff Departmental Consolidation*, published by the Canada Border Services Agency, as amended from time to time,
- (v) the applicable identification number set out in column 1 of Schedule 3, 4 or 7 for the hazardous waste or hazardous recyclable material set out in column 2 of that Schedule, or the applicable hazardous constituent code number set out in column 1 of Schedule 6 for the hazardous constituent set out in column 2 of that Schedule,
- (vi) the following information set out in the applicable schedules to the *Transportation of Dangerous Goods Regulations*, namely,
  - (A) the applicable UN number set out in column 1 of Schedule 1 or column 5 of Schedule 3,
  - (B) the applicable class set out in column 3 of Schedule 1 or the primary class set out in column 4 of Schedule 3, and
  - (C) the applicable packing group and risk group set out in column 4 of Schedule 1,
- (vii) the total quantity in kilograms or litres of each hazardous waste or hazardous recyclable material,
- (viii) the applicable disposal or recycling code set out in column 1 of Schedule 1 or 2 for every applicable operation set out in column 2 of that Schedule, and the name and description of the processes to be employed with respect to those operations, and
- (ix) in the case of an export, the options considered for reducing or phasing out the export of the hazardous waste and the reason that the final disposal is taking place outside Canada;
- (k) the name, quantity and concentration of any persistent organic pollutant set out in column 2 of Schedule 10 that is contained in the hazardous waste or hazardous recyclable material, if the concentration is equal to or greater than the concentration set out in column 3;
- (l) distinct line item numbers for each hazardous waste or hazardous recyclable material;
- (m) in the case of an export or import, a copy of the contract or series of contracts, excluding financial information, or the statement referred to in paragraph 9(f) or 16(e); and
- (iii) si le pays d'importation, d'exportation ou de transit est partie à la décision C(2001)107/Final de l'OCDE, le code applicable figurant à la partie II de l'appendice 4 de la décision,
- (iv) le numéro tarifaire et le suffixe de statistique selon la *Codification ministérielle du Tarif des douanes*, publiée par l'Agence des services frontaliers du Canada, avec ses modifications successives,
- (v) le numéro d'identification applicable prévu à la colonne 1 des annexes 3, 4 ou 7 pour le déchet ou la matière figurant à la colonne 2 ou le numéro de code du constituant dangereux applicable prévu à la colonne 1 de l'annexe 6 pour le constituant dangereux figurant à la colonne 2,
- (vi) les renseignements ci-après, tirés des annexes applicables du *Règlement sur le transport des marchandises dangereuses* :
  - (A) le numéro UN applicable prévu à la colonne 1 de l'annexe 1 ou à la colonne 5 de l'annexe 3,
  - (B) la classe applicable prévue à la colonne 3 de l'annexe 1 ou la classe primaire applicable prévue à la colonne 4 de l'annexe 3,
  - (C) le groupe d'emballage/groupe de risque applicable prévu à la colonne 4 de l'annexe 1,
- (vii) le poids en kilogrammes ou le volume en litres de chaque déchet ou matière,
- (viii) le code d'élimination ou de recyclage prévu à la colonne 1 des annexes 1 ou 2 pour toutes les opérations applicables figurant à la colonne 2, ainsi que le nom et la description du processus qui sera mis en œuvre,
- (ix) dans le cas d'une exportation, les solutions qui ont été envisagées en vue de réduire ou de supprimer les exportations de déchets et les raisons pour lesquelles l'élimination a lieu à l'étranger;
- k) les nom, quantité et concentration de toute substance polluante organique persistante visée à la colonne 2 de l'annexe 10 qui se trouve dans les déchets ou les matières, si la concentration est égale ou supérieure à la concentration applicable prévue à la colonne 3;
- l) un numéro de ligne distinct pour chaque déchet ou matière;
- m) dans le cas d'une exportation ou d'une importation, une copie du contrat ou de la série de contrats, sans les renseignements financiers, ou de la déclaration qui sont visés aux alinéas 9f) ou 16e);
- n) une déclaration signée et datée par l'auteur de la notification, comportant ce qui suit :
  - (i) dans le cas d'une exportation ou d'une importation, une mention que le contrat ou la série de contrats visé aux alinéas 9f) ou 16e) est en vigueur,

(n) a statement signed and dated by the person submitting the notice indicating that

(i) in the case of an export or import, the contract or series of contracts referred to in paragraph 9(f) or 16(e) is in force,

(ii) in the case of an export or import, if the hazardous waste cannot be disposed of or the hazardous recyclable material cannot be recycled in accordance with the export or import permit, the exporter or importer will implement the alternative arrangements required under Part 5 or, if alternative arrangements cannot be made, the exporter or importer will return the waste or material to the facility from which it originated in accordance with section 34 or 35,

(iii) the insurance policy referred to in section 37 will cover the period referred to in that section, and

(iv) the information in the notice is complete and correct.

## PART 2

### EXPORT

#### Conditions

Conditions of  
export

9. An exporter may export hazardous waste and hazardous recyclable material if

(a) at the time of the export

(i) the export is not prohibited under the laws of Canada,

(ii) the country of import is a party to the Convention, the Canada-USA Agreement or OECD Decision C(2001)107/Final and the import of the hazardous waste or hazardous recyclable material is not prohibited by that country, and

(iii) the country of transit does not prohibit the transit of the hazardous waste or hazardous recyclable material;

(b) the hazardous waste or hazardous recyclable material is not to be disposed of or recycled south of 60° south latitude;

(c) in the case of biomedical wastes set out in column 2 of Schedule 3 or anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*, the export is only for the purposes of disposal;

(d) the exporter is a resident of Canada or, in the case of a corporation, has a place of business in Canada;

(e) the exporter

(i) is the owner or operator of the facility from which the hazardous waste or hazardous recyclable material is exported, or

(ii) buys and sells hazardous recyclable material for the purposes of recycling and exports it to a country that is a party to OECD Decision C(2001)107/Final;

(ii) dans le cas d'une exportation ou d'une importation, si les déchets ne peuvent être éliminés ou les matières ne peuvent être recyclées conformément au permis d'exportation ou d'importation, un engagement de l'exportateur ou de l'importateur à mettre en œuvre les mesures de renvoi prévues à la partie 5 ou, à défaut, à ramener les déchets ou les matières à l'installation d'origine conformément aux articles 34 ou 35,

(iii) un engagement à maintenir en vigueur la police d'assurance visée à l'article 37 pour la période prévue à cet article,

(iv) une mention portant que les renseignements figurant à la notification sont complets et exacts.

## PARTIE 2

### EXPORTATIONS

#### Conditions

9. L'exportation de déchets dangereux ou de matières recyclables dangereuses est assujettie aux conditions suivantes :

a) au moment de l'exportation :

(i) les lois du Canada n'en interdisent pas l'exportation,

(ii) le pays d'importation est partie à la Convention, à l'accord Canada - États-Unis ou à la décision C(2001)107/Final de l'OCDE et n'en interdit pas l'importation,

(iii) le pays de transit n'en interdit pas le transit;

b) l'élimination ou le recyclage n'aura pas lieu au sud du 60° degré de latitude Sud;

c) dans le cas d'un déchet biomédical figurant à la colonne 2 de l'annexe 3 ou de toute chose comprise dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*, le déchet ou la chose est exporté pour être éliminé;

d) l'exportateur est un résident du Canada ou, s'il s'agit d'une personne morale, il a un établissement au Canada;

e) l'exportateur, selon le cas :

(i) est le propriétaire ou l'exploitant de l'installation d'où les déchets ou les matières sont exportés,

(ii) achète ou vend, à des fins de recyclage, des matières exportées dans un pays qui est partie à la décision C(2001)107/Final de l'OCDE;

f) il existe un contrat ou une série de contrats écrit et signé par l'exportateur, le destinataire

(f) there is a signed, written contract or a series of contracts among the exporter, the foreign receiver and the authorized facilities or, if any of those persons are the same legal entity, a written statement signed by that entity, that

(i) describes the hazardous waste or hazardous recyclable material,

(ii) sets out the quantity of hazardous waste or hazardous recyclable material to be exported,

(iii) indicates that the hazardous waste will be disposed of, or the hazardous recyclable material will be recycled, in accordance with the export permit,

(iv) describes the operation set out in Schedule 1 or 2 that will be used,

(v) requires the foreign receiver to complete Part C of the movement document, or authorizes the exporter to complete Part C on the foreign receiver's behalf if the waste or material is not considered or defined as hazardous under the legislation of the country of import, and to provide a copy of the movement document and a copy of the export permit to the exporter on delivery of the hazardous waste or hazardous recyclable material to the authorized facility, and

(vi) requires the foreign receiver

(A) to complete the disposal of the hazardous waste or recycling of the hazardous recyclable material within the time set out in paragraph (o),

(B) to submit written confirmation to the exporter of the disposal of the hazardous waste or recycling of the hazardous recyclable material within 30 days after the day on which the disposal or recycling is completed, and

(C) to take all practicable measures to assist the exporter in fulfilling the terms of the exporter's obligations under these Regulations if delivery is not accepted by the authorized facility named in the export permit, or if the authorized facility cannot, or refuses to, dispose of the hazardous waste or recycle the hazardous recyclable material in accordance with the export permit;

(g) the exporter and the authorized carrier if other than Her Majesty in right of Canada or of a province are insured in accordance with section 37;

(h) the hazardous waste or hazardous recyclable material is transported by the authorized carriers named in the export permit;

(i) the applicable safety mark is displayed on each shipment of hazardous waste or hazardous recyclable material in accordance with Part 4 of the *Transportation of Dangerous Goods Regulations*;

(j) the hazardous waste or hazardous recyclable material is exported through the port of exit named in the export permit;

étranger et l'installation agréée ou, dans le cas où deux ou trois de ces personnes sont la même entité juridique, il existe une déclaration écrite et signée par celle-ci :

(i) décrivant les déchets ou les matières,

(ii) indiquant la quantité de déchets ou de matières qui sera exportée,

(iii) portant que l'élimination ou le recyclage sera effectué conformément au permis d'exportation,

(iv) décrivant l'opération visée aux annexes 1 ou 2 qui sera utilisée,

(v) stipulant que le destinataire étranger doit remplir la partie C du document de mouvement – ou, si les déchets ou les matières ne sont pas considérés ou définis comme dangereux selon les lois du pays d'importation, autorisant l'exportateur à signer la partie C en son nom – et remettre une copie du document de mouvement et du permis d'exportation à l'exportateur lors de la livraison des déchets ou des matières à l'installation agréée,

(vi) stipulant que le destinataire étranger doit :

(A) achever l'élimination ou le recyclage dans le délai prévu à l'alinéa o),

(B) remettre à l'exportateur une confirmation écrite de l'élimination ou du recyclage dans les trente jours suivant l'achèvement de l'opération,

(C) prendre toutes les mesures possibles pour aider l'exportateur à remplir ses obligations au titre du présent règlement si l'installation agréée indiquée dans le permis d'exportation n'accepte pas les déchets ou les matières ou si elle est incapable ou refuse de les éliminer ou de les recycler conformément au permis d'exportation;

g) l'exportateur et le transporteur agréé, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détiennent l'assurance responsabilité visée à l'article 37;

h) le transport des déchets ou des matières est effectué par les transporteurs agréés nommés dans le permis d'exportation;

i) chaque envoi de déchets ou de matières porte une indication de danger conforme aux exigences de la partie 4 du *Règlement sur le transport des marchandises dangereuses*;

j) l'exportation se fait via le point de sortie indiqué dans le permis d'exportation;

k) la quantité de déchets ou de matières n'excède pas celle prévue dans le permis d'exportation;

l) une copie du permis d'exportation et une copie du document de mouvement rempli conformément aux articles 11 à 13 :

(i) accompagnent les déchets ou les matières,

(ii) sont déposées par l'exportateur ou le transporteur agréé au bureau de douane où les déchets et les matières doivent être déclarés en vertu de l'article 95 de la *Loi sur les douanes*;

(k) the quantity of hazardous waste or hazardous recyclable material exported does not exceed the quantity set out in the export permit;

(l) a copy of the export permit and a copy of the movement document completed in accordance with sections 11 to 13

(i) accompanies the hazardous waste or hazardous recyclable material, and

(ii) is deposited by the exporter or the authorized carrier at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under section 95 of the *Customs Act*;

(m) the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at the authorized facility named in the export permit using the disposal or recycling operation set out in the export permit;

(n) after operation D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2 is completed, the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at an authorized facility using an operation set out in Schedule 1 or 2 other than operation D13, D14 or D17 or R12, R13 or R16;

(o) in the case of operation D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the authorities of the jurisdiction in which the authorized facility is located require shorter time periods, in which case those time periods apply; and

(p) in the event that the hazardous waste or hazardous recyclable material is exported but is not accepted by the authorized facility named in the export permit, or if the authorized facility cannot, or refuses to, dispose of or recycle it in accordance with the export permit, the exporter

(i) immediately notifies the Minister, the foreign receiver and the authorities of the country of import of the non-acceptance or refusal and the reason for it,

(ii) if necessary, stores the hazardous waste or hazardous recyclable material in a facility authorized to store the waste or material by the authorities of the jurisdiction in which the facility is located, and

(iii) within 90 days after the day on which the Minister is notified, makes arrangements to return the hazardous waste or hazardous recyclable material to the facility in Canada from which it was shipped in accordance with section 34 or makes arrangements for the disposal of the waste or the recycling of the material in the country of import at an authorized facility other than the one named in the export permit and provides the Minister with the name and address of that facility and the name of a contact person.

m) l'élimination ou le recyclage est effectué dans l'installation agréée indiquée dans le permis d'exportation, selon l'opération qui y est indiquée;

n) une fois les opérations D13, D14 ou D17 figurant à l'annexe 1 ou les opérations R12, R13 ou R16 figurant à l'annexe 2 achevées, l'élimination ou le recyclage est effectué dans une installation agréée, selon une opération prévue aux annexes 1 ou 2, autre que D13, D14 ou D17 ou R12, R13 ou R16;

o) dans le cas de l'une ou l'autre des opérations D13, D14 ou D17 figurant à l'annexe 1 ou des opérations R12, R13 ou R16 figurant à l'annexe 2, elle est achevée dans les cent quatre-vingts jours suivant l'acceptation des déchets ou des matières par l'installation agréée ou, dans le cas d'une autre opération, elle est achevée dans l'année suivant cette acceptation, ou dans toute autre période plus courte exigée par les autorités du territoire où est située l'installation agréée;

p) si l'installation agréée indiquée dans le permis d'exportation n'accepte pas les déchets ou les matières ou est incapable ou refuse de les éliminer ou de les recycler conformément au permis :

(i) l'exportateur en avise aussitôt le ministre, le destinataire étranger et les autorités du pays d'importation, en précisant la raison du refus,

(ii) il les entrepose, au besoin, dans une installation autorisée à ces fins par les autorités du territoire où l'installation est située,

(iii) dans les quatre-vingt-dix jours suivant l'avis au ministre, il prend les arrangements en vue de leur renvoi à l'installation d'où ils proviennent au Canada, conformément à l'article 34, ou en vue de leur élimination ou recyclage dans le pays d'importation, dans une installation agréée autre que celle indiquée dans le permis, et communique au ministre les nom et adresse de l'installation ainsi que le nom d'une personne-ressource de celle-ci.



*Movement Document*

*Document de mouvement*

Movement document reference number	10. The Minister shall provide a movement document reference number to an exporter who requests one for the purpose of completing a movement document.	10. Le ministre attribue un numéro de référence à tout exportateur qui en fait la demande pour un document de mouvement.	Numéro de référence
Exporter	11. (1) Prior to shipping the hazardous waste or hazardous recyclable material, the exporter must complete Part A of a movement document, indicate the movement document reference number and provide a copy of the movement document and a copy of the export permit to the first authorized carrier.	11. (1) Avant l'expédition de déchets dangereux ou de matières recyclables dangereuses, l'exportateur remplit la partie A d'un document de mouvement, en indiquant le numéro de référence attribué par le ministre, et remet une copie du document et du permis d'exportation au premier transporteur agréé.	Exportateur
First authorized carrier	(2) Immediately on receipt of the movement document, the first authorized carrier must complete Part B of the movement document and provide a copy to the exporter.	(2) Sur réception du document de mouvement, le premier transporteur agréé en remplit la partie B et remet sans délai une copie de celui-ci à l'exportateur.	Premier transporteur agréé
Copy of movement document	(3) Within three working days after the day on which the hazardous waste or hazardous recyclable material is shipped, the exporter must send a copy of the movement document completed in accordance with subsections (1) and (2) to (a) the Minister; and (b) the authorities of the province of export, if they require it.	(3) Dans les trois jours ouvrables suivant le jour de l'expédition des déchets ou des matières, l'exportateur envoie une copie du document de mouvement rempli conformément aux paragraphes (1) et (2) : (a) au ministre; (b) aux autorités de la province d'exportation, si elles l'exigent.	Copie du document de mouvement
Authorized carriers	(4) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the export permit to the next authorized carrier or the foreign receiver, as the case may be, on delivery of the waste or material to that carrier or the foreign receiver.	(4) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis d'exportation, au transporteur agréé suivant ou au destinataire étranger, selon le cas, lors de la livraison.	Autres transporteurs agréés
Exporter	(5) The exporter must ensure that (a) every authorized carrier that transports the hazardous waste or hazardous recyclable material completes Part B of the movement document; and (b) the foreign receiver completes Part C of the movement document, unless the exporter is authorized to do so on the foreign receiver's behalf under the contract referred to in paragraph 9(f).	(5) L'exportateur veille à ce que : (a) tous les transporteurs agréés ayant transporté les déchets ou les matières remplissent la partie B du document de mouvement; (b) le destinataire étranger remplisse la partie C du document de mouvement, à moins que l'exportateur soit autorisé à la signer au nom de celui-ci aux termes du contrat visé à l'alinéa 9f).	Exportateur
Copy of movement document	(6) Within three working days after the day on which the hazardous waste or hazardous recyclable material is delivered to the authorized facility, the exporter must send a copy of the completed movement document to (a) the Minister; (b) the authorities of the province of export, if they require it; and (c) every authorized carrier of the hazardous waste or hazardous recyclable material.	(6) Dans les trois jours ouvrables suivant la livraison des déchets ou des matières à l'installation agréée, l'exportateur envoie une copie du document de mouvement rempli : (a) au ministre; (b) aux autorités de la province d'exportation, si elles l'exigent; (c) à tout transporteur agréé ayant transporté les déchets ou les matières.	Copie du document de mouvement
Rail consist	12. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.	12. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.	Feuille de train
Unit of measure	13. The exporter must ensure that the quantity of hazardous waste or hazardous recyclable material indicated in the movement document is in the same unit of measure as is used in the export permit.	13. L'exportateur veille à ce que les quantités de déchets dangereux ou de matières recyclables dangereuses indiquées dans le document de mouvement soient exprimées au moyen de la même unité	Unité de mesure

Retention of  
movement  
document

14. The exporter and every authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the day on which the hazardous waste or hazardous recyclable material is exported.

de mesure que celle utilisée dans le permis d'exportation.

14. L'exportateur et les transporteurs agréés conservent une copie du document de mouvement à leur principal établissement au Canada pour une période de trois ans suivant la date de l'exportation.

Conservation

### PART 3

#### IMPORT

##### Department of National Defence Exemption

Exemption

15. This Part does not apply to the Department of National Defence if the hazardous waste or hazardous recyclable material is

- (a) generated by that Department in the course of an operation conducted by it outside Canada;
- (b) transported from the site of operation to a defence establishment as defined in subsection 2(1) of the *National Defence Act*; and
- (c) transported under the sole direction or control of the Minister of National Defence as described in section 1.20 of the *Transportation of Dangerous Goods Regulations*, as though the hazardous waste or hazardous recyclable material is a dangerous good under those Regulations.

15. La présente partie ne s'applique pas à l'importation par le ministère de la Défense nationale de déchets dangereux ou de matières recyclables dangereuses, si ceux-ci sont à la fois :

- a) produits par le ministère dans le cadre d'une opération menée par celui-ci à l'extérieur du Canada;
- b) transportés du lieu de l'opération à un établissement de défense au sens du paragraphe 2(1) de la *Loi sur la défense nationale*;
- c) transportés sous la seule responsabilité du ministre de la Défense nationale, selon l'article 1.20 du *Règlement sur le transport des marchandises dangereuses*, comme s'il s'agissait de marchandises dangereuses visées par ce règlement.

Exemption

##### Conditions

Conditions of  
import

16. An importer may import hazardous waste or hazardous recyclable material if

- (a) at the time of the import
  - (i) the import is not prohibited under the laws of Canada,
  - (ii) the country of export is a party to the Convention, the Canada-USA Agreement or OECD Decision C(2001)107/Final, and
  - (iii) the country of transit does not prohibit the transit of the hazardous waste or hazardous recyclable material;
- (b) in the case of biomedical wastes set out in column 2 of Schedule 3 or anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*, the import is only for the purposes of disposal;
- (c) the importer is a resident of Canada or, in the case of a corporation, has a place of business in Canada;
- (d) the importer
  - (i) is the owner or operator of the authorized facility named in the import permit, or
  - (ii) buys and sells hazardous recyclable material for the purposes of recycling;
- (e) there is a signed, written contract or a series of contracts among the importer, the foreign exporter and the authorized facilities or, if any of

16. L'importation de déchets dangereux ou de matières recyclables dangereuses est assujettie aux conditions suivantes :

- a) au moment de l'importation :
  - (i) les lois du Canada n'en interdisent pas l'importation,
  - (ii) le pays d'exportation est partie à la Convention, à l'accord Canada - États-Unis ou à la décision C(2001)107/Final de l'OCDE,
  - (iii) le pays de transit n'en interdit pas le transit;
- b) dans le cas d'un déchet biomédical figurant à la colonne 2 de l'annexe 3 ou de toute chose comprise dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*, le déchet ou la chose est importé pour être éliminé;
- c) l'importateur est un résident du Canada ou, s'il s'agit d'une personne morale, il a un établissement au Canada;
- d) l'importateur, selon le cas :
  - (i) est le propriétaire ou l'exploitant de l'installation agréée visée par le permis d'importation,
  - (ii) achète ou vend des matières à des fins de recyclage;
- e) il existe un contrat ou une série de contrats écrit et signé par l'importateur, l'expéditeur

Conditions

those persons are the same legal entity, a written statement signed by that entity, that

- (i) describes the hazardous waste or hazardous recyclable material,
- (ii) sets out the quantity of hazardous waste or hazardous recyclable material to be imported,
- (iii) indicates that the hazardous waste will be disposed of, or the hazardous recyclable material will be recycled, in accordance with the import permit,
- (iv) describes the operation set out in Schedule 1 or 2 that will be used,
- (v) requires the foreign exporter to complete Part A of the movement document, or authorizes the importer to complete Part A on the foreign exporter's behalf if the waste or material is not considered or defined as hazardous under the legislation of the country of export, and to provide a copy of it and a copy of the import permit to the first authorized carrier prior to the shipment of the hazardous waste or hazardous recyclable material,
- (vi) requires the foreign exporter
  - (A) to send a copy of the movement document to the importer once Part A is completed by the foreign exporter, Part B is completed by the first authorized carrier and the hazardous waste or hazardous recyclable material has been shipped, and
  - (B) to take all practicable measures to assist the importer in fulfilling the terms of the importer's obligations under these Regulations if delivery is not accepted by the authorized facility named in the import permit, or if the authorized facility cannot, or refuses to, dispose of the hazardous waste or recycle the hazardous recyclable material in accordance with the import permit;
- (f) the importer and the authorized carrier if other than Her Majesty in right of Canada or of a province are insured in accordance with section 37;
- (g) the hazardous waste or hazardous recyclable material is transported by the authorized carriers named in the import permit;
- (h) the applicable safety mark is displayed on each shipment of hazardous waste or hazardous recyclable material in accordance with Part 4 of the *Transportation of Dangerous Goods Regulations*;
- (i) the hazardous waste or hazardous recyclable material is imported through the port of entry named in the import permit;
- (j) the quantity of hazardous waste or hazardous recyclable material imported does not exceed the quantity set out in the import permit;
- (k) a copy of the import permit and a copy of the movement document completed in accordance with sections 18 to 20
  - (i) accompanies the hazardous waste or hazardous recyclable material, and

étranger et l'installation agréée ou, dans le cas où deux ou trois de ces personnes sont la même entité juridique, il existe une déclaration écrite et signée par celle-ci :

- (i) décrivant les déchets ou les matières,
- (ii) indiquant la quantité de déchets ou de matières qui sera importée,
- (iii) portant que l'élimination ou le recyclage sera effectué conformément au permis d'importation,
- (iv) décrivant l'opération visée aux annexes 1 ou 2 qui sera utilisée,
- (v) stipulant que l'expéditeur étranger doit remplir la partie A du document de mouvement – ou, si les déchets ou les matières ne sont pas considérés ou définis comme dangereux selon les lois du pays d'exportation, autorisant l'importateur à remplir la partie A en son nom – et remettre une copie du document de mouvement et du permis d'importation au premier transporteur agréé avant l'expédition des déchets ou des matières,
- (vi) stipulant que l'expéditeur étranger doit :
  - (A) remettre une copie du document de mouvement à l'importateur une fois qu'il a rempli la partie A, que le premier transporteur agréé a rempli la partie B et que les des déchets ou des matières ont été expédiés,
  - (B) prendre toutes les mesures possibles pour aider l'importateur à remplir ses obligations au titre du présent règlement si l'installation agréée indiquée dans le permis d'importation n'accepte pas les déchets ou les matières ou si elle est incapable ou refuse de les éliminer ou de les recycler conformément au permis d'importation;
- f) l'importateur et le transporteur agréé, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détiennent l'assurance responsabilité visée à l'article 37;
- g) le transport des déchets ou des matières est effectué par les transporteurs agréés nommés dans le permis d'importation;
- h) chaque envoi de déchets ou de matières porte une indication de danger conforme aux exigences de la partie 4 du *Règlement sur le transport des marchandises dangereuses*;
- i) l'importation se fait via le point d'entrée indiqué dans le permis d'importation;
- j) la quantité de déchets ou de matières importés n'excède pas celle prévue dans le permis d'importation;
- k) une copie du permis d'importation et une copie du document de mouvement rempli conformément aux articles 18 à 20 :
  - (i) accompagnent les déchets ou les matières,
  - (ii) sont déposées par l'importateur ou le transporteur agréé au bureau de douane où les déchets et les matières doivent être déclarés en vertu de l'article 12 de la *Loi sur les douanes*;

(ii) is deposited by the importer or the authorized carrier at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under section 12 of the *Customs Act*;

(l) the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at the authorized facility named in the import permit using the disposal or recycling operation set out in the import permit;

(m) after operation D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2 is completed, the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at an authorized facility using an operation set out in Schedule 1 or 2, other than operation D13, D14 or D17 or R12, R13 or R16;

(n) in the case of operations D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the laws of the jurisdiction in which the authorized facility is located requires shorter time periods, in which case those time periods apply; and

(o) in the event that the hazardous waste or hazardous recyclable material is imported but is not accepted by the authorized facility named in the import permit, or if the authorized facility cannot, or refuses to, dispose of the waste or recycle the material in accordance with the permit, the importer

(i) immediately notifies the Minister, the foreign exporter and the authorities of the country of export of the non-acceptance or refusal and the reason for it,

(ii) if necessary, stores the hazardous waste or hazardous recyclable material at a facility authorized to store the waste or material by the authorities of the jurisdiction in which the facility is located,

(iii) within 90 days after the day on which the Minister is notified,

(A) makes arrangements to dispose of the hazardous waste or recycle the hazardous recyclable material in Canada at an authorized facility other than the one named in the import permit and advises the Minister of the name and address of the facility and the name of a contact person, or

(B) makes arrangements to return the hazardous waste or hazardous recyclable material to the facility from which it was exported in accordance with section 35, and

(iv) before shipping the hazardous waste or hazardous recyclable material to the authorized facility referred to in clause (iii)(A), receives confirmation from the Minister that the facility is an authorized facility.

l) l'élimination ou le recyclage est effectué dans l'installation agréée indiquée dans le permis d'importation, selon l'opération qui y est indiquée;

m) une fois les opérations D13, D14 ou D17 figurant à l'annexe 1 ou les opérations R12, R13 ou R16 figurant à l'annexe 2 achevées, l'élimination ou le recyclage est effectué dans une installation agréée, selon une opération prévue aux annexes 1 ou 2, autre que D13, D14 ou D17 ou R12, R13 ou R16;

n) dans le cas de l'une ou l'autre des opérations D13, D14 ou D17 figurant à l'annexe 1 ou des opérations R12, R13 ou R16 figurant à l'annexe 2, elle est achevée dans les cent quatre-vingts jours suivant l'acceptation des déchets ou des matières par l'installation agréée ou, dans le cas d'une autre opération, elle est achevée dans l'année suivant cette acceptation, ou dans toute autre période plus courte prévue par une loi du territoire où est située l'installation agréée;

o) si l'installation agréée indiquée dans le permis d'importation n'accepte pas les déchets ou les matières ou est incapable ou refuse de les éliminer ou de les recycler conformément au permis :

(i) l'importateur en avise aussitôt le ministre, l'expéditeur étranger et les autorités du pays d'exportation, en précisant la raison du refus,

(ii) il les entrepose, au besoin, dans une installation autorisée à ces fins par les autorités du territoire où l'installation est située,

(iii) dans les quatre-vingt-dix jours suivant l'avis au ministre :

(A) soit il prend des arrangements en vue de leur élimination ou recyclage au Canada, dans une installation agréée autre que celle indiquée dans le permis, et communique au ministre les nom et adresse de l'installation ainsi que le nom d'une personne-ressource de celle-ci,

(B) soit il prend des arrangements en vue de leur renvoi à l'installation d'où ils ont été exportés, conformément à l'article 35,

(iv) avant de transporter les déchets ou les matières à l'installation agréée visée à la division (iii)(A), l'importateur reçoit une confirmation du ministre indiquant qu'elle est une installation agréée.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

	<i>Movement Document</i>	<i>Document de mouvement</i>	
Movement document reference number	17. The Minister shall provide a movement document reference number to an importer who requests one for the purpose of completing a movement document.	17. Le ministre attribue un numéro de référence à tout importateur qui en fait la demande pour un document de mouvement.	Numéro de référence
Importer – prior to import	18. (1) Prior to importing the hazardous waste or hazardous recyclable material, the importer shall provide the foreign exporter with a copy of the movement document indicating the movement document reference number and a copy of the import permit.	18. (1) Avant l'importation de déchets dangereux ou de matières recyclables dangereuses, l'importateur envoie à l'expéditeur étranger une copie du permis d'importation et un document de mouvement sur lequel il indique le numéro de référence attribué par le ministre.	Responsabilité de l'importateur avant l'importation
Importer – at time of import	(2) At the time of the import of the hazardous waste or hazardous recyclable material, the importer must ensure that (a) the foreign exporter has completed Part A of the movement document unless the importer is authorized to do so on the foreign exporter's behalf under the contract referred to in paragraph 16(e); (b) the foreign exporter has provided a copy of the movement document and a copy of the import permit to the first authorized carrier; and (c) the first authorized carrier has completed Part B of the movement document and has provided a copy to the foreign exporter.	(2) Au moment de l'importation de déchets dangereux ou de matières recyclables dangereuses, l'importateur s'assure que : a) l'expéditeur étranger a rempli la partie A du document de mouvement, à moins que l'importateur soit autorisé à la signer en son nom aux termes du contrat visé à l'alinéa 16e); b) l'expéditeur étranger a remis une copie du document de mouvement et du permis d'importation au premier transporteur agréé; c) le premier transporteur a rempli la partie B du document de mouvement et a remis celui-ci à l'expéditeur étranger.	Responsabilité de l'importateur au moment de l'importation
Copy of movement document	(3) Within three working days after the day on which the importer receives a copy of the movement document with Parts A and B completed in accordance with subsection (2), the importer must send a copy of it to (a) the Minister; and (b) the authorities of the province of import, if they require it.	(3) Dans les trois jours ouvrables après avoir reçu une copie du document de mouvement dont les parties A et B ont été remplies conformément au paragraphe (2), l'importateur envoie une copie : a) au ministre; b) aux autorités de la province d'importation, si elles l'exigent.	Copie du document de mouvement
Authorized carriers	(4) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the import permit to the next authorized carrier or the importer, as the case may be, on delivery of the waste or material to that carrier or the importer.	(4) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis d'importation, au transporteur agréé suivant ou à l'importateur, selon le cas, lors de la livraison.	Transporteurs agréés
Importer	(5) The importer must ensure that every authorized carrier that transports the hazardous waste or hazardous recyclable material completes Part B of the movement document.	(5) L'importateur s'assure que tous les transporteurs agréés ayant transporté les déchets ou les matières ont rempli la partie B du document de mouvement.	Importateur
Copy of movement document	(6) Within three working days after the day on which the hazardous waste or hazardous recyclable material is delivered to the authorized facility, the importer must complete Part C of the movement document and must send a copy of the completed movement document to (a) the Minister; (b) the authorities of the province of import, if they require it; (c) the foreign exporter; and (d) every authorized carrier of the hazardous waste or hazardous recyclable material.	(6) Dans les trois jours ouvrables suivant la livraison des déchets ou des matières à l'installation agréée, l'importateur remplit la partie C du document de mouvement et envoie une copie de celui-ci : a) au ministre; b) aux autorités de la province d'importation, si elles l'exigent; c) à l'expéditeur étranger; d) à tout transporteur agréé ayant transporté les déchets ou les matières.	Copie du document de mouvement
Rail consist	19. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the	19. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu	Feuille de train

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* **SOR/DORS/2005-149**

movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.

qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.

Unit of  
measure

20. The importer must ensure that the quantity of hazardous waste or hazardous recyclable material indicated in the movement document is in the same unit of measure as is used in the import permit.

20. L'importateur veille à ce que les quantités de déchets dangereux ou de matières recyclables dangereuses indiquées dans le document de mouvement soient exprimées au moyen de la même unité de mesure que celle utilisée dans le permis d'importation.

Unité de  
mesure

Retention of  
movement  
document

21. The importer and every authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the date of import.

21. L'importateur et les transporteurs agréés conservent une copie du document de mouvement à leur principal établissement au Canada pour une période de trois ans suivant la date de l'importation.

Conservation

PART 4  
TRANSIT  
*Conditions*

PARTIE 4  
TRANSIT  
*Conditions*

Conditions of  
transit

22. A person may convey hazardous waste or hazardous recyclable material in transit if

22. Le transit de déchets dangereux ou de matières recyclables dangereuses est assujéti aux conditions suivantes :

Conditions

(a) at the time of transit, the export or import of the hazardous waste or hazardous recyclable material is not prohibited under the laws of Canada or the laws of the country of transit;

a) au moment du transit, les lois du Canada et celles du pays de transit n'en interdisent pas l'exportation ou l'importation;

(b) the hazardous waste or hazardous recyclable material is transported by the authorized carriers named in the transit permit;

b) le transport des déchets ou des matières est effectué par les transporteurs agréés nommés dans le permis de transit;

(c) the applicable safety mark is displayed on each shipment of hazardous waste or hazardous recyclable material in accordance with Part 4 of the *Transportation of Dangerous Goods Regulations*;

c) chaque envoi de déchets ou de matières porte une indication de danger conforme aux exigences de la partie 4 du *Règlement sur le transport des marchandises dangereuses*;

(d) the hazardous waste or hazardous recyclable material is exported and imported through the port of entry and port of exit named in the transit permit;

d) l'importation et l'exportation se font via le point de sortie et le point d'entrée indiqués dans le permis de transit;

(e) the quantity of hazardous waste or hazardous recyclable material conveyed in transit does not exceed the quantity set out in the transit permit;

e) la quantité de déchets ou de matières n'excède pas celle prévue dans le permis de transit;

(f) in the case of a transit through Canada, the authorized carrier if other than Her Majesty in right of Canada or of a province is insured in accordance with section 37;

f) dans le cas d'un transit au Canada, le transporteur agréé, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détient l'assurance responsabilité visée à l'article 37;

(g) in the case of a transit through a country other than Canada, the exporter and importer if other than Her Majesty in right of Canada or of a province are insured in accordance with section 37;

g) dans le cas d'un transit dans un pays autre que le Canada, l'exportateur et l'importateur, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détiennent l'assurance responsabilité visée à l'article 37;

(h) in the case of a transit through Canada, the country of export has provided the Minister with written confirmation that the country of import and any countries through which the hazardous waste or hazardous recyclable material will be transited after it has left Canada, has consented to the proposed import into or transit through that country; and

h) dans le cas d'un transit au Canada, le pays d'exportation a fourni au ministre une confirmation écrite portant que le pays d'importation ainsi que tout pays de transit où les déchets ou les matières doivent aller après leur sortie du Canada ont consenti à l'importation ou au transit;

(i) a copy of the transit permit and a copy of the movement document completed in accordance

i) une copie du permis de transit et une copie du document de mouvement rempli conformément aux articles 25 et 26 ou 30 et 31, selon le cas :

(i) accompagnent les déchets ou les matières,

(ii) sont déposées par l'exportateur, l'importateur ou le transporteur agréé au bureau de

with sections 25 and 26, or 30 and 31, as the case may be,

(i) accompanies the hazardous waste or hazardous recyclable material, and

(ii) is deposited by the exporter, importer or authorized carrier at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under sections 12 and 95 of the *Customs Act*.

douane où les déchets et les matières doivent être déclarés en vertu des articles 12 ou 95 de la *Loi sur les douanes*.

*Movement Document – Transits Through Canada*

*Document de mouvement pour les transits au Canada*

Application

23. Sections 24 to 27 apply to the transit of hazardous waste and hazardous recyclable material through Canada.

23. Les articles 24 à 27 s'appliquent au transit de déchets dangereux et de matières recyclables dangereuses au Canada.

Application

Movement document reference number

24. The Minister shall provide a movement document reference number to any person who requests one for the purpose of completing a movement document.

24. Le ministre attribue un numéro de référence à quiconque en fait la demande pour un document de mouvement.

Numéro de référence

Authorized carrier

25. (1) At the time the hazardous waste or hazardous recyclable material enters Canada, the authorized carrier must ensure that the foreign exporter has completed Part A of a movement document and that the movement document reference number provided by the Minister is indicated on the movement document.

25. (1) Au moment de l'entrée des déchets dangereux ou des matières recyclables dangereuses au Canada, le transporteur agréé s'assure que l'expéditeur étranger a rempli la partie A d'un document de mouvement et que le numéro de référence attribué par le ministre y figure.

Transporteur agréé

Authorized carriers

(2) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the transit permit to the next authorized carrier on delivery of the waste or material to that carrier.

(2) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis de transit, au transporteur agréé suivant lors de la livraison.

Transporteur agréé

Copy of movement document

(3) Within three working days after the day on which the hazardous waste or hazardous recyclable material exits Canada, the authorized carrier that transports the waste or material out of Canada must send a copy of the movement document completed in accordance with subsections (1) and (2) to the Minister.

(3) Dans les trois jours ouvrables suivant la sortie des déchets ou des matières du Canada, le transporteur agréé qui les a sortis du Canada envoie au ministre une copie du document de mouvement rempli conformément aux paragraphes (1) et (2).

Copie du document de mouvement

Rail consist

26. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.

26. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.

Feuille de train

Retention of movement document

27. If the authorized carrier has a place of business in Canada, the authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the day on which the hazardous waste or hazardous recyclable material exits Canada.

27. Si le transporteur agréé a un établissement au Canada, il y conserve une copie du document de mouvement pour une période de trois ans suivant la sortie des déchets ou des matières du Canada.

Conservation

*Movement Document – Transits Through a Country Other than Canada*

*Document de mouvement pour les transits dans un pays autre que le Canada*

Application

28. Sections 29 to 32 apply to the transit of hazardous waste and hazardous recyclable material where Canada is the country of origin and the country of destination.

28. Les articles 29 à 32 s'appliquent au transit de déchets dangereux et de matières recyclables dangereuses dans le cas où le pays d'origine et de destination est le Canada.

Application

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

Movement document reference number	29. The Minister shall provide a movement document reference number to any exporter who requests one for the purpose of completing a movement document.	29. Le ministre attribue un numéro de référence à tout exportateur qui en fait la demande pour un document de mouvement.	Numéro de référence
Exporter	30. (1) At the time the hazardous waste or hazardous recyclable material exits Canada, the exporter must complete Part A of a movement document, indicate the movement document reference number provided by the Minister and provide a copy of the movement document and a copy of the transit permit to the first authorized carrier.	30. (1) Au moment de la sortie des déchets dangereux ou des matières recyclables dangereuses du Canada, l'exportateur remplit la partie A d'un document de mouvement, en indiquant le numéro de référence attribué par le ministre, et remet une copie du document et du permis de transit au premier transporteur agréé.	Exportateur
First authorized carrier	(2) Immediately on receipt of the movement document, the first authorized carrier must complete Part B of the movement document and provide a copy to the exporter.	(2) Sur réception du document de mouvement, le premier transporteur agréé en remplit la partie B et remet sans délai une copie du document à l'exportateur.	Premier transporteur agréé
Copy of movement document	(3) Within three working days after the day on which the hazardous waste or hazardous recyclable material exits Canada, the exporter must send a copy of the movement document completed in accordance with subsections (1) and (2) to (a) the Minister; and (b) the authorities of the province of export, if they require it.	(3) Dans les trois jours ouvrables suivant la sortie des déchets ou des matières du Canada, l'exportateur envoie une copie du document de mouvement rempli conformément aux paragraphes (1) et (2) : a) au ministre; b) aux autorités de la province d'exportation, si elles l'exigent.	Copie du document de mouvement
Other authorized carriers	(4) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the transit permit on delivery of the waste or material to the next carrier or the importer, as the case may be.	(4) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis de transit, au transporteur agréé suivant ou à l'importateur, selon le cas, lors de la livraison.	Autres transporteurs agréés
Exporter	(5) The exporter must ensure that Part B of the movement document is completed by every authorized carrier that transports the hazardous waste or hazardous recyclable material.	(5) L'exportateur veille à ce que tous les transporteurs agréés ayant transporté les déchets ou les matières remplissent la partie B du document de mouvement.	Exportateur
Copy of movement document	(6) Within three working days after the day on which the hazardous waste or hazardous recyclable material is delivered to the authorized facility, the importer must complete Part C of the movement document and must send a copy of the completed movement document to (a) the Minister; (b) the authorities of the province of import, if they require it; (c) the exporter; and (d) every authorized carrier of the hazardous waste or hazardous recyclable material.	(6) Dans les trois jours ouvrables suivant la livraison des déchets ou des matières à l'installation agréée, l'importateur remplit la partie C du document de mouvement et envoie une copie de celui-ci : a) au ministre; b) aux autorités de la province d'importation, si elles l'exigent; c) à l'exportateur; d) à tout transporteur agréé ayant transporté les déchets ou les matières.	Copie du document de mouvement
Rail consist	31. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.	31. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.	Feuille de train
Retention of movement document	32. The exporter, the importer and every authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the day on which the hazardous waste or hazardous recyclable material is imported.	32. L'exportateur, l'importateur et les transporteurs agréés conservent une copie du document de mouvement à leur principal établissement au Canada pour une période de trois ans suivant la date de l'importation.	Conservation



PART 5

RETURNS

*Application*

Returns

33. This Part applies to the return of hazardous waste or hazardous recyclable material to  
(a) Canada after it has been exported from Canada; and  
(b) the country of export after it has been imported into Canada.

*Returns to Canada*

Notice

34. (1) If the hazardous waste or hazardous recyclable material is returned to Canada, the exporter that exported the waste or material from Canada must submit a notice to the Minister in writing, containing the following information:

- (a) the name, civic, mailing and electronic addresses and telephone and facsimile numbers of, and the name of the contact person for, the exporter, the foreign receiver and any authorized carriers that were not named in the original export permit;
- (b) the name of each insurance company and the policy number for each insurance policy required under these Regulations;
- (c) the reason for the return;
- (d) the quantity of hazardous waste or hazardous recyclable material that will be returned using the same unit of measure as in the original export permit;
- (e) if the quantity of hazardous waste or hazardous recyclable material to be returned is less than the quantity of waste or material exported from Canada, the reason for the difference;
- (f) the port of entry through which the return will take place and the customs office at which the hazardous waste or hazardous recyclable material will be reported;
- (g) the notice reference number contained in the original export permit; and
- (h) the line item number contained in the original export permit for the hazardous waste or hazardous recyclable material that will be returned.

Exporter

(2) After an import permit is issued, the exporter must

- (a) return the hazardous waste or hazardous recyclable material to the facility from which it was exported, using the authorized carriers and the port of entry named in the import permit;
- (b) ensure that a copy of the import permit and a copy of the movement document with Parts A and B completed, clearly indicating that the hazardous waste or hazardous recyclable material is being returned to Canada,
  - (i) accompanies the hazardous waste or hazardous recyclable material, and

PARTIE 5

RENOIS

*Champ d'application*

33. La présente partie s'applique :

Application

- a) au renvoi au Canada de déchets dangereux ou de matières recyclables dangereuses qui ont été exportés du Canada;
- b) au renvoi au pays d'exportation de déchets dangereux ou de matières recyclables dangereuses après leur importation au Canada.

*Renvoi au Canada*

34. (1) En cas de renvoi de déchets dangereux ou de matières recyclables dangereuses au Canada, l'exportateur qui les a exportés du Canada présente au ministre une notification écrite et fournit les renseignements suivants :

Notification

- a) le nom, les adresses municipale, postale et électronique et les numéros de téléphone et de télécopieur de l'exportateur, du destinataire étranger et de tout transporteur agréé autre que ceux nommés dans le permis d'exportation original, ainsi que le nom de leur personne-ressource;
- b) le nom de l'assureur et le numéro de la police;
- c) les motifs du renvoi;
- d) la quantité de déchets ou de matières qui sera renvoyée, exprimée à l'aide de la même unité de mesure que celle utilisée dans le permis d'exportation original;
- e) si la quantité de déchets ou de matières renvoyée est inférieure à celle qui a été exportée du Canada, les raisons de cette différence;
- f) le point d'entrée prévu pour l'importation et le bureau de douane où les déchets ou les matières seront déclarés;
- g) le numéro de référence de la notification figurant au permis d'exportation original;
- h) le numéro de la ligne dans le permis d'exportation original où sont inscrits les déchets ou les matières qui seront renvoyés.

(2) Une fois le permis d'importation délivré, l'exportateur :

Exportateur

- a) renvoie les déchets dangereux ou les matières recyclables dangereuses à l'installation d'où ils ont été exportés, en utilisant le point d'entrée indiqué dans le permis d'importation et en ayant recours aux transporteurs agréés qui y sont nommés;
- b) veille à ce qu'une copie du permis d'importation et une copie du document de mouvement dont les parties A et B sont remplies et qui indique clairement que les déchets ou les matières sont renvoyés au Canada :

- (ii) is deposited at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under section 12 of the *Customs Act*; and
- (c) submit a copy of the movement document referred to in paragraph (b) to the Minister, every authorized carrier and if they require it, to the authorities of the province of export.

#### Returns to the Country of Export

Notice –  
returns to  
country of  
export

35. (1) If the hazardous waste or hazardous recyclable material is returned to the country of export, the importer that imported the waste or material into Canada must submit a notice to the Minister in writing, containing the following information:

- (a) the name, civic, mailing and electronic addresses and telephone and facsimile numbers of, and the name of the contact person for, the importer, the foreign exporter and any authorized carriers that were not named in the original import permit;
- (b) the name of each insurance company and the policy number for each insurance policy required under these Regulations;
- (c) the reason for the return;
- (d) the quantity of hazardous waste or hazardous recyclable material that will be returned using the same unit of measure as in the original import permit;
- (e) if the quantity of hazardous waste or hazardous recyclable material to be returned is less than the quantity of waste or material imported into Canada, the reason for the difference;
- (f) the port of entry through which the return will take place and the customs office at which the hazardous waste or hazardous recyclable material will be reported;
- (g) the notice reference number contained in the original import permit for the import of the hazardous waste or hazardous recyclable material into Canada; and
- (h) the line item number contained in the original import permit for the hazardous waste or hazardous recyclable material that will be returned.

Importer's  
obligations

(2) After an export permit is issued, the importer must

- (a) return the hazardous waste or hazardous recyclable material to the facility from which it was imported, using the authorized carriers and the port of exit named in the export permit;
- (b) ensure that a copy of the export permit and a copy of the movement document with Parts B and C completed, clearly indicating that the hazardous waste or hazardous recyclable material is being returned to the country of export,
  - (i) accompanies the hazardous waste or hazardous recyclable material, and
  - (ii) is deposited at the customs office at which the hazardous waste or hazardous recyclable

- (i) accompagnent les déchets ou les matières,
- (ii) soient déposées au bureau de douane où les déchets ou les matières doivent être déclarés en vertu de l'article 12 de la *Loi sur les douanes*;
- c) envoie une copie du document de mouvement visé à l'alinéa b) au ministre, à chaque transporteur agréé et, si elles l'exigent, aux autorités de la province d'exportation.

#### Renvoi au pays d'exportation

Notification

35. (1) En cas de renvoi de déchets dangereux ou de matières recyclables dangereuses dans le pays d'exportation, l'importateur qui les a importés au Canada présente au ministre une notification écrite et fournit les renseignements suivants :

- a) le nom, les adresses municipale, postale et électronique et les numéros de téléphone et de télécopieur de l'importateur et de l'expéditeur étranger et de tout transporteur agréé, autre que ceux nommés dans le permis d'importation original, qui transporteront les déchets ou les matières, ainsi que le nom de leur personne-ressource;
- b) le nom de l'assureur et le numéro de la police;
- c) les motifs du renvoi;
- d) la quantité de déchets ou de matières renvoyée, exprimée à l'aide de la même unité de mesure que celle utilisée dans le permis d'importation original;
- e) si la quantité de déchets ou de matières renvoyée est inférieure à celle qui a été importée au Canada, les raisons de cette différence;
- f) le point de sortie prévu pour l'exportation et le bureau de douane où les déchets ou les matières seront déclarés;
- g) le numéro de référence figurant au permis d'importation original pour l'importation des déchets ou des matières au Canada;
- h) le numéro de la ligne dans le permis d'importation original où sont inscrits les déchets ou les matières qui seront renvoyés.

(2) Une fois le permis d'exportation délivré, l'importateur :

Obligations de  
l'importateur

- a) renvoie les déchets dangereux ou les matières recyclables dangereuses à l'installation d'où ils ont été importés, en utilisant le point de sortie indiqué dans le permis d'exportation et en ayant recours aux transporteurs agréés qui y sont nommés;
- b) veille à ce qu'une copie du permis d'exportation et une copie du document de mouvement dont les parties B et C sont remplies et qui indique clairement que les déchets ou les matières sont renvoyés dans le pays d'exportation :

material is to be reported under section 95 of the *Customs Act*; and

(c) submit a copy of the movement document referred to in paragraph (b) to the Minister, every authorized carrier and if they require it, the authorities of the province of import.

(i) accompagnent les déchets ou les matières, (ii) soient déposées au bureau de douane où les déchets ou les matières doivent être déclarés en vertu de l'article 95 de la *Loi sur les douanes*;

c) envoie une copie du document de mouvement visé à l'alinéa b) au ministre, à chaque transporteur agréé et, si elles l'exigent, aux autorités de la province d'importation.

## PART 6

### MISCELLANEOUS MATTERS

#### Confirmation of Disposal or Recycling

**Confirmation** 36. (1) Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled

(a) in accordance with the export or import permit;

(b) in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and

(c) within the period referred to in paragraph 9(o) or 16(n).

**Mandatory reference** (2) The exporter or importer must include the movement document reference number and line item number for the applicable hazardous waste or hazardous recyclable material referred to in subsection (1) in the confirmation.

**Retention of confirmation** (3) The exporter or importer must keep a copy of the confirmation at their principal place of business in Canada for a period of three years after the day on which it is submitted to the Minister.

#### Liability Insurance

**Coverage** 37. (1) The liability insurance required by these Regulations must be in respect of

(a) any damages to third parties for which the exporter, importer or authorized carrier is responsible; and

(b) any costs imposed by law on the exporter, importer or authorized carrier to clean up the environment in respect of any hazardous waste or hazardous recyclable material that is released.

**Amount** (2) The amount of liability insurance required in respect of each export or import of hazardous waste or hazardous recyclable material is

(a) for exporters or importers, at least \$5,000,000 for hazardous waste;

(b) for exporters or importers, at least \$1,000,000 for hazardous recyclable material; and

## PARTIE 6

### DISPOSITIONS GÉNÉRALES

#### Déclaration d'élimination ou de recyclage

**Déclaration** 36. (1) Dans les trente jours suivant l'élimination des déchets dangereux ou le recyclage des matières recyclables dangereuses, l'exportateur ou l'importateur présente au ministre une déclaration écrite, signée et datée attestant que l'élimination ou le recyclage a été effectué :

a) conformément au permis;

b) d'une manière qui garantit la protection de l'environnement et de la santé humaine contre les effets nuisibles que les déchets ou les matières peuvent avoir;

c) dans le délai visé aux alinéas 9o) ou 16n).

(2) L'exportateur ou l'importateur indique sur la déclaration le numéro de référence du document de mouvement et le numéro de la ligne dans le permis d'exportation ou d'importation où sont inscrits les déchets dangereux ou les matières recyclables dangereuses.

(3) L'exportateur ou l'importateur conserve une copie de la déclaration à son principal établissement au Canada pendant la période de trois ans suivant la date de la présentation de la déclaration au ministre.

#### Assurance responsabilité

**Couverture** 37. (1) L'assurance responsabilité exigée par le présent règlement couvre :

a) les dommages subis par des tiers dont l'exportateur, l'importateur ou le transporteur agréé est responsable;

b) les frais qu'une règle de droit oblige l'exportateur, l'importateur ou le transporteur agréé à payer pour nettoyer l'environnement à la suite d'un rejet de déchets dangereux ou de matières recyclables dangereuses.

(2) Le montant de la protection pour chaque exportation ou importation est :

a) dans le cas d'un exportateur ou d'un importateur de déchets, d'au moins 5 000 000 \$;

b) dans le cas d'un exportateur ou d'un importateur de matières, d'au moins 1 000 000 \$;

Coverage period	<p>(c) for authorized carriers, the amount required by the laws of the jurisdiction in which the hazardous waste or hazardous recyclable material is transported.</p> <p>(3) The insurance must cover liability arising</p> <p>(a) in the case of an export from Canada, from the time the hazardous waste or hazardous recyclable material leaves the exporter's facility to the time an authorized facility, including an authorized facility in Canada if the waste or material is returned to Canada in accordance with section 34, accepts delivery of the waste for disposal or the material for recycling;</p> <p>(b) in the case of an import into Canada, from the time the hazardous waste or hazardous recyclable material enters Canada to the time an authorized facility in Canada accepts delivery of the waste or material, or to the time the waste or material leaves Canada for return to the country of export in accordance with section 35; or</p> <p>(c) if Canada is a country of transit, at any time during the transit through Canada.</p>	<p>c) dans le cas d'un transporteur agréé, le montant exigé par les lois du territoire sur lequel les déchets ou les matières sont transportés.</p>
	<p><i>Export Reduction Plans</i></p>	<p>(3) L'assurance doit couvrir la responsabilité :</p> <p>a) dans le cas d'une exportation, à compter du moment où les déchets ou les matières quittent l'installation de l'exportateur jusqu'à ce qu'une installation agréée, y compris une installation au Canada s'ils y sont renvoyés conformément à l'article 34, en accepte la livraison en vue de leur élimination ou de leur recyclage;</p> <p>b) dans le cas d'une importation, à compter du moment où ils entrent au Canada jusqu'à ce qu'une installation agréée en accepte la livraison, ou jusqu'à ce qu'ils quittent le Canada en raison de leur renvoi dans le pays d'exportation conformément à l'article 35;</p> <p>c) dans le cas d'un transit au Canada, pendant la durée de celui-ci.</p>
Content of plan	<p>38. (1) The plan referred to in subsection 188(1) of the Act must contain</p> <p>(a) the following information with respect to the hazardous waste to which the plan applies, namely,</p> <p>(i) the International Waste Identification Code under OECD Decision C(94)152/Final, substituting the disposal code with the disposal code set out in column 1 of Schedule 1 to these Regulations for the applicable operation set out in column 2 of that Schedule and, if the hazardous waste is a gas, substituting the letter G for the letter L, P or S in the International Waste Identification Code,</p> <p>(ii) the applicable code set out in List A of Annex VIII to the Convention,</p> <p>(iii) the identification number set out in column 1 of Schedule 3, 4 or 7, and</p> <p>(iv) the following information set out in the applicable schedules to the <i>Transportation of Dangerous Goods Regulations</i>, namely,</p> <p>(A) the applicable UN number set out in column 1 of Schedule 1 or column 5 of Schedule 3,</p> <p>(B) the applicable class set out in column 3 of Schedule 1 or the primary class set out in column 4 of Schedule 3, and</p> <p>(C) the applicable packing group and risk group set out in column 4 of Schedule 1;</p> <p>(b) the name, quantity and concentration of any persistent organic pollutant set out in column 2 of Schedule 10 that is contained in the hazardous waste referred to in the plan;</p>	<p><i>Plans de réduction des exportations de déchets dangereux</i></p> <p>38. (1) Le plan visé au paragraphe 188(1) de la Loi comporte les renseignements suivants :</p> <p>a) relativement à chaque déchet dangereux qu'il vise :</p> <p>(i) le code international d'identification des déchets applicable selon la décision C(94)152/Final de l'OCDE, sauf que le code d'élimination est remplacé par celui prévu à la colonne 1 de l'annexe 1 du présent règlement pour l'opération applicable figurant à la colonne 2, et que les lettres « L », « P » ou « S » sont remplacées par la lettre « G » si le déchet est un gaz,</p> <p>(ii) le code applicable figurant à la liste A de l'annexe VIII de la Convention,</p> <p>(iii) le numéro d'identification prévu à la colonne 1 des annexes 3, 4 ou 7,</p> <p>(iv) les renseignements ci-après provenant des annexes applicables du <i>Règlement sur le transport des marchandises dangereuses</i> :</p> <p>(A) le numéro UN applicable prévu à la colonne 1 de l'annexe 1 ou à la colonne 5 de l'annexe 3,</p> <p>(B) la classe applicable prévue à la colonne 3 de l'annexe 1 ou la classe primaire applicable prévue à la colonne 4 de l'annexe 3,</p> <p>(C) le groupe d'emballage/groupe de risque applicable prévu à la colonne 4 de l'annexe 1;</p> <p>b) les nom, quantité et concentration de toute substance polluante organique persistante visée à la colonne 2 de l'annexe 10 qui se trouve dans les déchets visés par le plan;</p>

- (c) if the exporter generates the hazardous waste referred to in the plan, the name and a description of the process that generated the waste and the activity in which that process is used;
- (d) the origin of the hazardous waste if the exporter does not generate the waste referred to in the plan;
- (e) the quantity of hazardous waste exported at the start of the implementation of the plan and the quantity of export reduction to be achieved at each stage of the plan;
- (f) a description of the manner in which the exporter will reduce or phase out exports of the hazardous waste referred to in the plan;
- (g) the options considered for reducing or phasing out the export of the hazardous waste referred to in the plan, including options for disposing or recycling it in Canada;
- (h) the stages of the plan and a schedule for implementing the plan; and
- (i) for each stage of the plan, an estimate of the quantity of goods produced that generates the hazardous waste to which the plan applies and a description of the impact of any changes to the quantity produced on the reduction or phasing out of exports of that waste.

Retention of plan

(2) A person who submits a plan to the Minister must keep a copy of the plan at their principal place of business in Canada for a period of five years after the day on which the plan is submitted.

#### Environmentally Sound Management

Refusal to issue permit

39. If the Minister is of the opinion that the hazardous waste or hazardous recyclable material will not be managed in a manner that will protect the environment and human health against the adverse effects that may result from that waste or material, the Minister may, in accordance with subsection 185(2) of the Act, refuse to issue a permit taking into account the following criteria:

- (a) the implementation of an environmental management system at the authorized facility that includes
  - (i) procedures for ensuring the protection of the environment and human health against the adverse effects that may result from the disposal of the hazardous waste or the recycling of the hazardous recyclable material including measures for monitoring the efficiency of the procedures and modifying them in the event that they do not protect the environment and human health,
  - (ii) measures to monitor and ensure compliance with applicable laws with respect to the protection of the environment and human health, and
  - (iii) a certification that the system includes those procedures and measures;
- (b) the implementation of a plan at the authorized facility to prevent, prepare for and respond to an

- (c) si l'exportateur produit les déchets visés par le plan, le nom et une description du procédé de production des déchets et de l'activité dans laquelle ce procédé est utilisé;
- (d) si l'exportateur ne produit pas les déchets visés par le plan, la provenance des déchets;
- (e) la quantité de déchets exportée à la mise en œuvre du plan et la réduction visée à chaque étape du plan;
- (f) la façon dont l'exportateur réduira ou supprimera l'exportation des déchets visés par le plan;
- (g) les solutions qui ont été envisagées en vue de réduire ou de supprimer les exportations de déchets visés par le plan, y compris celles concernant le recyclage des déchets au Canada;
- (h) les étapes du plan et l'échéancier;
- (i) pour chaque étape du plan, la quantité estimative de biens dont la production génère les déchets visés par le plan, ainsi qu'une description de l'effet des variations de quantité sur la réduction ou la suppression des exportations de déchets.

(2) La personne qui remet le plan au ministre en conserve une copie à son principal établissement au Canada pour une période de cinq ans suivant la remise du plan.

Conservation

#### Gestion écologiquement rationnelle

39. Si le ministre estime que les déchets dangereux ou les matières recyclables dangereuses ne seront pas gérés d'une manière qui garantisse la protection de l'environnement et de la santé humaine contre les effets nuisibles qu'ils peuvent avoir, il peut refuser, en vertu du paragraphe 185(2) de la Loi, de délivrer le permis compte tenu des facteurs suivants :

Refus de délivrer un permis

- (a) la mise en application d'un système de gestion environnementale à l'installation agréée, lequel comprend notamment :
  - (i) des modalités qui garantissent la protection de l'environnement et de la santé humaine contre les effets nuisibles que l'élimination des déchets ou le recyclage des matières pourrait entraîner ainsi que des mesures pour contrôler l'efficacité de ces modalités et les modifier si elles ne protègent pas l'environnement et la santé humaine,
  - (ii) des mesures pour assurer le respect des lois applicables concernant la protection de l'environnement et de la santé humaine,
  - (iii) une attestation du fait que le système comprend les modalités et les mesures;
- (b) la mise en application, à l'installation agréée, d'un plan pour prévenir tout rejet non contrôlé, non planifié ou accidentel de déchets ou de matières et pour faire face à un tel rejet;

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

uncontrolled, unplanned or accidental release of hazardous waste or hazardous recyclable material; and

(c) the existence of prohibitions or conditions relating to the disposal of hazardous waste or the recycling of hazardous recyclable material in Canada or abroad.

c) l'existence d'interdictions ou de conditions concernant l'élimination des déchets ou le recyclage des matières au Canada ou à l'étranger.

#### CONSEQUENTIAL AMENDMENT

Consequential amendment

40. Paragraph 2(2)(b) of the *Export of Substances Under the Rotterdam Convention Regulations*<sup>1</sup> is replaced by the following:

(b) is, or is contained in, a hazardous waste or hazardous recyclable material regulated by the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*;

#### MODIFICATION CORRÉLATIVE

Modification corrélative

40. L'alinéa 2(2)b) du *Règlement sur l'exportation de substances aux termes de la Convention de Rotterdam*<sup>1</sup> est remplacé par ce qui suit :

b) la substance est un déchet dangereux ou une matière recyclable dangereuse — ou est contenue dans un tel déchet ou une telle matière — qui est régi par le *Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuse*;

#### REPEAL

Repeal

41. The *Export and Import of Hazardous Wastes Regulations*<sup>2</sup> are repealed.

#### ABROGATION

Abrogation

41. Le *Règlement sur l'exportation et l'importation des déchets dangereux*<sup>1</sup> est abrogé.

#### COMING INTO FORCE

Coming into Force

42. These Regulations come into force on November 1, 2005.

#### ENTRÉE EN VIGUEUR

Entrée en vigueur

42. Le présent règlement entre en vigueur le 1<sup>er</sup> novembre 2005.

<sup>1</sup> SOR/2002-317  
<sup>2</sup> SOR/92-637

<sup>1</sup> DORS/2002-317  
<sup>2</sup> DORS/92-637

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

### SCHEDULE 1

(Subsection 1(1), section 4, subparagraphs 8(j)(i) and (viii) and 9(f)(iv), paragraphs 9(n) and (o), subparagraph 16(e)(iv), paragraphs 16(m) and (n) and subparagraph 38(1)(a)(i))

### DISPOSAL OPERATIONS FOR HAZARDOUS WASTE

Item	Column 1 Disposal Code	Column 2 Operation
1.	D1	Release into or onto land, other than by any of operations D3 to D5 or D12.
2.	D2	Land treatment, such as biodegradation of liquids or sludges in soil.
3.	D3	Deep injection, such as injection into wells, salt domes, mines or naturally occurring repositories.
4.	D4	Surface impoundment, such as placing liquids or sludges into pits, ponds or lagoons.
5.	D5	Specially engineered landfilling, such as placement into separate lined cells that are isolated from each other and the environment.
6.	D6	Release into water, other than a sea or ocean, other than by operation D4.
7.	D7	Release into a sea or ocean, including sea-bed insertion, other than by operation D4.
8.	D8	Biological treatment, not otherwise set out in this Schedule.
9.	D9	Physical or chemical treatment, not otherwise referred to in this Schedule; such as calcination, neutralization or precipitation.
10.	D10	Incineration or thermal treatment on land.
11.	D11	Incineration or thermal treatment at sea.
12.	D12	Permanent storage.
13.	D13	Blending or mixing, prior to any of operations D1 to D12.
14.	D14	Repackaging, prior to any of operations D1 to D13.
15.	D15	Release, including the venting of compressed or liquified gases, or treatment, other than by any of operations D1 to D12.
16.	D16	Testing of a new technology to dispose of a hazardous waste.
17.	D17	Interim storage, prior to any of operations D1 to D12.

### SCHEDULE 2

(Subsection 2(1), subparagraph 2(2)(e)(iii), section 4, subparagraphs 8(j)(i) and (viii) and 9(f)(iv), paragraphs 9(n) and (o), subparagraph 16(e)(iv) and paragraphs 16(m) and (n))

### RECYCLING OPERATIONS FOR HAZARDOUS RECYCLABLE MATERIAL

Item	Column 1 Recycling Code	Column 2 Operation
1.	R1	Use as a fuel in an energy recovery system, where the net heating value of the material is at least 12 780 kJ/kg.
2.	R2	Recovery or regeneration of substances that have been used as solvents.
3.	R3	Recovery of organic substances that have not been used as solvents.
4.	R4	Recovery of metals and metal compounds.
5.	R5	Recovery of inorganic materials other than metals or metal compounds.
6.	R6	Regeneration of acids or bases.
7.	R7	Recovery of components used for pollution abatement.
8.	R8	Recovery of components from catalysts.
9.	R9	Re-refining or re-use of used oil, other than by operation R1.
10.	R10	Land treatment resulting in agricultural or ecological improvement.
11.	R11	Use of residual materials obtained by any of operations R1 to R10 or R14.
12.	R12	Exchange of a recyclable material for another recyclable material prior to recycling by any of operations R1 to R11 or R14.
13.	R13	Accumulation prior to recycling by any of operations R1 to R11 or R14.
14.	R14	Recovery or regeneration of a substance or use or re-use of a recyclable material, other than by any of operations R1 to R10.
15.	R15	Testing of a new technology to recycle a hazardous recyclable material.
16.	R16	Interim storage prior to any of operations R1 to R11 or R14.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

### SCHEDULE 3

(Paragraphs 1(1)(a) and 2(1)(a), subparagraph 8(j)(v), paragraphs 9(c) and 16(b) and subparagraph 38(1)(a)(iii))

#### HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS

	Column 1	Column 2																																		
Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material																																		
1.	HAZ1	<p>Biomedical waste – the following wastes, other than those generated from building maintenance, office administration or food preparation and consumption, that are generated by human or animal health care establishments, medical, health care or veterinary teaching or research establishments, clinical laboratories or facilities that test or produce vaccines and needle and syringe exchange programs:</p> <p>(a) human tissues, organs or body parts, excluding teeth, hair or nails;</p> <p>(b) human blood or blood products;</p> <p>(c) human bodily fluids that are contaminated with blood;</p> <p>(d) human bodily fluids removed in the course of autopsy, treatment, or surgery for diagnosis;</p> <p>(e) animal tissues, organs, body parts or carcasses, excluding teeth, nails, hair, bristles, feathers, horns and hooves, resulting from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraph 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(f) animal blood or blood products resulting from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraph 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(g) animal bodily fluids that are visibly contaminated with animal blood and that result from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraph 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(h) animal bodily fluids removed in the course of surgery, treatment or necropsy, and that result from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraphs 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(i) live or attenuated vaccines, human or animal cell cultures, microbiology laboratory cultures, stocks or specimens of microorganisms and any items that have come into contact with them;</p> <p>(j) any items that are saturated with the blood or bodily fluids referred to in paragraphs (b) to (d) or (f) to (h), including items that were saturated but that have dried; and</p> <p>(k) cytotoxic drugs and any items, including tissues, tubing, needles or gloves, that have come into contact with a cytotoxic drug.</p> <p>Biomedical waste does not include</p> <p>(a) urine or feces;</p> <p>(b) wastes that are controlled under the <i>Health of Animals Act</i>; or</p> <p>(c) wastes that result from the breeding or raising of animals.</p>																																		
2.	HAZ2	Used lubricating oils in quantities of 500 L or more, from internal combustion engines or gear boxes, transmissions, transformers, hydraulic systems or other equipment associated with such engines.																																		
3.	HAZ3	Used oil filters containing more than 6% of oil by mass.																																		
4.	HAZ4	Cyanide, or substances containing cyanide, in a concentration equal to or greater than 100 mg/kg.																																		
5.	HAZ5	Wastes that contain more than 2 mg/kg of polychlorinated terphenyls or polybrominated biphenyls described in Schedule 1 to the Act.																																		
6.	HAZ6	<p>Wastes that contain, in a concentration of more than 100 ng/kg of 2,3,7,8-tetrachlorodibenzo-p-dioxin equivalent,</p> <p>(a) total polychlorinated dibenzofurans that have a molecular formula <math>C_{12}H_{8-n}Cl_nO</math> in which "n" is greater than 1; or</p> <p>(b) total polychlorinated dibenzo-p-dioxins that have a molecular formula <math>C_{12}H_{6-n}Cl_nO_2</math> in which "n" is greater than 1.</p> <p>The concentration is calculated in accordance with "International Toxicity Equivalency Factor (I-TEF) Method of Risk Assessment for Complex Mixtures of Dioxins and Related Compounds", <i>Pilot Study on International Information Exchange on Dioxins and Related Compounds</i>, Committee on the Challenges of Modern Society, North Atlantic Treaty Organization, Report Number 176, August 1988, as amended from time to time, using the following factors:</p> <table><tr><td>2,3,7,8-tetrachlorodibenzodioxin</td><td>1.001</td></tr><tr><td>1,2,3,7,8-pentachlorodibenzodioxin</td><td>0.5</td></tr><tr><td>1,2,3,4,7,8-hexachlorodibenzodioxin</td><td>0.1</td></tr><tr><td>1,2,3,7,8,9-hexachlorodibenzodioxin</td><td>0.1</td></tr><tr><td>1,2,3,6,7,8-hexachlorodibenzodioxin</td><td>0.1</td></tr><tr><td>1,2,3,4,6,7,8-heptachlorodibenzodioxin</td><td>0.01</td></tr><tr><td>octachlorodibenzodioxin</td><td>0.001</td></tr><tr><td>2,3,7,8-tetrachlorodibenzofuran</td><td>0.1</td></tr><tr><td>2,3,4,7,8-pentachlorodibenzofuran</td><td>0.5</td></tr><tr><td>1,2,3,7,8-pentachlorodibenzofuran</td><td>0.05</td></tr><tr><td>1,2,3,4,7,8-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>1,2,3,7,8,9-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>1,2,3,6,7,8-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>2,3,4,6,7,8-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>1,2,3,4,6,7,8-heptachlorodibenzofuran</td><td>0.01</td></tr><tr><td>1,2,3,4,7,8,9-heptachlorodibenzofuran</td><td>0.01</td></tr><tr><td>octachlorodibenzofuran</td><td>0.001</td></tr></table>	2,3,7,8-tetrachlorodibenzodioxin	1.001	1,2,3,7,8-pentachlorodibenzodioxin	0.5	1,2,3,4,7,8-hexachlorodibenzodioxin	0.1	1,2,3,7,8,9-hexachlorodibenzodioxin	0.1	1,2,3,6,7,8-hexachlorodibenzodioxin	0.1	1,2,3,4,6,7,8-heptachlorodibenzodioxin	0.01	octachlorodibenzodioxin	0.001	2,3,7,8-tetrachlorodibenzofuran	0.1	2,3,4,7,8-pentachlorodibenzofuran	0.5	1,2,3,7,8-pentachlorodibenzofuran	0.05	1,2,3,4,7,8-hexachlorodibenzofuran	0.1	1,2,3,7,8,9-hexachlorodibenzofuran	0.1	1,2,3,6,7,8-hexachlorodibenzofuran	0.1	2,3,4,6,7,8-hexachlorodibenzofuran	0.1	1,2,3,4,6,7,8-heptachlorodibenzofuran	0.01	1,2,3,4,7,8,9-heptachlorodibenzofuran	0.01	octachlorodibenzofuran	0.001
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octachlorodibenzofuran	0.001																																			



SCHEDULE 4  
(Paragraphs 1(1)(c) and 2(1)(c) and subparagraphs 8(j)(v) and 38(1)(a)(iii))

PART I

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM NON-SPECIFIC SOURCES

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
1.	F001	The following spent halogenated solvents used in degreasing: tetrachloroethylene, trichloroethylene, methylene chloride, 1,1,1-trichloroethane, carbon tetrachloride and chlorinated fluorocarbons; all spent solvent mixtures and blends used in degreasing containing, before use, a total of 10% or more (by volume) of one or more of the above halogenated solvents or those solvents listed as F002, F004 or F005; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
2.	F002	The following spent halogenated solvents: tetrachloroethylene, methylene chloride, trichloroethylene, 1,1,1-trichloroethane, chlorobenzene, 1,1,2-trichloro-1,2,2-trifluoroethane, ortho-dichlorobenzene, trichlorofluoromethane and 1,1,2-trichloroethane; all spent solvent mixtures and blends containing, before use, a total of 10% or more (by volume) of one or more of the above halogenated solvents or those listed as F001, F004 or F005; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
3.	F003	The following spent non-halogenated solvents: xylene, acetone, ethyl acetate, ethyl benzene, ethyl ether, methyl isobutyl ketone, n-butyl alcohol, cyclohexanone and methanol; all spent solvent mixtures and blends containing, before use, only the above spent non-halogenated solvents; and all spent solvent mixtures and blends containing, before use, one or more of the above spent non-halogenated solvents, and a total of 10% or more (by volume) of one or more of those solvents listed as F001, F002, F004 or F005; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
4.	F004	The following spent non-halogenated solvents: cresols, cresylic acid and nitrobenzene; all spent solvent mixtures and blends containing, before use, a total of 10% or more (by volume) of one or more of the above spent non-halogenated solvents or those solvents listed as F001, F002 or F005; and still bottoms from the recovery of these spent solvents and spent solvent mixtures.
5.	F005	The following spent non-halogenated solvents: toluene, methyl ethyl ketone, carbon disulphide, isobutanol, pyridine, benzene, 2-ethoxyethanol and 2-nitropropane; all spent solvent mixtures and blends containing, before use, a total of 10% or more (by volume) of one or more of the above spent non-halogenated solvents or those solvents listed as F001, F002 or F004; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
6.	F006	Wastewater treatment sludges from electroplating operations except for the following processes: (1) sulphuric acid anodizing of aluminum; (2) tin plating on carbon steel; (3) zinc plating (on a segregated basis) on carbon steel; (4) aluminum or aluminum-zinc plating on carbon steel; (5) cleaning or stripping associated with tin, zinc or aluminum plating on carbon steel; and (6) chemical etching and milling of aluminum.
7.	F007	Spent cyanide plating bath solutions from electroplating operations.
8.	F008	Plating bath sludge from the bottom of plating baths from electroplating operations where cyanides are used in the process.
9.	F009	Spent stripping and cleaning bath solutions from electroplating operations where cyanides are used in the process.
10.	F010	Quenching bath sludge from oil baths from metal heat treating operations where cyanides are used in the process.
11.	F011	Spent cyanide solutions from salt bath pot cleaning from metal heat treating operations.
12.	F012	Quenching wastewater treatment sludge from metal heat treating operations where cyanides are used in the process.
13.	F019	Wastewater treatment sludge from the chemical conversion coating of aluminum except from zirconium phosphating in aluminum can washing if such phosphating is an exclusive conversion coating process.
14.	F020	Wastes from the production or manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tri- or tetrachlorophenol or of intermediates used to produce their pesticide derivatives, excluding wastewater and spent carbon from hydrogen chloride purification and wastes from the production of hexachlorophene from highly purified 2,4,5-trichlorophenol.
15.	F021	Wastes from the production or manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of pentachlorophenol or of intermediates used to produce its derivatives, excluding wastewater and spent carbon from hydrogen chloride purification.
16.	F022	Wastes from the manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tetra-, penta- or hexachlorobenzenes under alkaline conditions, excluding wastewater and spent carbon from hydrogen chloride purification.
17.	F023	Wastes from the production of materials on equipment previously used for the production or manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tri- and tetrachlorophenols, excluding wastewater and spent carbon from hydrogen chloride purification and wastes from equipment used only for the production or use of hexachlorophene from highly purified 2,4,5-trichlorophenol.
18.	F024	Process wastes, including, but not limited to, distillation residues, heavy ends, tars and reactor clean-out wastes from the production of certain chlorinated aliphatic hydrocarbons by free radical catalyzed processes, those chlorinated aliphatic hydrocarbons being those having carbon chain lengths ranging from 1 to and including 5, with varying amounts and positions of chlorine substitution, and excluding wastewaters, wastewater treatment sludge, spent catalysts and wastes set out in Schedule 7.
19.	F025	Condensed light ends, spent filters and filter aids, and spent desiccant wastes from the production of certain chlorinated aliphatic hydrocarbons, by free radical catalyzed processes, those chlorinated aliphatic hydrocarbons being those having carbon chain lengths ranging from 1 to and including 5, with varying amounts and positions of chlorine substitution.
20.	F026	Wastes from the production of materials on equipment previously used for the manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tetra-, penta- or hexachlorobenzene under alkaline conditions, excluding wastewater and spent carbon from hydrogen chloride purification.
21.	F027	Discarded unused formulations containing tri-, tetra- or pentachlorophenol or discarded unused formulations containing compounds derived from those chlorophenols, excluding formulations containing hexachlorophene synthesized from prepurified 2,4,5-trichlorophenol as the sole component.
22.	F028	Residues resulting from incineration or treatment of soil contaminated with wastes listed as F020, F021, F022, F023, F026 or F027.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4 — Continued

PART 1 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM NON-SPECIFIC SOURCES — Continued

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material
23.	F032	Wastewaters, spent formulations from wood preserving processes generated at plants that currently use or have previously used chlorophenolic formulations, process residuals and preservative drippage, except wastewaters that have not come into contact with process contaminants, spent formulations that potentially cross-contaminated wastes from wood preserving processes at plants that do not resume or initiate use of chlorophenolic preservatives, and bottom sediment sludge listed as K001.
24.	F034	Wastewaters, process residuals, preservative drippage and spent formulations from wood preserving processes generated at plants that use creosote formulations, excluding bottom sediment sludge listed as K001 and wastewaters that have not come into contact with process contaminants.
25.	F035	Wastewaters, process residuals, preservative drippage and spent formulations from wood preserving processes generated at plants that use inorganic preservatives containing arsenic or chromium, excluding bottom sediment sludge listed as K001 and wastewaters that have not come into contact with process contaminants.
26.	F037	Petroleum refinery primary oil, water and solids separation sludge; sludge generated from the gravitational separation of oil, water and solids during the storage or treatment of process wastewaters and oil cooling wastewaters from petroleum refineries, including, but not limited to, those generated in oil, water and solids separators, tanks and impoundments, ditches and other conveyances, sumps and stormwater units receiving dry weather flow; sludge generated in stormwater units that do not receive dry weather flow; sludge generated from non-contact once-through cooling waters segregated for treatment from other processes or oily cooling waters; sludge generated in biological treatment units that employ one of the following treatment methods: activated sludge, trickling filter, rotating biological contactor for the continuous accelerated biological oxidation of wastewaters, or high-rate aeration (including sludge generated in one or more additional units after wastewaters have been treated in biological treatment units). Wastes listed as K051 are excluded.
27.	F038	Petroleum refinery secondary (emulsified) oil, water and solids separation sludge; sludge or float generated from the physical or chemical separation of oil, water and solids in process wastewaters and oily cooling wastewaters from petroleum refineries, including, but not limited to, sludge and floats generated in induced air flotation (IAF) units, tanks and impoundments, and in dissolved air flotation (DAF) units; sludge generated in stormwater units that do not receive dry weather flow; sludge generated from non-contact once-through cooling waters segregated for treatment from other processes or oily cooling water; sludge and float generated in biological treatment units that employ one of the following treatment methods: activated sludge, trickling filter, rotating biological contactor for the continuous accelerated biological oxidation of wastewaters, or high-rate aeration (including sludge and float generated in one or more additional units after wastewaters have been treated in a biological treatment unit). Wastes listed as F037, K048 and K051 are excluded.
28.	F039	Leachate (liquids that percolated through land disposed wastes) resulting from the disposal of more than one waste classified as a hazardous waste by being included in this Schedule.

PART 2

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material
<b>Wood Preservation</b>		
1.	K001	Bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote or pentachlorophenol or both.
<b>Inorganic Pigments</b>		
2.	K002	Wastewater treatment sludge from the production of chrome yellow and orange pigments.
3.	K003	Wastewater treatment sludge from the production of molybdate orange pigments.
4.	K004	Wastewater treatment sludge from the production of zinc yellow pigments.
5.	K005	Wastewater treatment sludge from the production of chrome green pigments.
6.	K006	Wastewater treatment sludge from the production of chromeoxide green pigments (anhydrous and hydrated).
7.	K007	Wastewater treatment sludge from the production of iron blue pigments.
8.	K008	Oven residue from the production of chromeoxide green pigments.
<b>Organic Chemicals</b>		
9.	K009	Distillation bottoms from the production of acetaldehyde from ethylene.
10.	K010	Distillation side cuts from the production of acetaldehyde from ethylene.
11.	K011	Bottom stream from the wastewater stripper in the production of acrylonitrile.
12.	K013	Bottom stream from the acetonitrile column in the production of acrylonitrile.
13.	K014	Bottoms from the acetonitrile purification column in the production of acrylonitrile.
14.	K015	Still bottoms from the distillation of benzylchloride.
15.	K016	Heavy ends or distillation residues from the production of carbon tetrachloride.
16.	K017	Heavy ends (still bottoms) from the purification column in the production of epichlorohydrin.
17.	K018	Heavy ends from the fractionation column in ethyl chloride production.

SCHEDULE 4 — *Continued*

PART 2 — *Continued*

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES — *Continued*

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
18.	K019	Heavy ends from the distillation of ethylene dichloride in ethylene dichloride production.
19.	K020	Heavy ends from the distillation of vinyl chloride in vinyl chloride monomer production.
20.	K021	Aqueous spent antimony catalyst waste from fluoromethanes production.
21.	K022	Distillation bottom tars from the production of phenol and acetone from cumene.
22.	K023	Distillation light ends from the production of phthalic anhydride from naphthalene.
23.	K024	Distillation bottoms from the production of phthalic anhydride from naphthalene.
24.	K025	Distillation bottoms from the production of nitrobenzene by the nitration of benzene.
25.	K026	Stripping still tails from the production of methyl ethyl pyridines.
26.	K027	Centrifuge and distillation residues from toluene diisocyanate production.
27.	K028	Spent catalyst from the hydrochlorinator reactor in the production of 1,1,1-trichloroethane.
28.	K029	Waste from the product stream stripper in the production of 1,1,1-trichloroethane.
29.	K030	Column bottoms or heavy ends from the combined production of trichloroethylene and perchloroethylene.
30.	K083	Distillation bottoms from aniline production.
31.	K085	Distillation or fractionating column bottoms from the production of chlorobenzenes.
32.	K093	Distillation light ends from the production of phthalic anhydride from o-xylene.
33.	K094	Distillation bottoms from the production of phthalic anhydride from o-xylene.
34.	K095	Distillation bottoms from the production of 1,1,1-trichloroethane.
35.	K096	Heavy ends from the heavy ends columns from the production of 1,1,1-trichloroethane.
36.	K103	Process residues from aniline extraction from the production of aniline.
37.	K104	Combined wastewater streams from nitrobenzene and aniline production.
38.	K105	Separated aqueous stream from the reactor product washing step in the production of chlorobenzene.
39.	K107	Column bottoms from product separation from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
40.	K108	Condensed column overheads from product separation and condensed reactor vent gases from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
41.	K109	Spent filter cartridges from product purification from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
42.	K110	Condensed column overheads from intermediate separation from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
43.	K111	Product washwaters from the production of dinitrotoluene via nitration of toluene.
44.	K112	Reaction by-product water from the drying column in the production of toluenediamine via hydrogenation of dinitrotoluene.
45.	K113	Condensed liquid light ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.
46.	K114	Vicinals from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.
47.	K115	Heavy ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.
48.	K116	Organic condensate from the solvent recovery column in the production of toluene diisocyanate via phosgenation of toluenediamine.
49.	K117	Wastewater from the reactor vent gas scrubber in the production of ethylene dibromide via bromination of ethene.
50.	K118	Spent adsorbent solids from the purification of ethylene dibromide in the production of ethylene dibromide via bromination of ethene.
51.	K136	Still bottoms from the purification of ethylene dibromide in the production of ethylene dibromide via bromination of ethene.
52.	K140	Floor sweepings, off-specification product and spent filter media from the production of 2,4,6-tribromophenol.
53.	K149	Distillation bottoms from the production of alpha- (or methyl-) chlorinated toluenes, ring- chlorinated toluenes, benzoyl chlorides and compounds with mixtures of those functional groups, excluding still bottoms from the distillation of benzyl chloride.
54.	K150	Organic residuals, excluding spent carbon adsorbent, from the spent chlorine gas and hydrochloric acid recovery processes associated with the production of alpha- (or methyl-) chlorinated toluenes, ring-chlorinated toluenes, benzoyl chlorides and compounds with mixtures of those functional groups.
55.	K151	Wastewater treatment sludge generated during the treatment of wastewaters from the production of alpha- (or methyl-) chlorinated toluenes, ring-chlorinated toluenes, benzoyl chlorides and compounds with mixtures of those functional groups, excluding neutralization and biological sludge.
56.	K156	Organic waste (including heavy ends, still bottoms, light ends, spent solvents, filtrates and decantates) from the production of carbamates and carbamoyl oximes, excluding waste generated from the manufacture of 3-iodo-2-propynyl n-butylcarbamate.
57.	K157	Wastewaters (including scrubber waters, condenser waters, washwaters and separation waters) from the production of carbamates and carbamoyl oximes, excluding wastes generated from the manufacture of 3-iodo-2-propynyl n-butylcarbamate.
58.	K158	Bag house dusts and filter or separation solids from the production of carbamates and carbamoyl oximes, excluding wastes generated from the manufacture of 3-iodo-2-propynyl n-butylcarbamate.
59.	K159	Organics from the treatment of thiocarbamate wastes.
60.	K161	Purification solids (including filtration, evaporation and centrifugation solids), bag house dust and floor sweepings from the production of dithiocarbamate acids and their salts, excluding substances listed as K125 or K126.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4 — Continued

PART 2 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES — Continued

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material
<b>Inorganic chemicals</b>		
61.	K071	Brine purification sludge from the mercury cell process in chlorine production if separately prepurified brine is not used.
62.	K073	Chlorinated hydrocarbon wastes from the purification step of the diaphragm cell process using graphite anodes in chlorine production.
63.	K106	Wastewater treatment sludge from the mercury cell process in chlorine production.
<b>Pesticides</b>		
64.	K031	By-product salts generated in the production of monosodium acid methanearsonate (MSMA) and cacodylic acid.
65.	K032	Wastewater treatment sludge from the production of chlordane.
66.	K033	Wastewater and scrub water from the chlorination of cyclopentadiene in the production of chlordane.
67.	K034	Filter solids from the filtration of hexachlorocyclopentadiene in the production of chlordane.
68.	K035	Wastewater treatment sludge from the production of creosote.
69.	K036	Still bottoms from toluene reclamation distillation in the production of disulfoton.
70.	K037	Wastewater treatment sludge from the production of disulfoton.
71.	K038	Wastewater from the washing and stripping of phorate production.
72.	K039	Filter cake from the filtration of diethylphosphorodithioic acid in the production of phorate.
73.	K040	Wastewater treatment sludge from the production of phorate.
74.	K041	Wastewater treatment sludge from the production of toxaphene.
75.	K042	Heavy ends or distillation residues from the distillation of tetrachlorobenzene in the production of 2,4,5-T.
76.	K043	2,6-Dichlorophenol waste from the production of 2,4-D.
77.	K097	Vacuum stripper discharge from the chlordane chlorinator in the production of chlordane.
78.	K098	Untreated process wastewater from the production of toxaphene.
79.	K099	Untreated wastewater from the production of 2,4-D.
80.	K123	Process wastewater, including supernates, filtrates and washwaters, from the production of ethylenebisdithiocarbamic acid and its salts.
81.	K124	Reactor vent scrubber water from the production of ethylenebisdithiocarbamic acid and its salts.
82.	K125	Filtration, evaporation and centrifugation solids from the production of ethylenebisdithiocarbamic acid and its salts.
83.	K126	Baghouse dust and floor sweepings in milling and packaging operations from the production or formulation of ethylenebisdithiocarbamic acid and its salts.
84.	K131	Wastewater from the reactor and spent sulfuric acid from the acid dryer from the production of methyl bromide.
85.	K132	Spent absorbent and wastewater separator solids from the production of methyl bromide.
<b>Explosives</b>		
86.	K044	Wastewater treatment sludge from the manufacturing and processing of explosives.
87.	K045	Spent carbon from the treatment of wastewater containing explosives.
88.	K046	Wastewater treatment sludge from the manufacturing, formulation and loading of lead-based initiating compounds.
89.	K047	Pink and red water from the production of TNT.
<b>Petroleum refining</b>		
90.	K048	Dissolved air flotation (DAF) float from the petroleum refining industry.
91.	K049	Slop oil emulsion solids from the petroleum refining industry.
92.	K050	Heat exchanger bundle cleaning sludge from the petroleum refining industry.
93.	K051	American Petroleum Institute (API) separator sludge from the petroleum refining industry.
94.	K052	Tanks bottoms (lead) from the petroleum refining industry.
95.	K169	Crude oil storage tank sediment from refining petroleum.
96.	K170	Clarified slurry oil tank sediment and in-line filter or separation solids from refining petroleum.
97.	K171	Spent hydrotreating catalyst from refining petroleum, including guard beds used to desulfurize feeds to other catalytic reactors, excluding inert support media.
98.	K172	Spent hydrorefining catalyst from refining petroleum, including guard beds used to desulfurize feeds to other catalytic reactors, excluding inert support media.
<b>Iron and steel</b>		
99.	K061	Emission control dust and sludge from the primary production of steel in electric furnaces.
100.	K062	Spent pickle liquor from steel finishing operations of facilities within the iron and steel industry at steel works, blast furnaces (including coke ovens), rolling mills, iron and steel foundries, gray and ductile iron foundries, malleable iron foundries, steel investment foundries or other miscellaneous steel foundries, or at facilities in the electrometallurgical products (except steel) industry, steel wiredrawing and steel nails and spikes industry, coldrolled steel sheet, strip and bars industry or steel pipes and tubes industry.
<b>Primary copper</b>		
101.	K064	Acid plant blowdown slurry and sludge resulting from the thickening of blowdown slurry from primary copper production.

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

SCHEDULE 4 — *Continued*

PART 2 — *Continued*

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES — *Continued*

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material
<b>Primary lead</b>		
102.	K065	Surface impoundment solids contained in and dredged from surface impoundments at primary lead smelting facilities.
<b>Primary zinc</b>		
103.	K066	Sludge from treatment of process wastewater and acid plant blowdown from primary zinc production.
<b>Primary aluminum</b>		
104.	K088	Spent potliners from primary aluminum reduction.
<b>Ferroalloys</b>		
105.	K090	Emission control dust or sludge from ferrochromium-silicon production.
106.	K091	Emission control dust or sludge from ferrochromium production.
<b>Secondary lead</b>		
107.	K069	Emission control dust and sludge from secondary lead smelting.
108.	K100	Waste leaching solution from acid leaching of emission control dust and sludge from secondary lead smelting.
<b>Veterinary pharmaceuticals</b>		
109.	K084	Wastewater treatment sludge from the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.
110.	K101	Distillation tar residues from the distillation of aniline-based compounds in the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.
111.	K102	Residue from the use of activated carbon for decolourization in the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.
<b>Ink formulation</b>		
112.	K086	Solvent washes and sludge, caustic washes and sludge or water washes and sludge from cleaning tubs and equipment used in the formulation of ink from pigments, driers, soaps and stabilizers containing chromium and lead.
<b>Coking</b>		
113.	K060	Ammonia still lime sludge from coking operations.
114.	K087	Decanter tank tar sludge from coking operations.
115.	K141	Process residues from the recovery of coal tar, including, but not limited to, collecting sump residues from the production of coke from coal and the recovery of coke by-products produced from coal, excluding those wastes listed as K087.
116.	K142	Tar storage tank residues from the production of coke from coal or from the recovery of coke by-products produced from coal.
117.	K143	Process residues from the recovery of light oil, including, but not limited to, those generated in stills, decanters and wash oil recovery units from the recovery of coke by-products produced from coal.
118.	K144	Wastewater sump residues from light oil refining, including, but not limited to, intercepting or contamination sump sludge from the recovery of coke by-products produced from coal.
119.	K145	Residues from naphthalene collection and recovery operations from the recovery of coke by-products produced from coal.
120.	K147	Tar storage tank residues from coal tar refining.
121.	K148	Residues from coal tar distillation, including, but not limited to, still bottoms.

SCHEDULE 5  
(Paragraphs 1(1)(d) and 2(1)(d))

ENVIRONMENTALLY HAZARDOUS SUBSTANCES

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
1.	Acetaldehyde	100.0
2.	Acetaldehyde ammonia	100.0
3.	Acetic acid	100.0
4.	Acetic anhydride	100.0
5.	Acetone cyanohydrin	100.0
6.	Acetyl bromide	100.0
7.	Acetyl chloride	100.0
8.	Acrolein, stabilized	100.0
9.	Acrylonitrile, stabilized	100.0
10.	Adipic acid	100.0

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 5 — Continued

ENVIRONMENTALLY HAZARDOUS SUBSTANCES — Continued

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
11.	Allethrin	100.0
12.	Allyl alcohol	100.0
13.	Allyl chloride	100.0
14.	Aluminum sulphate	100.0
15.	N-Aminopropylmorpholine	100.0
16.	Ammonia	100.0
17.	Ammonia solutions	100.0
18.	Ammonium acetate	100.0
19.	Ammonium benzoate	100.0
20.	Ammonium bicarbonate	100.0
21.	Ammonium bisulphite	100.0
22.	Ammonium carbamate	100.0
23.	Ammonium carbonate	100.0
24.	Ammonium chloride	100.0
25.	Ammonium citrate, dibasic	100.0
26.	Ammonium oxalate	100.0
27.	Ammonium sulphamate	100.0
28.	Ammonium sulphide	100.0
29.	Ammonium tartrate	100.0
30.	Ammonium thiocyanate	100.0
31.	Ammonium thiosulphate	100.0
32.	Amyl acetates	100.0
33.	Aniline	100.0
34.	Antimony pentachloride	100.0
35.	Antimony potassium tartrate	100.0
36.	Antimony tribromide	100.0
37.	Antimony trichloride	100.0
38.	Antimony trioxide	100.0
39.	Benzidine	100.0
40.	Benzoic acid	100.0
41.	Benzonitrile	100.0
42.	Benzoyl chloride	100.0
43.	Benzyl chloride	100.0
44.	Beryllium chloride	100.0
45.	Butyl acetates	100.0
46.	n-Butylamine	100.0
47.	n-Butyl phthalate	100.0
48.	Calcium hypochlorite	100.0
49.	Captan	100.0
50.	Carbon disulphide	100.0
51.	Chlordecone	100.0
52.	2-Chlorophenol	100.0
53.	Chlorosulphonic acid (with or without sulphur trioxide)	100.0
54.	Cobaltous bromide	100.0
55.	Cobaltous formate	100.0
56.	Cobaltous sulphamate	100.0
57.	Copper-based pesticides (all forms)	100.0
58.	Copper chloride	100.0
59.	Coumaphos	100.0
60.	Creosote	100.0
61.	Crotonaldehyde	100.0
62.	Cupric acetate	100.0
63.	Cupric oxalate	100.0
64.	Cupric sulphate	100.0
65.	Cupric sulphate, ammoniated	100.0
66.	Cupric tartrate	100.0
67.	Cyclohexane	100.0

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 5 — Continued

ENVIRONMENTALLY HAZARDOUS SUBSTANCES — Continued

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
68.	Dichlobenil	100.0
69.	Dichlone	100.0
70.	1,1-Dichloro-2,2-di-(p-chlorophenyl) ethane	100.0
71.	Dichlorodiphenyltrichloroethane	100.0
72.	2,2-Dichloroethyl ether	100.0
73.	Dichloropropene	100.0
74.	2,2-Dichloropropionic acid	100.0
75.	Dichlorvos	100.0
76.	Dicofol	100.0
77.	Diethylamine	100.0
78.	Dimethylamine	100.0
79.	Dinitrobenzenes	100.0
80.	Dinitrophenol	100.0
81.	Dinitrotoluenes (excluding 2,4-dinitrotoluene)	100.0
82.	Disulfoton	100.0
83.	Endosulfan	100.0
84.	Epichlorohydrin	100.0
85.	Ethion	100.0
86.	Ethylbenzene	100.0
87.	Ethylenediamine	100.0
88.	Ethylenediaminetetraacetic acid	100.0
89.	Ethylene dibromide	100.0
90.	Ethylene dichloride	100.0
91.	Ferric ammonium citrate	100.0
92.	Ferric ammonium oxalate	100.0
93.	Ferric chloride	100.0
94.	Ferric nitrate	100.0
95.	Ferric sulphate	100.0
96.	Ferrous ammonium sulphate	100.0
97.	Ferrous chloride	100.0
98.	Ferrous sulphate	100.0
99.	Formaldehyde	100.0
100.	Formic acid	100.0
101.	Fumaric acid	100.0
102.	Furfural	100.0
103.	Hexachlorocyclopentadiene	100.0
104.	Isobutyl acetate	100.0
105.	Isobutylamine	100.0
106.	Isobutyric acid	100.0
107.	Isoprene	100.0
108.	Kelthane	100.0
109.	Mercaptodimethur	100.0
110.	Methyl bromide and ethylene dibromide mixtures	100.0
111.	Methyl methacrylate	100.0
112.	Methylamine	100.0
113.	Mevinphos	100.0
114.	Mexacarbate	100.0
115.	Naled	100.0
116.	Naphthalene	100.0
117.	Naphthenic acid	100.0
118.	Nickel ammonium sulphate	100.0
119.	Nickel chloride	100.0
120.	Nickel hydroxide	100.0
121.	Nickel sulphate	100.0
122.	Nitrophenols (o-, m-, p-)	100.0
123.	Nitrotoluenes, (o-, m-, p-)	100.0
124.	Organotin compounds (all forms)	100.0

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 5 — Continued

ENVIRONMENTALLY HAZARDOUS SUBSTANCES — Continued

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
125.	Organotin Pesticides (all forms)	100.0
126.	Oxalates, water soluble	100.0
127.	Paraformaldehyde	100.0
128.	Phenacpton	100.0
129.	Phenol	100.0
130.	Phosphorus	100.0
131.	Phosphorus oxychloride	100.0
132.	Phosphorus pentasulphide	100.0
133.	Phosphorus trichloride	100.0
134.	Polychlorinated-biphenyls	50.0
135.	Potassium permanganate	100.0
136.	Propargite	100.0
137.	Propionic acid	100.0
138.	Propionic anhydride	100.0
139.	Propylene dichloride	100.0
140.	Propylene oxide	100.0
141.	Pyrethrins	100.0
142.	Quinoline	100.0
143.	Resorcinol	100.0
144.	Silver nitrate	100.0
145.	Sodium bisulphite	100.0
146.	Sodium dodecylbenzene sulphonate (branched chain)	100.0
147.	Sodium hydrogen sulphite	100.0
148.	Sodium hydrosulphide	100.0
149.	Sodium methylate	100.0
150.	Sodium phosphate, dibasic	100.0
151.	Sodium phosphate, tribasic	100.0
152.	Strychnine or Strychnine mixtures	100.0
153.	Strychnine salts or Strychnine salt mixtures	100.0
154.	Styrene	100.0
155.	Sulphur monochloride	100.0
156.	Tetrachloroethane	100.0
157.	Tetraethyl Pyrophosphate	100.0
158.	Thallium sulphate	100.0
159.	Thiram	100.0
160.	Titanium sulphate	100.0
161.	Toluene	100.0
162.	Triazine Pesticides	100.0
163.	Trichlorphon	100.0
164.	Triethylamine	100.0
165.	Trimethylamine	100.0
166.	Vanadium pentoxide, non-fused form	100.0
167.	Vanadyl sulphate	100.0
168.	Vinyl acetate	100.0
169.	Xylenes	100.0
170.	Xylenols	100.0
171.	Zinc acetate	100.0
172.	Zinc ammonium chloride	100.0
173.	Zinc carbonate	100.0
174.	Zinc chloride	100.0
175.	Zinc formate	100.0
176.	Zinc phenolsulphonate	100.0
177.	Zinc phosphide	100.0
178.	Zinc sulphate	100.0
179.	Zirconium sulphate	100.0



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 6  
(Paragraphs 1(1)(e) and 2(1)(e) and subparagraphs 2(2)(e)(ii) and 8(j)(v))

HAZARDOUS CONSTITUENTS CONTROLLED UNDER LEACHATE TEST AND REGULATED LIMITS

Column 1		Column 2	Column 3
Item	Hazardous Constituent Code No.	Hazardous Constituents (synonyms and descriptors)	Concentration (mg/L)
1.	L32	Aldicarb	0.900
2.	L3	Aldrin + Dieldrin	0.070
3.	L4	Arsenic	2.500
4.	L33	Atrazine + N-dealkylated metabolites	0.500
5.	L34	Azinphos-methyl	2.000
6.	L5	Barium	100.000
7.	L35	Bendiocarb	4.000
8.	L36	Benzene	0.500
9.	L37	Benzo(a)pyrene	0.001
10.	L6	Boron	500.000
11.	L38	Bromoxynil	0.500
12.	L7	Cadmium	0.500
13.	L8	Carbaryl/Sevin/1-Naphthyl-N methyl carbamate	9.000
14.	L39	Carbofuran	9.000
15.	L40	Carbon tetrachloride (Tetrachloromethane)	0.500
16.	L41	Chloramines	300.000
17.	L9	Chlordane	0.700
18.	L42	Chlorobenzene (Monochlorobenzene)	8.000
19.	L43	Chloroform	10.000
20.	L44	Chlorpyrifos	9.000
21.	L10	Chromium	5.000
22.	L45	Cresol (Mixture — total of all isomers, when isomers cannot be differentiated)	200.000
23.	L46	m-Cresol	200.000
24.	L47	o-Cresol	200.000
25.	L48	p-Cresol	200.000
26.	L49	Cyanazine	1.000
27.	L11	Cyanide	20.000
28.	L2	2,4-D / (2,4-Dichlorophenoxy)acetic acid	10.000
29.	L50	2,4-DCP / (2,4-Dichlorophenol)	90.000
30.	L12	DDT (total isomers)	3.000
31.	L13	Diazinon/Phosphordithioic acid, o,o-diethyl o-(2-isopropyl 6-methyl-4-pyrimidinyl) ester	2.000
32.	L51	Dicamba	12.000
33.	L52	1,2-Dichlorobenzene (o-Dichlorobenzene)	20.00
34.	L53	1,4-Dichlorobenzene (p-Dichlorobenzene)	0.50
35.	L54	1,2-Dichloroethane (Ethylene dichloride)	5.0
36.	L55	1,1-Dichloroethylene (Vinylidene chloride)	1.40
37.	L56	Dichloromethane (also see — methylene chloride)	5.00
38.	L57	Diclofop-methyl	0.90
39.	L58	Dimethoate	2.00
40.	L59	2,4-Dinitrotoluene	0.13
41.	L60	Dinoseb	1.00
42.	L70	Diquat	7.00
43.	L71	Diuron	15.00
44.	L14	Endrin	0.02
45.	L15	Fluoride	150.00
46.	L72	Glyphosate	28.00
47.	L16	Heptachlor + Heptachlor epoxide	0.30
48.	L73	Hexachlorobenzene	0.13
49.	L74	Hexachlorobutadiene	0.50
50.	L75	Hexachloroethane	3.00
51.	L17	Lead	5.00
52.	L18	Lindane	0.40
53.	L76	Malathion	19.00
54.	L19	Mercury	0.10
55.	L20	Methoxychlor/1,1,1-Trichloro-2,2-bis(p-methoxyphenyl) ethane	90.00

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 6 — Continued

HAZARDOUS CONSTITUENTS CONTROLLED UNDER LEACHATE TEST AND REGULATED LIMITS — Continued

Item	Column 1 Hazardous Constituent Code No.	Column 2 Hazardous Constituents (synonyms and descriptors)	Column 3 Concentration (mg/L)
56.	L77	Methyl ethyl ketone / Ethyl methyl ketone	200.00
57.	L21	Methyl Parathion	0.70
58.	L78	Methylene chloride / Dichloromethane	5.00
59.	L79	Metolachlor	5.00
60.	L80	Metribuzin	8.00
61.	L81	Nitrate	4500.00
62.	L22	Nitrate + Nitrite	1000.00
63.	L23	Nitritotriacetic acid (NTA)	40.00
64.	L24	Nitrite	320.00
65.	L82	Nitrobenzene	2.00
66.	L83	Paraquat	1.00
67.	L26	Parathion	5.00
68.	L84	Pentachlorophenol	6.00
69.	L85	Phorate	0.20
70.	L86	Picloram	19.00
71.	L100	Polychlorinated dibenzo dioxins and furans	0.0000015 TEQ
72.	L87	Pyridine	5.00
73.	L27	Selenium	1.00
74.	L88	Simazine	1.00
75.	L89	2,4,5-T (2,4,5-Trichlorophenoxyacetic acid)	28.00
76.	L1	2,4,5-TP/ Silvex/ 2-(2,4,5-Trichlorophenoxy)propionic acid	1.00
77.	L90	Temephos	28.00
78.	L91	Terbufos	0.10
79.	L92	Tetrachloroethylene	3.00
80.	L93	2,3,4,6-Tetrachlorophenol / (2,3,4,6-TeCP)	10.00
81.	L29	Toxaphene	0.50
82.	L94	Triallate	23.00
83.	L95	Trichloroethylene	5.00
84.	L96	2,4,5-Trichlorophenol / (2,4,5-TCP)	400.00
85.	L97	2,4,6-Trichlorophenol / (2,4,6-TCP)	0.50
86.	L98	Trifluralin	4.50
87.	L30	Trihalomethanes — Total (also see — Chloroform)	10.00
88.	L31	Uranium	10.00
89.	L99	Vinyl chloride	0.20

SCHEDULE 7

(Paragraphs 1(1)(f) and 2(1)(f), subparagraphs 8(j)(v) and 38(1)(a)(iii) and Schedule 4)

PART 1

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
1.	P026	1-(o-Chlorophenyl)thiourea
2.	P081	1,2,3-Propanetriol, trinitrate
3.	P042	1,2-Benzenediol, 4-[1-hydroxy-2-(methylamino)ethyl]-
4.	P067	1,2-Propylenimine
5.	P185	1,3-Dithiolane-2-carboxaldehyde, 2,4-dimethyl-, O-[(methylamino)-carbonyl]oxime
6.	P004	1,4,5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexa-chloro-1,4,4a,5,8,8a-hexahydro-, (1alpha,4alpha,4abeta,5alpha,8alpha,8abeta)-
7.	P060	1,4,5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexa-chloro-1,4,4a,5,8,8a-hexahydro-, (1alpha,4alpha,4abeta,5beta,8beta,8abeta)-
8.	P002	1-Acetyl-2-thiourea
9.	P048	2,4-Dinitrophenol

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
10.	P051	2,7:3,6-Dimethanonaphth[2,3-b]oxirene, 3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a,7,7a-octahydro-, (1aalpha,2beta,2abeta,3alpha,6alpha,6abeta,7beta,7aalpha)-, and metabolites
11.	P037	2,7:3,6-Dimethanonaphth[2,3-b]oxirene, 3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a,7,7a-octahydro-, (1aalpha,2beta,2aalpha,3beta,6beta,6aalpha,7beta,7aalpha)-[b]oxirene, 3,4,5,6,9,9-hexachloro-
12.	P045	2-Butanone, 3,3-dimethyl-1-methylthio-, O-(methylamino)carbonyloxime
13.	P034	2-Cyclohexyl-4,6-dinitrophenol
14.	P001	2H-1-Benzopyran-2-one, 4-hydroxy-3-(3-oxo-1-phenylbutyl)-, and salts, when present at concentrations greater than 0.3%
15.	P069	2-Methylactonitrile
16.	P017	2-Propanone, 1-bromo-
17.	P005	2-Propen-1-ol
18.	P003	2-Propenal
19.	P102	2-Propyn-1-ol
20.	P007	3(2H)-Isioxazolone, 5-(aminomethyl)-
21.	P027	3-Chloropropionitrile
22.	P202	3-Isopropylphenyl N-methylcarbamate
23.	P047	4,6-Dinitro-o-cresol, and salts
24.	P059	4,7-Methano-1H-indene, 1,4,5,6,7,8,8-heptachloro-3a,4,7,7a-tetrahydro-
25.	P008	4-Aminopyridine
26.	P008	4-Pyridinamine
27.	P007	5-(Aminomethyl)-3-isoxazolol
28.	P050	6,9-Methano-2,4,3-benzodioxathiepin, 6,7,8,9,10,10-hexachloro-1,5,5a,6,9,9a-hexahydro-, 3-oxide
29.	P127	7-Benzofuranol, 2,3-dihydro-2,2-dimethyl-, methylcarbamate
30.	P088	7-Oxabicyclo[2.2.1]heptane-2,3-dicarboxylic acid
31.	P023	Acetaldehyde, chloro-
32.	P057	Acetamide, 2-fluoro-
33.	P002	Acetamide, N-(aminothioxomethyl)-
34.	P058	Acetic acid, fluoro-, sodium salt
35.	P003	Acrolein
36.	P070	Aldicarb
37.	P203	Aldicarb sulfone
38.	P004	Aldrin
39.	P005	Allyl alcohol
40.	P046	alpha,a-Dimethylphenethylamine
41.	P072	alpha-Naphthylthiourea
42.	P006	Aluminum phosphide
43.	P009	Ammonium picrate
44.	P119	Ammonium vanadate
45.	P099	Argentate(1-), bis(cyano-C)-, potassium
46.	P010	Arsenic acid H <sub>3</sub> AsO <sub>4</sub>
47.	P012	Arsenic oxide As <sub>2</sub> O <sub>3</sub>
48.	P011	Arsenic oxide As <sub>2</sub> O <sub>3</sub>
49.	P011	Arsenic pentoxide
50.	P012	Arsenic trioxide
51.	P038	Arsine, diethyl-
52.	P036	Arsonous dichloride, phenyl-
53.	P054	Aziridine
54.	P067	Aziridine, 2-methyl-
55.	P013	Barium cyanide

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
56.	P024	Benzenamine, 4-chloro-
57.	P077	Benzenamine, 4-nitro-
58.	P028	Benzene, (chloromethyl)-
59.	P046	Benzeneethanamine, alpha,alpha-dimethyl-
60.	P014	Benzenethiol
61.	P188	Benzoic acid, 2-hydroxy-, compd with (3aS-cis)-1,2,3,3a,8,8a-hexahydro-1,3a,8-trimethylpyrrolo[2,3-b]indol-5-yl methylcarbamate ester (1:1)
62.	P028	Benzyl chloride
63.	P015	Beryllium powder
64.	P017	Bromoacetone
65.	P018	Brucine
66.	P021	Calcium cyanide
67.	P021	Calcium cyanide $\text{Ca}(\text{CN})_2$
68.	P189	Carbamic acid, [(dibutylamino)-thio]methyl-, 2,3-dihydro-2,2-dimethyl-7-benzofuranyl ester
69.	P191	Carbamic acid, dimethyl-, 1-[(dimethyl-amino)carbonyl]-5-methyl-1H-pyrazol-3-yl ester
70.	P190	Carbamic acid, methyl-, 3-methylphenyl ester
71.	P192	Carbamic acid, dimethyl-, 3-methyl-1-(1-methylethyl)-1H-pyrazol-5-yl ester
72.	P127	Carbofuran
73.	P022	Carbon disulfide
74.	P095	Carbonic dichloride
75.	P189	Carbosulfan
76.	P023	Chloroacetaldehyde
77.	P029	Copper cyanide
78.	P029	Copper cyanide $\text{Cu}(\text{CN})$
79.	P030	Cyanides (soluble cyanide salts), not otherwise specified
80.	P031	Cyanogen
81.	P033	Cyanogen chloride
82.	P033	Cyanogen chloride $(\text{CN})\text{Cl}$
83.	P016	Dichloromethyl ether
84.	P036	Dichlorophenylarsine
85.	P037	Dieldrin
86.	P038	Diethylarsine
87.	P041	Diethyl-p-nitrophenyl phosphate
88.	P043	Diisopropylfluorophosphate (DFP)
89.	P044	Dimethoate
90.	P191	Dimetilan
91.	P020	Dinoseb
92.	P085	Diphosphoramidate, octamethyl-
93.	P111	Diphosphoric acid, tetraethyl ester
94.	P039	Disulfoton
95.	P049	Dithiobiuret
96.	P050	Endosulfan
97.	P088	Endothall
98.	P051	Endrin
99.	P051	Endrin, and metabolites
100.	P042	Epinephrine
101.	P031	Ethanedinitrile

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* **SOR/DORS/2005-149**

**SCHEDULE 7 — Continued**

**PART 1 — Continued**

**ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued**

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
102.	P194	Ethanimidothioic acid, 2-(dimethylamino)-N-[[[(methylamino)carbonyl]oxy]-2-oxo-, methyl ester
103.	P066	Ethanimidothioic acid, N-[[[(methylamino)carbonyl]oxy]-, methyl ester
104.	P101	Ethyl cyanide
105.	P054	Ethyleneimine
106.	P097	Famphur
107.	P056	Fluorine
108.	P057	Fluoroacetamide
109.	P058	Fluoroacetic acid, sodium salt
110.	P198	Formetanate hydrochloride
111.	P197	Formparanate
112.	P065	Fulminic acid, mercury(2+) salt
113.	P059	Heptachlor
114.	P062	Hexaethyl tetraphosphate
115.	P068	Hydrazine, methyl-
116.	P116	Hydrazinecarbothioamide
117.	P063	Hydrocyanic acid
118.	P063	Hydrogen cyanide
119.	P096	Hydrogen phosphide
120.	P060	Isodrin
121.	P192	Isolan
122.	P196	Manganese, bis(dimethylcarbamodithioato-S,S')-
123.	P196	Manganese dimethyl dihiocarbamate
124.	P202	M-Cumenyl methylcarbamate
125.	P065	Mercury fulminate
126.	P092	Mercury, (acetato-O)phenyl-
127.	P082	Methanamine, N-methyl-N-nitroso-
128.	P064	Methane, isocyanato-
129.	P016	Methane, oxybis[chloro-
130.	P112	Methane, tetranitro-
131.	P118	Methanethiol, trichloro-
132.	P197	Methanimidamide, N,N-dimethyl-N'-[2-methyl-4-[[[(methylamino)carbonyl]oxy]phenyl]-
133.	P198	Methanimidamide, N,N-dimethyl-N'-[3-[[[(methylamino)carbonyl]oxy]phenyl]-, monohydrochloride
134.	P199	Methiocarb
135.	P066	Methomyl
136.	P068	Methyl hydrazine
137.	P064	Methyl isocyanate
138.	P071	Methyl parathion
139.	P190	Metolcarb
140.	P128	Mexacarbate
141.	P073	Nickel carbonyl
142.	P073	Nickel carbonyl Ni(CO) <sub>4</sub> , (T-4)-
143.	P074	Nickel cyanide
144.	P074	Nickel cyanide Ni(CN) <sub>2</sub>
145.	P075	Nicotine, and salts
146.	P076	Nitric oxide
147.	P078	Nitrogen dioxide
148.	P076	Nitrogen oxide NO

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
149.	P078	Nitrogen oxide NO <sub>2</sub>
150.	P081	Nitroglycerine
151.	P082	N-Nitrosodimethylamine
152.	P084	N-Nitrosomethylvinylamine
153.	P040	O,O-Diethyl O-pyrazinyl phosphorothioate
154.	P085	Octamethylpyrophosphoramidate
155.	P087	Osmium oxide OsO <sub>4</sub> (T-4)
156.	P087	Osmium tetroxide
157.	P194	Oxamyl
158.	P089	Parathion
159.	P024	p-Chloroaniline
160.	P020	Phenol, 2-(1-methylpropyl)-4,6-dinitro-
161.	P009	Phenol, 2,4,6-trinitro-, ammonium salt
162.	P048	Phenol, 2,4-dinitro-
163.	P034	Phenol, 2-cyclohexyl-4,6-dinitro-
164.	P047	Phenol, 2-methyl-4,6-dinitro-, and salts
165.	P202	Phenol, 3-(1-methylethyl)-, methylcarbamate
166.	P201	Phenol, 3-methyl-5-(1-methylethyl)-, methylcarbamate
167.	P199	Phenol, (3,5-dimethyl-4-(methylthio)-, methylcarbamate
168.	P128	Phenol, 4-(dimethylamino)-3,5-dimethyl-, methylcarbamate (ester)
169.	P092	Phenylmercury acetate
170.	P093	Phenylthiourea
171.	P094	Phorate
172.	P095	Phosgene
173.	P096	Phosphine
174.	P041	Phosphoric acid, diethyl 4-nitrophenyl ester
175.	P094	Phosphorodithioic acid, O,O-diethyl S-[(ethylthio)methyl] ester
176.	P039	Phosphorodithioic acid, O,O-diethyl S-[2-(ethylthio)ethyl] ester
177.	P044	Phosphorodithioic acid, O,O-dimethyl S-[2-(methylamino)-2-oxoethyl] ester
178.	P043	Phosphorofluoridic acid, bis(1-methylethyl) ester
179.	P071	Phosphorothioic acid, O,O-dimethyl O-(4-nitrophenyl) ester
180.	P089	Phosphorothioic acid, O,O-diethyl O-(4-nitrophenyl) ester
181.	P040	Phosphorothioic acid, O,O-diethyl O-pyrazinyl ester
182.	P097	Phosphorothioic acid, O-[4-[(dimethylamino)sulfonyl]phenyl] O,O-r dimethyl ester
183.	P188	Physostigmine salicylate
184.	P204	Physostigmine
185.	P110	Plumbane, tetraethyl-
186.	P077	p-Nitroaniline
187.	P098	Potassium cyanide
188.	P098	Potassium cyanide K(CN)
189.	P099	Potassium silver cyanide
190.	P201	Promecarb
191.	P203	Propanal, 2-methyl-2-(methyl-sulfonyl)-, O-[(methylamino)carbonyl]oxime
192.	P070	Propanal, 2-methyl-2-(methylthio)-, O-[(methylamino)carbonyl]oxime
193.	P101	Propanenitrile
194.	P069	Propanenitrile, 2-hydroxy-2-methyl-
195.	P027	Propanenitrile, 3-chloro-
196.	P102	Propargyl alcohol
197.	P075	Pyridine, 3-(1-methyl-2-pyrrolidinyl)-, (S)-, and salts
198.	P204	Pyrrolo[2,3-b]indol-5-ol, 1,2,3,3a,8,8a-hexahydro-1,3a,8-trimethyl-, methylcarbamate (ester), (3aS-cis)-
199.	P114	Selenious acid, dihallium(1+) salt
200.	P103	Selenourea

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

SCHEDULE 7 — *Continued*

PART 1 — *Continued*

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — *Continued*

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
201.	P104	Silver cyanide
202.	P104	Silver cyanide Ag(CN)
203.	P105	Sodium azide
204.	P106	Sodium cyanide
205.	P106	Sodium cyanide Na(CN)
206.	P108	Strychnidin-10-one, and salts
207.	P018	Strychnidin-10-one, 2,3-dimethoxy-
208.	P108	Strychnine, and salts
209.	P115	Sulfuric acid, dithallium(I+) salt
210.	P110	Tetraethyl lead
211.	P111	Tetraethyl pyrophosphate
212.	P109	Tetraethyldithiopyrophosphate
213.	P112	Tetranitromethane
214.	P062	Tetraphosphoric acid, hexaethyl ester
215.	P113	Thallic oxide
216.	P113	Thallium oxide $Tl_2O_3$
217.	P114	Thallium(I) selenite
218.	P115	Thallium(I) sulfate
219.	P109	Thiodiphosphoric acid, tetraethyl ester
220.	P045	Thiofanox
221.	P049	Thioimidodicarbonic diamide $[(H_2N)C(S)]_2NH$
222.	P014	Thiophenol
223.	P116	Thiosemicarbazide
224.	P026	Thiourea, (2-chlorophenyl)-
225.	P072	Thiourea, 1-naphthalenyl-
226.	P093	Thiourea, phenyl-
227.	P185	Tirpate
228.	P123	Toxaphene
229.	P118	Trichloromethanethiol
230.	P119	Vanadic acid, ammonium salt
231.	P120	Vanadium oxide $V_2O_5$
232.	P120	Vanadium pentoxide
233.	P084	Vinylamine, N-methyl-N-nitroso-
234.	P001	Warfarin, and salts, when present at concentrations greater than 0.3%
235.	P121	Zinc cyanide
236.	P121	Zinc cyanide $Zn(CN)_2$
237.	P122	Zinc phosphide $Zn_3P_2$ , when present at concentrations greater than 10%
238.	P205	Zinc, bis(dimethylcarbamodithioato-S,S')-
239.	P205	Ziram

PART 2

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
1.	U021	[1,1'-Biphenyl]-4,4'-diamine
2.	U073	[1,1'-Biphenyl]-4,4'-diamine, 3,3'-dichloro-
3.	U091	[1,1'-Biphenyl]-4,4'-diamine, 3,3'-dimethoxy-
4.	U095	[1,1'-Biphenyl]-4,4'-diamine, 3,3'-dimethyl-
5.	U208	1,1,1,2-Tetrachloroethane
6.	U209	1,1,2,2-Tetrachloroethane

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
7.	U227	1,1,2-Trichloroethane
8.	U078	1,1-Dichloroethylene
9.	U098	1,1-Dimethylhydrazine
10.	U207	1,2,4,5-Tetrachlorobenzene
11.	U085	1,2:3,4-Diepoxybutane
12.	U069	1,2-Benzenedicarboxylic acid, dibutyl ester
13.	U088	1,2-Benzenedicarboxylic acid, diethyl ester
14.	U102	1,2-Benzenedicarboxylic acid, dimethyl ester
15.	U107	1,2-Benzenedicarboxylic acid, dioctyl ester
16.	U028	1,2-Benzenedicarboxylic acid, bis(2-ethylhexyl) ester
17.	U202	1,2-Benzisothiazol-3(2H)-one, 1,1-dioxide, and salts
18.	U066	1,2-Dibromo-3-chloropropane
19.	U079	1,2-Dichloroethylene
20.	U099	1,2-Dimethylhydrazine
21.	U109	1,2-Diphenylhydrazine
22.	U155	1,2-Ethanediamine, N,N-dimethyl-N'-2-pyridinyl-N'-(2-thienylmethyl)-
23.	U193	1,2-Oxathiolane, 2,2-dioxide
24.	U142	1,3,4-Metheno-2H-cyclobuta[cd]pentalen-2-one, 1,1a,3,3a,4,5,5,5a,5b,6-decachlorooctahydro-
25.	U234	1,3,5-Trinitrobenzene
26.	U182	1,3,5-Trioxane, 2,4,6-trimethyl-
27.	U201	1,3-Benzenediol
28.	U364	1,3-Benzodioxol-4-ol, 2,2-dimethyl-,
29.	U278	1,3-Benzodioxol-4-ol, 2,2-dimethyl-, methyl carbamate
30.	U141	1,3-Benzodioxole, 5-(1-propenyl)-
31.	U203	1,3-Benzodioxole, 5-(2-propenyl)-
32.	U090	1,3-Benzodioxole, 5-propyl-
33.	U128	1,3-Butadiene, 1,1,2,3,4,4-hexachloro-
34.	U130	1,3-Cyclopentadiene, 1,2,3,4,5,5-hexachloro-
35.	U084	1,3-Dichloropropene
36.	U190	1,3-Isobenzofurandione
37.	U186	1,3-Pentadiene
38.	U193	1,3-Propane sultone
39.	U074	1,4-Dichloro-2-butene
40.	U108	1,4-Diethyleneoxide
41.	U108	1,4-Dioxane
42.	U166	1,4-Naphthalenedione
43.	U166	1,4-Naphthoquinone
44.	U172	1-Butanamine, N-butyl-N-nitroso-
45.	U031	1-Butanol
46.	U011	1H-1,2,4-Triazol-3-amine
47.	U186	1-Methylbutadiene
48.	U167	1-Naphthalenamine
49.	U279	1-Naphthalenol, methylcarbamate
50.	U194	1-Propanamine
51.	U111	1-Propanamine, N-nitroso-N-propyl-
52.	U110	1-Propanamine, N-propyl-
53.	U235	1-Propanol, 2,3-dibromo-, phosphate (3:1)
54.	U140	1-Propanol, 2-methyl-
55.	U243	1-Propene, 1,1,2,3,3,3-hexachloro-
56.	U084	1-Propene, 1,3-dichloro-
57.	U085	2,2-Bioxirane
58.	T140	2,3,4,6-Tetrachlorophenol
59.	U237	2,4-(1H,3H)-Pyrimidinedione, 5-[bis(2-chloroethyl)amino]-
60.	T140	2,4,5-T



SCHEDULE 7 — *Continued*

PART 2 — *Continued*

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — *Continued*

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
61.	T140	2,4,5-Trichlorophenol
62.	U408	2,4,6-Tribromophenol
63.	T140	2,4,6-Trichlorophenol
64.	U240	2,4-D, salts and esters
65.	U081	2,4-Dichlorophenol
66.	U101	2,4-Dimethylphenol
67.	U105	2,4-Dinitrotoluene
68.	U197	2,5-Cyclohexadiene-1,4-dione
69.	U147	2,5-Furandione
70.	U082	2,6-Dichlorophenol
71.	U106	2,6-Dinitrotoluene
72.	U236	2,7-Naphthalenedisulfonic acid, 3,3'-[(3,3'-dimethyl[1,1'-biphenyl]-4,4'-diyl)bis(azo)]bis[5-amino-4-hydroxy]-, tetrasodium salt
73.	U005	2-Acetylaminofluorene
74.	U159	2-Butanone
75.	U160	2-Butanone, peroxide
76.	U053	2-Butenal
77.	U074	2-Butene, 1,4-dichloro-
78.	U143	2-Butenoic acid, 2-methyl-, 7-[[[2,3-dihydroxy-2-(1-methoxyethyl)-3-methyl-1-oxobutoxy]methyl]-2,3,5,7a-tetrahydro-1H-pyrrolizin-1-yl ester, [1S-[1alpha(Z), 7(2S*,3R*), 7aalpha]]-
79.	U042	2-Chloroethyl vinyl ether
80.	U125	2-Furancarboxaldehyde
81.	U058	2H-1,3,2-Oxazaphosphorin-2-amine, N,N-bis(2-chloroethyl)tetrahydro-, 2-oxide
82.	U248	2H-1-Benzopyran-2-one, 4-hydroxy-3-(3-oxo-1-phenyl-butyl)-, and salts, when present at concentrations of 0.3% or less
83.	U116	2-Imidazolidinedithione
84.	U168	2-Naphthalenamine
85.	U171	2-Nitropropane
86.	U191	2-Picoline
87.	U002	2-Propanone
88.	U007	2-Propenamide
89.	U009	2-Propenenitrile
90.	U152	2-Propenenitrile, 2-methyl-
91.	U008	2-Propenoic acid
92.	U118	2-Propenoic acid, 2-methyl-, ethyl ester
93.	U162	2-Propenoic acid, 2-methyl-, methyl ester
94.	U113	2-Propenoic acid, ethyl ester
95.	U073	3,3'-Dichlorobenzidine
96.	U091	3,3'-Dimethoxybenzidine
97.	U095	3,3'-Dimethylbenzidine
98.	U148	3,6-Pyridazinedione, 1,2-dihydro-
99.	U157	3-Methylcholanthrene
100.	U164	4(1H)-Pyrimidinone, 2,3-dihydro-6-methyl-2-thioxo-
101.	U158	4,4'-Methylenebis(2-chloroaniline)
102.	U036	4,7-Methano-1H-indene, 1,2,4,5,6,7,8,8-octachloro-2,3,3a,4,7,7a-hexahydro-
103.	U030	4-Bromophenyl phenyl ether
104.	U049	4-Chloro-o-toluidine, hydrochloride
105.	U161	4-Methyl-2-pentanone
106.	U059	5,12-Naphthacenedione,8-acetyl-10-[(3-amino-2,3,6-trideoxy)-alpha-L-lyxo-hexopyranosyloxy]-7,8,9,10-tetrahydro-6,8,11-trihydroxy-1-methoxy-, (8S-cis)-
107.	U181	5-Nitro-o-toluidine
108.	U094	7,12-Dimethylbenz[a]anthracene
109.	U367	7-Benzofuranol, 2,3-dihydro-2,2-dimethyl-
110.	U394	A2213
111.	U001	Acetaldehyde
112.	U034	Acetaldehyde, trichloro-

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
113.	U187	Acetamide, N-(4-ethoxyphenyl)-
114.	U005	Acetamide, N-9H-fluoren-2-yl-
115.	U112	Acetic acid ethyl ester
116.	T140	Acetic acid, (2,4,5-trichlorophenoxy)-
117.	U240	Acetic acid, (2,4-dichlorophenoxy)-, salts and esters
118.	U144	Acetic acid, lead(2+) salt
119.	U214	Acetic acid, thallium(1+) salt
120.	U002	Acetone
121.	U003	Acetonitrile
122.	U004	Acetophenone
123.	U006	Acetyl chloride
124.	U007	Acrylamide
125.	U008	Acrylic acid
126.	U009	Acrylonitrile
127.	U096	alpha, alpha-Dimethylbenzylhydroperoxide
128.	U167	alpha-Naphthylamine
129.	U011	Amitrole
130.	U012	Aniline
131.	U136	Arsinic acid, dimethyl-
132.	U014	Auramine
133.	U015	Azaserine
134.	U010	Azirino[2,3,4]pyrrolo[1,2-a]indole-4,7-dione, 6-amino-8-[(aminocarbonyloxy)methyl]-1,1a,2,8,8a,8b-hexahydro-8a-methoxy-5-methyl-, [1aS-(1aalpha,8beta,8aalpha,8balpha)]-
135.	U280	Barban
136.	U278	Bendiocarb
137.	U364	Bendiocarb phenol
138.	U271	Benomyl
139.	U018	Benz[a]anthracene
140.	U094	Benz[a]anthracene, 7,12-dimethyl-
141.	U016	Benz[c]acridine
142.	U157	Benz[j]aceanthrylene, 1,2-dihydro-3-methyl-
143.	U017	Benzal chloride
144.	U192	Benzamide, 3,5-dichloro-N-(1,1-dimethyl-2-propynyl)-
145.	U012	Benzenamine
146.	U328	Benzenamine, 2-methyl-
147.	U222	Benzenamine, 2-methyl-, hydrochloride
148.	U181	Benzenamine, 2-methyl-5-nitro-
149.	U014	Benzenamine, 4,4-carbonimidoylbis[N,N-dimethyl-
150.	U158	Benzenamine, 4,4-methylenebis[2-chloro-
151.	U049	Benzenamine, 4-chloro-2-methyl-, hydrochloride
152.	U353	Benzenamine, 4-methyl-
153.	U093	Benzenamine, N,N-dimethyl-4-(phenylazo)-
154.	U019	Benzene
155.	U055	Benzene, (1-methylethyl)-
156.	U017	Benzene, (dichloromethyl)-
157.	U023	Benzene, (trichloromethyl)-
158.	U247	Benzene, 1,1-(2,2,2-trichloroethylidene)bis[4-methoxy-
159.	U207	Benzene, 1,2,4,5-tetrachloro-
160.	U070	Benzene, 1,2-dichloro-
161.	U234	Benzene, 1,3,5-trinitro-
162.	U071	Benzene, 1,3-dichloro-
163.	U223	Benzene, 1,3-diisocyanatomethyl-
164.	U072	Benzene, 1,4-dichloro-
165.	U030	Benzene, 1-bromo-4-phenoxy-

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
166.	U105	Benzene, 1-methyl-2,4-dinitro-
167.	U106	Benzene, 2-methyl-1,3-dinitro-
168.	U037	Benzene, chloro-
169.	U239	Benzene, dimethyl-
170.	U127	Benzene, hexachloro-
171.	U056	Benzene, hexahydro-
172.	U220	Benzene, methyl-
173.	U169	Benzene, nitro-
174.	U183	Benzene, pentachloro-
175.	U185	Benzene, pentachloronitro-
176.	U061	Benzene, 1,1-(2,2,2-trichloroethylidene)bis[4-chloro-
177.	U060	Benzene, 1,1-(2,2-dichloroethylidene)bis[4-chloro-
178.	U038	Benzeneacetic acid, 4-chloro-alpha-(4-chlorophenyl)-alpha-hydroxy-, ethyl ester
179.	U035	Benzenebutanoic acid, 4-[bis(2-chloroethyl)amino]-
180.	U221	Benzenediamine, ar-methyl-
181.	U020	Benzenesulfonic acid chloride
182.	U020	Benzenesulfonyl chloride
183.	U021	Benzidine
184.	U022	Benzo[a]pyrene
185.	U064	Benzo[rs]pentaphene
186.	U023	Benzotrichloride
187.	U047	beta-Chloronaphthalene
188.	U168	beta-Naphthylamine
189.	U225	Bromoform
190.	U136	Cacodylic acid
191.	U032	Calcium chromate
192.	U280	Carbamic acid, (3-chlorophenyl)-, 4-chloro-2-butynyl ester
193.	U409	Carbamic acid, [1,2-phenylenebis (iminocarbonothioyl)]bis-, dimethyl ester
194.	U271	Carbamic acid, [1-[(butylamino)carbonyl]-1H-benzimidazol-2-yl]-, methyl ester
195.	U372	Carbamic acid, 1H-benzimidazol-2-yl,methyl ester
196.	U238	Carbamic acid, ethyl ester
197.	U178	Carbamic acid, methylnitroso-, ethyl ester
198.	U373	Carbamic acid, phenyl-, 1-methylethyl ester
199.	U097	Carbamic chloride, dimethyl-
200.	U114	Carbamodithioic acid, 1,2-ethanediy]bis-, salts and esters
201.	U389	Carbamothioic acid, bis(1-methylethyl)-, S-(2,3,3-trichloro-2-propenyl)ester
202.	U062	Carbamothioic acid, bis(1-methylethyl)-S-(2,3-dichloro-2-propenyl) ester
203.	U387	Carbamothioic acid, dipropyl-, S-(phenylmethyl) ester
204.	U279	Carbaryl
205.	U372	Carbendazim
206.	U367	Carbofuran phenol
207.	U033	Carbon oxyfluoride
208.	U211	Carbon tetrachloride
209.	U215	Carbonic acid, diethallium(1+) salt
210.	U033	Carbonic difluoride
211.	U156	Carbonochloridic acid, methyl ester
212.	U034	Chloral
213.	U035	Chlorambucil
214.	U036	Chlordane, alpha and gamma isomers
215.	U026	Chloromaphazin
216.	U037	Chlorobenzene
217.	U038	Chlorobenzilate
218.	U044	Chloroform
219.	U046	Chloromethyl methyl ether

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
220.	U032	Chromic acid $H_2CrO_4$ , calcium salt
221.	U050	Chrysene
222.	U051	Creosote
223.	U052	Cresol (cresylic acid)
224.	U053	Crotonaldehyde
225.	U055	Cumene
226.	U246	Cyanogen bromide (CN)Br
227.	U056	Cyclohexane
228.	U129	Cyclohexane, 1,2,3,4,5,6-hexachloro-, (1alpha,2alpha,3beta,4alpha,5alpha,6beta)-
229.	U057	Cyclohexanone
230.	U058	Cyclophosphamide
231.	U059	Daunomycin
232.	U060	DDD
233.	U061	DDT
234.	U206	D-Glucose, 2-deoxy-2-[(methylnitrosoamino)-carbonyl]amino]-
235.	U062	Diallate
236.	U063	Dibenz[a,h]anthracene
237.	U064	Dibenzo[a,i]pyrene
238.	U069	Dibutyl phthalate
239.	U075	Dichlorodifluoromethane
240.	U025	Dichloroethyl ether
241.	U027	Dichloroisopropyl ether
242.	U024	Dichloromethoxy ethane
243.	U088	Diethyl phthalate
244.	U395	Diethylene glycol, dicarbamate
245.	U028	Diethylhexyl phthalate
246.	U089	Diethylstilbestrol
247.	U090	Dihydrosafrole
248.	U102	Dimethyl phthalate
249.	U103	Dimethyl sulfate
250.	U092	Dimethylamine
251.	U097	Dimethylcarbamoyl chloride
252.	U107	Di-n-octyl phthalate
253.	U111	Di-n-propylnitrosamine
254.	U110	Dipropylamine
255.	U041	Epichlorohydrin
256.	U001	Ethanal
257.	U404	Ethanamine, N,N-diethyl-
258.	U174	Ethanamine, N-ethyl-N-nitroso-
259.	U208	Ethane, 1,1,1,2-tetrachloro-
260.	U226	Ethane, 1,1,1-trichloro-
261.	U209	Ethane, 1,1,2,2-tetrachloro-
262.	U227	Ethane, 1,1,2-trichloro-
263.	U024	Ethane, 1,1'-[methylenebis(oxy)]bis[2-chloro-
264.	U076	Ethane, 1,1-dichloro-
265.	U117	Ethane, 1,1'-oxybis-
266.	U025	Ethane, 1,1'-oxybis[2-chloro-
267.	U067	Ethane, 1,2-dibromo-
268.	U077	Ethane, 1,2-dichloro-
269.	U131	Ethane, hexachloro-
270.	U184	Ethane, pentachloro-
271.	U218	Ethanethioamide
272.	U394	Ethanimidothioic acid, 2-(dimethylamino)-N-hydroxy-2-oxo-, methyl ester
273.	U410	Ethanimidothioic acid, N,N'-[thiobis[(methylimino)carbonyloxy]]bis-, dimethyl ester

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
274.	U173	Ethanol, 2,2'-(nitrosoimino)bis-
275.	U395	Ethanol, 2,2'-oxybis-, dicarbamate
276.	U359	Ethanol, 2-ethoxy-
277.	U004	Ethanone, 1-phenyl-
278.	U042	Ethene, (2-chloroethoxy)-
279.	U078	Ethene, 1,1-dichloro-
280.	U079	Ethene, 1,2-dichloro-, (E)-
281.	U043	Ethene, chloro-
282.	U210	Ethene, tetrachloro-
283.	U228	Ethene, trichloro-
284.	U112	Ethyl acetate
285.	U113	Ethyl acrylate
286.	U238	Ethyl carbamate (urethane)
287.	U117	Ethyl ether
288.	U118	Ethyl methacrylate
289.	U119	Ethyl methanesulfonate
290.	U067	Ethylene dibromide
291.	U077	Ethylene dichloride
292.	U359	Ethylene glycol monoethyl ether
293.	U115	Ethylene oxide
294.	U114	Ethylenebisdithiocarbamic acid, salts and esters
295.	U116	Ethylenethiourea
296.	U076	Ethylidene dichloride
297.	U120	Fluoranthene
298.	U122	Formaldehyde
299.	U123	Formic acid
300.	U124	Furan
301.	U213	Furan, tetrahydro-
302.	U125	Furfural
303.	U124	Furfuran
304.	U206	Glucopyranose, 2-deoxy-2-(3-methyl-3-nitrosoureido)-, D-
305.	U126	Glycidylaldehyde
306.	U163	Guanidine, N-methyl-N'-nitro-N-nitroso-
307.	U127	Hexachlorobenzene
308.	U128	Hexachlorobutadiene
309.	U130	Hexachlorocyclopentadiene
310.	U131	Hexachloroethane
311.	U132	Hexachlorophene
312.	U243	Hexachloropropene
313.	U133	Hydrazine
314.	U098	Hydrazine, 1,1-dimethyl-
315.	U086	Hydrazine, 1,2-diethyl-
316.	U099	Hydrazine, 1,2-dimethyl-
317.	U109	Hydrazine, 1,2-diphenyl-
318.	U134	Hydrofluoric acid
319.	U134	Hydrogen fluoride
320.	U135	Hydrogen sulfide
321.	U135	Hydrogen sulfide H <sub>2</sub> S
322.	U096	Hydroperoxide, 1-methyl-1-phenylethyl-
323.	U137	Indeno[1,2,3-cd]pyrene
324.	U140	Isobutyl alcohol
325.	U141	Isosafrole
326.	U142	Kepone
327.	U143	Lasiocarpine

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
328.	U144	Lead acetate
329.	U145	Lead phosphate
330.	U146	Lead subacetate
331.	U146	Lead, bis(acetato-O)(tetrahydroxytri-
332.	U129	Lindane
333.	U150	L-Phenylalanine, 4-[bis(2-chloroethyl)amino]-
334.	U015	L-Serine, diazoacetate (ester)
335.	U147	Maleic anhydride
336.	U148	Maleic hydrazide
337.	U149	Malononitrile
338.	U071	m-Dichlorobenzene
339.	U150	Melphalan
340.	U151	Mercury
341.	U152	Methacrylonitrile
342.	U092	Methanamine, N-methyl-
343.	U029	Methane, bromo-
344.	U045	Methane, chloro-
345.	U046	Methane, chloromethoxy-
346.	U068	Methane, dibromo-
347.	U080	Methane, dichloro-
348.	U075	Methane, dichlorodifluoro-
349.	U138	Methane, iodo-
350.	U211	Methane, tetrachloro-
351.	U225	Methane, tribromo-
352.	U044	Methane, trichloro-
353.	U121	Methane, trichlorofluoro-
354.	U119	Methanesulfonic acid, ethyl ester
355.	U153	Methanethiol
356.	U154	Methanol
357.	U155	Methapyrilene
358.	U247	Methoxychlor
359.	U154	Methyl alcohol
360.	U029	Methyl bromide
361.	U045	Methyl chloride
362.	U156	Methyl chlorocarbonate
363.	U226	Methyl chloroform
364.	U159	Methyl ethyl ketone (MEK)
365.	U160	Methyl ethyl ketone peroxide
366.	U138	Methyl iodide
367.	U161	Methyl isobutyl ketone
368.	U162	Methyl methacrylate
369.	U068	Methylene bromide
370.	U080	Methylene chloride
371.	U164	Methylthiouracil
372.	U010	Mitomycin C
373.	U163	MNNG
374.	U086	N,N'-Diethylhydrazine
375.	U026	Naphthalenamine, N,N'-bis(2-chloroethyl)-
376.	U165	Naphthalene
377.	U047	Naphthalene, 2-chloro-
378.	U031	n-Butyl alcohol
379.	U217	Nitric acid, thallium(I+) salt
380.	U169	Nitrobenzene
381.	U173	N-Nitrosodiethanolamine

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
382.	U174	N-Nitrosodiethylamine
383.	U172	N-Nitrosodi-n-butylamine
384.	U176	N-Nitroso-N-ethylurea
385.	U177	N-Nitroso-N-methylurea
386.	U178	N-Nitroso-N-methylurethane
387.	U179	N-Nitrosopiperidine
388.	U180	N-Nitrosopyrrolidine
389.	U194	n-Propylamine
390.	U087	O,O-Diethyl S-methyl dithiophosphate
391.	U048	o-Chlorophenol
392.	U070	o-Dichlorobenzene
393.	U328	o-Toluidine
394.	U222	o-Toluidine hydrochloride
395.	U115	Oxirane
396.	U041	Oxirane, (chloromethyl)-
397.	U126	Oxiranecarboxyaldehyde
398.	U182	Paraldehyde
399.	U197	p-Benzoquinone
400.	U039	p-Chloro-m-cresol
401.	U072	p-Dichlorobenzene
402.	U093	p-Dimethylaminoazobenzene
403.	U183	Pentachlorobenzene
404.	U184	Pentachloroethane
405.	U185	Pentachloronitrobenzene (PCNB)
406.	T140	Pentachlorophenol
407.	U161	Pentanol, 4-methyl-
408.	U187	Phenacetin
409.	U188	Phenol
410.	U411	Phenol, 2-(1-methylethoxy)-, methylcarbamate
411.	T140	Phenol, 2,3,4,6-tetrachloro-
412.	T140	Phenol, 2,4,5-trichloro-
413.	T140	Phenol, 2,4,6-trichloro-
414.	U081	Phenol, 2,4-dichloro-
415.	U101	Phenol, 2,4-dimethyl-
416.	U082	Phenol, 2,6-dichloro-
417.	U048	Phenol, 2-chloro-
418.	U089	Phenol, 4,4'-(1,2-diethyl-1,2-ethenediyl)bis-, (E)-
419.	U039	Phenol, 4-chloro-3-methyl-
420.	U170	Phenol, 4-nitro-
421.	U052	Phenol, methyl-
422.	T140	Phenol, pentachloro-
423.	U132	Phenol, 2,2'-methylenebis[3,4,6-trichloro-
424.	U145	Phosphoric acid, lead(2+) salt (2:3)
425.	U087	Phosphorodithioic acid, O,O-diethyl S-methyl ester
426.	U189	Phosphorus sulfide
427.	U190	Phthalic anhydride
428.	U179	Piperidine, 1-nitroso-
429.	U170	p-Nitrophenol
430.	U192	Pronamide
431.	U066	Propane, 1,2-dibromo-3-chloro-
432.	U083	Propane, 1,2-dichloro-
433.	U027	Propane, 2,2'-oxybis[2-chloro-
434.	U171	Propane, 2-nitro-
435.	U149	Propanedinitrile

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
436.	T140	Propanoic acid, 2-(2,4,5-0 trichlorophenoxy)-
437.	U373	Propham
438.	U411	Propoxur
439.	U083	Propylene dichloride
440.	U387	Prosulfocarb
441.	U353	p-Toluidine
442.	U196	Pyridine
443.	U191	Pyridine, 2-methyl-
444.	U180	Pyrrolidine, 1-nitroso-
445.	U200	Reserpine
446.	U201	Resorcinol
447.	U202	Saccharin, and salts
448.	U203	Safrole
449.	U204	Selenious acid
450.	U204	Selenium dioxide
451.	U205	Selenium sulfide
452.	U205	Selenium sulfide SeS <sub>2</sub>
453.	T140	Silvex (2,4,5-TP)
454.	U206	Streptozotocin
455.	U189	Sulfur phosphide
456.	U103	Sulfuric acid, dimethyl ester
457.	U210	Tetrachloroethylene
458.	U213	Tetrahydrofuran
459.	U216	Thallium chloride TlCl
460.	U214	Thallium(I) acetate
461.	U215	Thallium(I) carbonate
462.	U216	Thallium(I) chloride
463.	U217	Thallium(I) nitrate
464.	U218	Thioacetamide
465.	U410	Thiodicarb
466.	U153	Thiomethanol
467.	U244	Thioperoxydicarbonic diamide[(H <sub>2</sub> N)C(S)] <sub>2</sub> S <sub>2</sub> , tetramethyl-
468.	U409	Thiophanate-methyl
469.	U219	Thiourea
470.	U244	Thiram
471.	U220	Toluene
472.	U223	Toluene diisocyanate
473.	U221	Toluenediamine
474.	U389	Triallate
475.	U228	Trichloroethylene
476.	U121	Trichloromonofluoromethane
477.	U404	Triethylamine
478.	U235	Tris(2,3-dibromopropyl) phosphate
479.	U236	Trypan blue
480.	U237	Uracil mustard
481.	U176	Urea, N-ethyl-N-nitroso-
482.	U177	Urea, N-methyl-N-nitroso-
483.	U043	Vinyl chloride
484.	U248	Warfarin, and salts, when present at concentrations of 0.3% or less
485.	U239	Xylene
486.	U200	Yohimban-16-carboxylic acid, 11,17-dimethoxy-18-[(3,4,5-trimethoxybenzoyl)oxy]-, methyl ester, (3beta,16beta,17alpha,18beta,20alpha)-
487.	U249	Zinc phosphide Zn <sub>3</sub> P <sub>2</sub> , when present at concentrations of 10% or less



2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* **SOR/DORS/2005-149**

**SCHEDULE 8**  
**(Subparagraph 2(2)(e)(i))**

**EXCLUDED MATERIALS**

Item	Description
1.	Slags, skimmings and dross containing precious metals, copper or zinc for further refining
2.	Platinum group metal (PGM) automobile catalysts
3.	Electronic scrap such as circuit boards, electronic components and wires that are suitable for base or precious metal recovery
4.	Brass in the form of turnings, borings and choppings

SCHEDULE 9  
(Section 4)  
MOVEMENT DOCUMENT

MOVEMENT DOCUMENT  
DOCUMENT DE MOUVEMENT

Movement Document Reference No.  
N° de référence du document de mouvement

<b>A Exporter / foreign exporter</b> <b>Exportateur / expéditeur étranger</b> Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial				<b>B Carrier</b> <b>Transporteur</b> Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial				<b>C Importer / foreign receiver</b> <b>Importateur / destinataire étranger</b> Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial			
Company name / Nom de l'entreprise				Company name / Nom de l'entreprise				Importer / foreign receiver information same as in Part A. Les renseignements sur l'importateur / le destinataire étranger sont les mêmes qu'à la partie A. <input type="checkbox"/> Yes / Oui <input type="checkbox"/> No, complete the box below / Non, remplir la case ci-dessous			
Mailing address / Adresse postale City / Ville Province Postal code / Code postal				Mailing address / Adresse postale City / Ville Province Postal code / Code postal				Company name / Nom de l'entreprise Mailing address / Adresse postale City / Ville Province Postal code / Code postal E-mail / Courriel électronique Tel. No. / N° de tél. ( ) Receiving site address / Adresse du lieu de destination			
E-mail / Courriel électronique Tel. No. / N° de tél. ( )				E-mail / Courriel électronique Tel. No. / N° de tél. ( )				Date received / Date de réception Year / Année Month / Mois Day / Jour Time / Heures <input type="checkbox"/> A.M. <input type="checkbox"/> P.M. If waste or recyclable material is to be transferred, specify intended company name / Si les déchets ou matières recyclables doivent être transférés, préciser le nom du destinataire			
Shipping site address / Adresse du lieu de l'expédition City / Ville Province Postal code / Code postal				Vehicle / Véhicule Registration No. / N° d'immatriculation Prov. Trailer - Rail car No. 1 1 <sup>er</sup> remorque - wagon Trailer - Rail car No. 2 2 <sup>e</sup> remorque - wagon Port of entry / Point d'entrée Port of exit / Point de sortie Carrier Declaration: I certify that I have received waste or recyclable material from the exporter / foreign exporter for delivery to the importer / foreign receiver as set out in Part A and that the information contained in Part B is correct and complete. / Attestation du transporteur: J'atteste avoir reçu les déchets ou matières recyclables de l'exportateur / expéditeur étranger en vue de leur livraison à l'importateur / le destinataire étranger. Les infos figurant à la partie A et tous les renseignements fournis à la partie B sont exacts et complets. Name of authorized person (print) Tel. No. / N° de tél. ( ) Norm de l'agent autorisé (caractères d'impression):				Quantity received / Quantité reçue Units / Unités L or / ou kg Litres Comments / Commentaires Handling Code / Code de manutention Shipment / Envoi Accepted / Accepté Refused / Refusé Pack. / Vah. Cont. / Vah.			
Importer / foreign receiver Importateur / destinataire étranger Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial Mailing address / Adresse postale City / Ville Province Postal code / Code postal E-mail / Courriel électronique Tel. No. / N° de tél. ( ) Receiving site address / Adresse du lieu de destination City / Ville Province Postal code / Code postal				Year / Année Month / Mois Day / Jour Signature Name of authorized person (print) Tel. No. / N° de tél. ( )				If waste or recyclable material is to be transferred, specify intended company name / Si les déchets ou matières recyclables doivent être transférés, préciser le nom du destinataire Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial			
Prev. code / Code prov. Shipping name / Appellation réglementaire Class / Classe Sub class(es) / Sous-classes UN No. / N° UN Packing / Pack or Or d'emballage / de manut. Quantity shipped / Quantité expédiée Units / Unités L or / ou kg Litres Packaging/Container / Codes No. / N° LSPD Code / Code LSPD				National code in country of / Code du pays Export / Importation Customs code(s) / Code(s) de douanes				If handling code "Other" (specify) / Si code de manutention « autre » (spécifier) Importer / foreign receiver certification: I certify that the information contained in Part C is correct and complete. / Attestation de l'importateur / destinataire étranger: J'atteste que tous les renseignements à la partie C sont exacts et complets. Name of authorized person (print) / Nom de l'agent autorisé (caractères d'impression) Signature Tel. No. / N° de tél. ( )			
Notice No. / N° de notification Notice Line No. / N° de ligne de la notification Shipment / Envoi OK / De D or R code / Code D ou R C code / Code C Basel Annex VII or OECD Code / Annexe VII de Bâle ou Code OCDE H code / Code H Y code / Code Y				Special handling / Manutention spéciale <input type="checkbox"/> Attached / Ci-joint: <input type="checkbox"/> As follows / Ci-dessous:				Date shipped / Date d'expédition Year / Année Month / Mois Day / Jour Time / Heures <input type="checkbox"/> A.M. <input type="checkbox"/> P.M. Scheduled arrival date / Date d'arrivée prévue Year / Année Month / Mois Day / Jour			
Exporter / foreign exporter certification: I certify that the information contained in Part A is correct and complete. / Attestation de l'exportateur / expéditeur étranger: J'atteste que tous les renseignements à la partie A sont exacts et complets. Name of authorized person (print) / Nom de l'agent autorisé (caractères d'impression) Signature Tel. No. / N° de tél. ( )											

This is Exhibit B referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 6<sup>th</sup> day  
of September, 2011

[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

**Richard Patrick Pigott, a Commissioner, etc.,  
Province of Ontario, for B. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.**

00116-A0079574 pages 1 - 4



Statement of:

Sr. Edward G. **WELLS** # 446  
Senior Investigator  
Environment Canada  
Environmental Enforcement

---

I am a Senior Investigator employed by Environment Canada assigned to the Environmental Enforcement Division, Ontario Region. I am designated by the Minister of Environment as an Enforcement Officer under the Canadian Environmental Protection Act, 1999. I have been employed in this position since August 2000. I have twenty-eight years law enforcement experience. I attended the Ontario Police College and received training in general police duties, fraud investigations and criminal investigations. I have also attended the RCM Police College where I received general enforcement training for environmental enforcement. I have seventeen years experience conducting fraud investigations, twelve of which were leading major fraud investigations for the Government of Canada.

On September 16, 2005 I met with Bradley **MAY**, the Manager of the Investigation Section to discuss a potential file. During this meeting the following information was relayed to me:

1. Brad **SIMPSON** a Senior Inspector with Environment Canada's Environmental Enforcement Division Inspection Section had recommended a file for investigation.
2. This referral identified RPR Environmental Inc., of Stoney Creek, Ontario as the subject of the investigation.
3. That the company had failed to properly complete, by providing a notice number, and submit hazardous waste manifests as required by the *Export and Import of Hazardous Waste Regulations* ("EIHWR").
4. That this non-compliance had continued over several months.

On September 16, 2005, an investigation was assigned to me by Bradley **MAY** the Manager of the Investigation Section. The file was assigned through Environment Canada's case file system and issued identification number 3007-2005-09-16-001.

On October 11, 2005, I reviewed the files and noted that faxed copies of corrected manifest(s) had been sent to Jan **KROSE** of the Waste Movement Division and Bradley **SIMPSON** of the Environmental Enforcement Division, both of which are part of Environment Canada. These faxed documents were dated September 26, 2005.



Statement of:

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During the review I also noted that Bradley SIMPSON had contacted RPR Environmental and informed them of the problem and they promised to correct the matter by September 23, 2005.

On MAY 4, 2006 I tasked Investigator Edward N. WELLS to conduct a further review of the file, including putting together an investigative plan.

On June 25, 2007 I reviewed Investigator Edward N. WELLS search warrant, including his grounds to believe and his offence recommendations.

On July 9, 2007 in the company Investigator Edward N. WELLS, I attended the address of RPR Environmental Inc. 164 South Service Road, Stoney Creek. The purpose of this visit was to conduct passive observation of the business in preparation for the execution of a search warrant.

On July 18, 2007, in the company Investigator Edward N. WELLS, I attended the offices of Waste Management Division located in Gatineau, Quebec.

Well at the offices we met with Joe WITTWER and Jan KROSE.

Jan KROSE assisted in the identification of the non compliant manifests.

On August 2, 2007 in the company Investigator Edward N. WELLS, I attended the Hamilton Court for the purpose of applying for a search warrant.

On August 2, 2007 in the company Investigator Edward N. WELLS, I met with the Justice of the Peace. She informed us that she would not sign the warrant indicating that she felt it was too broad and sweeping.

On August 2, 2007 I tasked Investigator Edward N. WELLS to rewrite the warrant.

On August 3, 2007 I received a phone call from Investigator Edward N. WELLS that the rewritten warrant had been signed.



Statement of:

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Senior Investigator  
Environment Canada  
Environmental Enforcement

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On August 8, 2007 I attended the Environmental Enforcements Burlington Office, where a briefing was conducted with the search warrant team. A package titled "RPR Environmental Instructions" was provided to each member.

On August 9, 2007 at 0910 a search warrant was executed at the offices of RPR Environmental located at 164-168 South Service Road.

Upon entry I spoke with Frances SCANDINAVO, senior company representative on site.

Frances SCANDINAVO was shown the original warrant and a copy was given to her.

Once the staff departed the offices the search team entered the building. Video was taken of the offices before the search began.

At 1755 the search was completed and I took custody of all seized evidence, where it was transported to my offices.

All evidence was locked away in evidence lockers 5 and 6.

On August 15, 2007 in the company Investigator Edward N. WELLS, a review of the seized evidence was conducted.

Bag # 22 contained a folder marked "Out Bound Manifests" "January 2005. All original manifests for the month were located.

Manifest number TT96113-2 (Exhibit # ) was completed correctly on the same date as manifest TT9623-7 which was done on the same date. I noted this MAY indicate the company new how to complete a manifest correctly.

Bag # 006 (Exhibit # ) indicated knowledge company was aware of the issues involving late manifest.

On August 16, 2007 in the company Investigator Edward N. WELLS a review of the evidence continued.



Statement of:

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Environment Canada  
Environmental Enforcement

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On August 17, 2007 in the company Investigator Edward N. WELLS a review of the evidence continued.

Bag # 057 (Exhibit # ) contents a letter dated 8-November-2004. The body of the letter shows the company had been informed that they may face prosecution if in violation of Export/Import Hazardous Waste Regulations.

Bag # 056 (Exhibit # ) contains the export permit for the period of 24-Novemeber-2004 to 23-November-2005 for UN 1993.

Bag # 055 (Exhibit # ) contains the export permit for the period of 27-October-27-October-2005 for UN 1992; UN 1263; UN1993.

Bag # 044 (Exhibit # ) contains downloaded version of the Export/Import Hazardous Waste Regulations. This indicates knowledge of the regulations.

**THIS CONCLUDES THE EVIDENCE.**

00116-A0079574 pages 1 - 4



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Statement of:

**Sr. Edward G. WELLS # 446**  
Senior Investigator  
Environment Canada  
Environmental Enforcement

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On August 17, 2007 in the company Investigator Edward N. WELLS a review of the evidence continued.

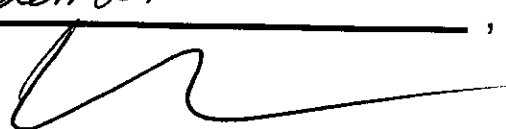
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**THIS CONCLUDES THE EVIDENCE.**

This is Exhibit C referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 6th day  
of September, 2011  


Commissioner for Taking Affidavits  
(or as the case may be)

*Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.*

2009-May-01 12:57 PM Environment Canada 416-739-5705

Environment Canada / Environnement Canada

06956-A0079108 pages 1 - 2

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**PERFORMANCE MANAGEMENT AND COMMUNICATION / GESTION DU RENDEMENT ET COMMUNICATION**  
**OVERALL PERFORMANCE REVIEW FORM / FORMULE D'EXAMEN DU RENDEMENT GLOBAL**

(For all employees except Pay Performance Employees, Research Scientists and Management Trainees)  
(Pour tous les employés sauf les employés assujettis à la rémunération au rendement, les chercheurs scientifiques et les stagiaires en gestion)

**1. FEEDBACK LANGUAGE / LANGUE DE LA RÉTROACTION**

To be completed by employees occupying bilingual positions in designated bilingual regions  
À remplir par les employés occupant des postes bilingues dans des régions désignées bilingues

I request that this performance review be completed in the following official language : English French  
Je demande que cet examen du rendement soit rempli dans la langue officielle suivante : Anglais Français

To be completed by the MANAGER of the employee being evaluated if the latter has supervisory duties/  
À remplir par le/la GESTIONNAIRE de l'employé(e) évalué(e) si ce dernier ou cette dernière a des fonctions de supervision

This employee met his/her official languages obligations in his/her capacity of supervisor. Yes/Oui No/Non  
Cet(te) employé(e) a respecté ses obligations touchant les langues officielles en sa qualité de superviseur.

Manager's Initials /  
Initiales du (de la) gestionnaire

**2. IDENTIFICATION**

Employee Surname and Given Names / Nom et prénom de l'employé(e)  
Edward Nicholas WELLS

Personal Record Identifier /  
Code d'identification du dossier personnel

Position title / Titre du poste  
Environmental Investigator

Position Group and Level/  
Groupe et niveau du poste  
GT-02

Branch & Directorate / Direction et direction générale  
Environmental Enforcement Division (Ontario)

Location / Lieu de travail  
TORONTO

Manager's Name /  
Nom du (de la) gestionnaire  
Bradley MAY

Manager's Position Title /  
Titre du poste du (de la) gestionnaire  
Manager, Investigation Section

Review Period / Période visée  
From /Du : To /Au :  
April 01, 2005 to March 31, 2006

The Overall Performance Review Discussion should confirm the feedback exchanged throughout the review period and include a summary of the employee's performance and major achievements. /

La discussion portant sur l'examen du rendement global devrait confirmer la rétroaction échangée tout au long de la période d'examen et inclure un résumé du rendement de l'employé(e) et de ses principales réalisations.

**3. PERFORMANCE MANAGEMENT AND COMMUNICATION CONFIRMATION /  
CONFIRMATION DE LA GESTION DU RENDEMENT ET DE LA COMMUNICATION**

We have exchanged sufficient feedback throughout the review period in accordance with previously agreed upon expectations and approach. /  
Nous avons échangé une rétroaction suffisante tout au long de la période d'examen conformément aux attentes et à l'approche sur lesquelles nous nous étions entendus.

Employee's Signature / Signature de l'employé(e)

21 July 2006  
Date

Yes/Oui

No/Non

Manager's Signature / Signature du (de la) gestionnaire

226/07/21  
Date

Yes/Oui

No/Non

Supporting documentation attached or Written Summary on reverse  
Documentation justificative jointe ou résumé écrit à l'endos

A Verbal Summary is sufficient.  
Un résumé verbal est suffisant.

**4. REVIEW / RÉVISION**

I would like to discuss the review of my performance with the Reviewing Officer/Review Committee.  
J'aimerais discuter de l'examen de mon rendement avec l'agent/le comité de révision.

Yes/Oui

No/Non

Employee's Signature /  
Signature de l'employé(e)

21 July 2006  
Date

Manager's Signature /  
Signature du (de la) gestionnaire

226/07/21  
Date

Reviewing Officer Signature / Signature de l'agent réviseur Date

2009-May-01 12:57 PM Environment Canada 416-739-5705

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**5. PERFORMANCE REVIEW SUMMARY** (This section, which can be written or verbal depending on the agreement made by both parties, is completed by the manager based on the feedback exchanged with the employee during the discussion of the overall performance.)  
**RÉSUMÉ DE L'EXAMEN DU RENDEMENT** (Cette partie, qui peut être écrite ou verbale suivant l'entente conclue par les deux parties, est remplie par le gestionnaire en fonction de la rétroaction échangée avec l'employé(e) pendant la discussion du rendement global.)

Review employee's performance against attached objectives, summarize his/her major achievements and discuss areas for improvement.  
Examiner le rendement de l'employé(e) en fonction des objectifs ci-joints, résumer ses principales réalisations et discuter des aspects à améliorer.

s.19(1)

**6. LEARNING ACTIVITIES / ACTIVITÉS D'APPRENTISSAGE**

Identify on the job and technical training required by the employee to perform his/her current and evolving duties and discuss other related learning activities, such as assignments, mentoring, university courses, reading material, etc. / Indiquer la formation nécessaire à l'employé(e) pour s'acquitter de ses fonctions courantes et en évolution et discuter des autres activités d'apprentissage pertinentes, comme les affectations, les conférences, le mentorat, les cours universitaires, les lectures, etc.

Over the next assessment period, Edward will be attending the Department's « Basic Enforcement Training » course at Algonquin College, from May 16<sup>th</sup> – July 7<sup>th</sup>, 2008.

Important additional training includes:

s.19(1)

Forty Hour Health and Safety course (O2)  
Skid School driving course (T25)  
Emergency Vehicle course (T25)  
WHMIS on-line training (O2)

s.19(1)

**7. EMPLOYEE'S COMMENTS / COMMENTAIRES DE L'EMPLOYÉ(E)**

PERSONAL INFORMATION PROVIDED ON THIS FORM IS PROTECTED UNDER THE PROVISIONS OF THE PRIVACY ACT. /  
LES RENSEIGNEMENTS FOURNIS DANS LE PRÉSENT DOCUMENT SONT PROTÉGÉS EN VERTU DE LA LOI SUR LA PROTECTION DES RENSEIGNEMENTS PERSONNELS.

Overall Performance Review Form (Employees) / Formulaire d'examen du rendement global (employé) 006957

This is Exhibit D referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 11 day  
of September, 2011  
[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.



**COMPLIANCE AND ENFORCEMENT POLICY FOR THE  
*CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999 (CEPA, 1999)***

**MARCH 2001**



## Table of Contents

<b>Introduction .....</b>	<b>3</b>
<b>What are Compliance and Enforcement.....</b>	<b>4</b>
<b>Guiding Principles.....</b>	<b>5</b>
<b>Key Elements of the <i>Canadian Environmental Protection Act, 1999</i>.....</b>	<b>6</b>
Key Elements .....	6
Relationship between the Minister of Environment and the Minister of Health .....	7
Relationship with other government under CEPA, 1999 .....	8
<b>Authorities Responsible for the Implementation of the <i>Canadian Environmental Protection Act, 1999</i> .....</b>	<b>10</b>
Minister of Environment .....	10
Minister of Health .....	10
Enforcement Officers .....	10
Analysts .....	11
Review officers .....	11
Attorney General and Officials of the Department of the Attorney General .....	12
Courts .....	12
<b>Measures to Promote Compliance .....</b>	<b>13</b>
Education and Information.....	13
Technical Information .....	14
Consultation on Regulation Development and Review .....	15
Environmental Codes of Practice and Guidelines .....	16
Promotion of Environmental Audits .....	17
<b>Inspection and Investigation .....</b>	<b>18</b>
Inspection .....	18
Inspection Program .....	19
Investigation .....	19
<b>Responses to Alleged Violations.....</b>	<b>21</b>
Criteria for Responses to Alleged Violations.....	21
Responses to Alleged Violations.....	21
Warnings .....	22
Directions in the Event of Releases.....	23
Tickets .....	24
Ministerial Orders .....	25
Detention Orders for Ships.....	27
Environmental Protection Compliance Orders .....	27
Injunctions .....	28
Prosecution .....	29
Environmental Protection Alternative Measures .....	30
Penalties and Court Orders Upon Conviction.....	32
Use of Court Orders Upon Conviction.....	33
Civil Suit by the Crown to Recover Costs .....	35
<b>For More Information .....</b>	<b>37</b>

## Introduction

Canadians expect their government to provide laws and regulations, in order to protect them and their society. However, it is not enough to adopt laws; legislation must be effectively enforced.

In the *Canadian Environmental Protection Act, 1999* (CEPA, 1999), Parliament has made it matter of law that enforcement of the Act must be fair, predictable and consistent.

In keeping with the duty to enforce imposed in the Act, this Compliance and Enforcement Policy establishes the principles for enforcement of CEPA, 1999 and tells everyone who shares a responsibility for protection of the environment — governments, industry, organized labour and individuals — what is expected of them. It also lets everyone know what to expect from Environment Canada and the officers who enforce the *Canadian Environmental Protection Act, 1999* and its regulations. The policy has been developed in co-operation with the Department of Justice.

This document is intended to provide guidance only. It is not a substitute for the *Canadian Environmental Protection Act, 1999*. In the event of an inconsistency between this document and the Act, the statute prevails.

## **What are Compliance and Enforcement?**

The terms "compliance" and "enforcement" are used many times throughout the Compliance and Enforcement Policy for the Act. It is therefore useful to make their meanings clear.

Compliance means the state of conformity with the law. Environment Canada will secure compliance with the *Canadian Environmental Protection Act, 1999* through two types of activity: promotion and enforcement.

Measures to promote compliance include communication and publication of information, consultation with parties affected by the Act.

Enforcement activities include:

- inspection to verify compliance;
- investigations of violations;
- measures to compel compliance without resorting to formal court action, such as directions by the Minister or enforcement officers, ticketing, and environmental protection compliance orders by enforcement officers; and
- measures to compel compliance through court action, such as injunctions, prosecution, court orders upon conviction, and civil suit for recovery of costs.

## **Guiding Principles**

The following general principles govern the application of the Act:

- Compliance with the Act and its regulations is mandatory.
- Enforcement officers throughout Canada will apply the Act in a manner that is fair, predictable and consistent. They will use rules, sanctions and processes securely founded in law.
- Enforcement officers will administer the Act with an emphasis on prevention of damage to the environment.
- Enforcement officers will examine every suspected violation of which they have knowledge, and will take action consistent with this Compliance and Enforcement Policy.
- Enforcement officers will encourage the reporting of suspected violations of the Act.

## **Key Elements of the *Canadian Environmental Protection Act, 1999***

The full title of the legislation is "An Act respecting the protection of the environment and of human health in order to contribute to sustainable development", which clearly defines the purpose of the statute. Also, the Declaration of the *Canadian Environmental Protection Act, 1999* states that "the protection of the environment is essential to the well-being of Canadians and the primary purpose of this Act is to contribute to sustainable development through pollution prevention". The Declaration underscores the importance placed by the Government of Canada on prevention of harm to the environment and its commitment to sustainable development.

### **Key Elements**

The *Canadian Environmental Protection Act, 1999* has the following elements:

- authority for the Minister to require submission of information on any subject covered by the Act;
- authority to control the introduction into Canadian commerce of substances that are new to Canada;
- authority to obtain information on and to require testing of both new substances and substances already existing in Canadian commerce;
- provisions to control all aspects of the life cycle of toxic substances from their development, manufacture or importation, transport, distribution, storage and use, their release into the environment as emissions at various phases of their life cycle, and their ultimate disposal as waste;
- provisions to create guidelines and codes for environmentally sound practices as well as objectives that set desirable levels of environmental quality;
- provisions to control nutrients, such as phosphates, in water conditioners or cleaning products, including detergents, which can interfere with the use of waters by humans, animals, fish or plants;
- provisions to issue permits to control disposal at sea from ships, barges, aircraft and structures (excluding normal discharges from off-shore facilities involved in exploration for, exploitation and processing of seabed mineral resources);
- authority to regulate fuels and components of fuels;

- authority to control emissions from motors that power automobiles, trucks and other equipment such as lawnmowers, outboard motors and all-terrain vehicles;
- authority to control the export, import and transit through Canada, as well as shipments within Canada which cross internal provincial or territorial borders, of hazardous waste and hazardous recyclable material;
- authority to identify, by regulation, specific non-hazardous waste which may be exported, imported or travel through Canada in transit to another destination, where that non-hazardous waste is destined for final disposal, and authority to impose controls on those shipments;
- provisions to control sources of air or water pollution in Canada where a violation of an international agreement would otherwise result, or where the air or water pollution caused in Canada affects another country;
- authority to deal with environmental emergencies, where no other federal Act does so in a manner that protects the environment and human health;
- authority to regulate activities of federal departments, boards, agencies and Crown corporations to ensure that those activities have as little as possible negative impact on the environment;
- provisions to regulate federal works, undertakings and to regulate activities on federal land and aboriginal land, where no other federal legislation and/or regulations are in force and, in the opinion of the Governor in Council, provide sufficient protection to the environment and human health;
- authority to sign agreements with a provincial, territorial or aboriginal government or aboriginal people regarding administration of the Act;
- authority to sign agreements that recognize that legislation or regulations adopted by a provincial, territorial or aboriginal government are equivalent to CEPA regulations and will apply instead of the CEPA requirements; and
- provisions setting out the powers that may be exercised by the Minister, enforcement officers and CEPA analysts in enforcing the legislation.

### **Relationship between the Minister of Environment and the Minister of Health**

The Minister of Health has responsibility under the Act to provide advice in relation to human health aspects to the Minister of Environment. Among the subjects on which the Minister of Health may give advice are the toxicity of substances, the ability of the substance to become incorporated into and to accumulate in human tissue, and the ability of the substance to cause biological change, as well as the human health effects of

emissions and discharges from Canadian sources of international air or international water pollution. In addition, jointly with the Minister of Environment, the Minister of Health recommends regulatory actions for toxic substances to the Governor in Council.

## **Relationships with other governments under CEPA, 1999**

### **(a) Administrative Agreements**

Protection of the environment is a responsibility shared by all levels of government as well as by industry, organized labour and individuals. For this reason, the *Canadian Environmental Protection Act, 1999* gives the Minister of Environment the authority to conclude, with the approval of the Governor in Council, agreements with a provincial, territorial or aboriginal government or aboriginal people concerning the administration of the Act.

### **(b) Equivalency Agreements**

In addition, the legislation allows the Governor in Council, upon recommendation of the Minister of Environment, to make an order recognizing that requirements imposed by a provincial, territorial or aboriginal government are equivalent to regulations under the *Canadian Environmental Protection Act, 1999*. This means that the province, territory or aboriginal government will apply its equivalent requirements, rather than the regulation made under the federal Act.

The areas of CEPA, 1999 which are open to an order by the Governor in Council declaring the requirements of another government to be equivalent to those developed under CEPA, 1999 are:

- regulations dealing with toxic substances;
- regulations dealing with Canadian sources of international air or international water pollution;
- regulations dealing with environmental emergencies; and
- regulations respecting the practices of federal departments, boards, agencies, commissions, federal Crown corporations, federal works or undertakings, or respecting federal land or aboriginal land and persons on that land or whose activities involve that land.

For the recommendation to the Governor in Council, specific criteria will be used to determine equivalency. The factors to establish equivalency will include:

- equal level of control as sanctioned by law;
- comparable compliance measurement techniques;
- comparable penalties; and

- comparable rights for an individual, resident in Canada, to require investigation of a suspected offence and to receive a report of the findings.

In the annual report to Parliament on administration of the *Canadian Environmental Protection Act, 1999*, the Minister is required to include a specific accounting of activities conducted under equivalency agreements with provincial, territorial and aboriginal governments. The same requirement is imposed on the Minister for activities that take place under administrative agreements with provincial, territorial and aboriginal governments and those concluded with aboriginal people for implementation of the Act. Agreements will ensure that provinces, territories, aboriginal governments or aboriginal people enforcing all or any part of the statute, do so in a manner consistent with this policy. In addition, the agreements will spell out procedures for measuring performance.



## **Authorities Responsible for the Implementation of the *Canadian Environmental Protection Act, 1999***

The following authorities are responsible for implementation of the *Canadian Environmental Protection Act, 1999*.

### **Minister of Environment**

The Minister of Environment has responsibility for the administration of the Act. The Minister must act in accordance with the legislation and is accountable to Parliament for his or her actions.

### **Minister of Health**

Under the Act, the Minister of Health provides advice in relation to human health aspects and, jointly with the Minister of Environment, recommends regulatory actions for toxic substances. The Minister of Health also advises on the human health effects of emissions and discharges from Canadian sources of international air or international water pollution. However, the Minister of Health has no direct enforcement responsibility.

### **Enforcement Officers**

Enforcement officers are individuals with that designation under the *Canadian Environmental Protection Act, 1999*.

They can:

- carry out inspections to verify compliance with the law;
- direct that corrective measures be taken, where there is danger to the environment, human life or health, caused when the illegal release of a regulated substance has occurred or is about to occur;
- direct that conveyances, such as cars, trucks, trains and other means of transport be stopped and moved to a location suitable for inspection; and
- conduct investigations of suspected violations.

The powers of enforcement officers including entry, search, seizure and detention of items related to the enforcement of the *Canadian Environmental Protection Act, 1999* and the power to require the production of documents and electronically stored data as well as the power to issue tickets, directions and orders are detailed in the statute. In addition to these powers, a CEPA enforcement officer has the powers of a peace officer. At the time that the Minister designates a qualified individual to be an enforcement officer, the Minister has the authority, under CEPA, 1999, to specify limits on the peace officer powers that the enforcement officer may exercise.

### **Analysts**

CEPA, 1999 provides authority for the Minister to designate individuals to act as analysts for the purpose of any part or all of the Act. An analyst may be any qualified person, such as a laboratory technician, a toxicologist, a computer systems analyst, an engineer with expertise in a particular area such as metal finishing or the use of organic substances in industrial processes, or a forensic accountant.

CEPA analysts have the following powers:

- to enter any place or premises to which the Act or its regulations apply;
- to open receptacles;
- to take samples;
- to conduct tests and/or measurements;
- to require documents and/or data to be provided to them and take copies as necessary.

Analysts can only exercise those powers when they accompany an enforcement officer to a site.

CEPA analysts who carry out laboratory testing or analysis may have their evidence presented in court in the form of a certificate rather than in person.

### **Review Officers**

Review officers are appointed by the Minister of Environment. Their function is to review an environmental protection compliance order (EPCO), if the person subject to the order applies for a review. EPCOs are orders that enforcement officers are able to issue to prevent a violation from occurring, to stop a violation that is ongoing, or to order that a person carry out required conduct that they have omitted or refused to do. EPCOs are discussed in detail later in this policy, in the chapter entitled "Responses to Alleged Violations".

While review officers are appointed by the Minister of Environment, their salary is set by Governor in Council, in order to ensure an arm's length relationship from the Minister. The Minister chooses one of the review officers as Chief Review Officer. It is the Chief

who puts in place the procedures for reviews of EPCOs, and who assigns the various cases to his or her fellow review officers.

Decisions by review officers may be appealed to the Federal Court by the person subject to the EPCO or the Minister of Environment as described under the heading "Courts".

### **Attorney General and Officials of the Department of the Attorney General**

The Minister of Justice is the Attorney General for Canada. The Attorney General has responsibility for all litigation relating to the *Canadian Environmental Protection Act, 1999*. The Attorney General, the officials of the Department of the Attorney General and Crown prosecutors may also provide advice to CEPA enforcement officers respecting the preparation of :

- warnings, directions or environmental protection compliance orders, which are enforcement measures that are discussed in the chapter of this policy entitled "Responses to alleged Violations"; or
- documents to lay charges, or to secure inspection warrants or search warrants.

While enforcement officers may lay charges for offences under the Act, the ultimate decision on whether to proceed with prosecution of the charges rests with the Attorney General. With respect to an application for an injunction or a civil suit for recovery of costs in the various circumstances in which such recovery is allowed under the Act, enforcement officers will recommend these civil actions to officials of the Attorney General. The legal counsel of the office of the Attorney General will then have the ultimate decision on proceeding with the injunction or suit for cost recovery.

When considering litigative action under the Act, the Attorney General or Crown prosecutors acting on his or her behalf will have regard to this policy.

### **Courts**

The courts make the final decisions regarding prosecutions, injunction applications and civil suits under the *Canadian Environmental Protection Act, 1999*, including what penalty to impose or what remedy to order.

The Federal Court of Canada has a role regarding appeals which that Court may receive when a person subject to an environmental protection compliance order or the Minister of Environment is dissatisfied with the outcome of a review of the order conducted by a review officer under CEPA, 1999. The Federal Court of Canada would receive the appeal and decide whether to hear the case. If the Federal Court hears the case, it would render a decision, which would itself be appealable to the Federal Court of Appeal and to the Supreme Court of Canada.

## Measures to Promote Compliance

Environment Canada believes that promotion of compliance through information, education and other means is an effective tool in securing conformity with the law. Accordingly, Environment Canada will undertake public education and information transfer measures, as described in this chapter.

In addition, the department will meet as required with other federal departments and agencies, provinces, territories, aboriginal governments and aboriginal people, industry, environmental groups and other interested parties, so that information and concerns can be exchanged about the *Canadian Environmental Protection Act, 1999*, enforcement practices and compliance.

One of the roles of Environment Canada engineers, biologists, chemists, geologists and experts in environmental sciences is to promote compliance through various means that are described below. However, due to the nature of their responsibilities to verify compliance with CEPA, 1999 and to investigate suspected violations, enforcement officers and CEPA analysts will limit their compliance promotion activities to providing copies of CEPA, 1999, its regulations and this policy. For further information, scientific personnel and enforcement officers and analysts may also refer the public to Environment Canada's website at <http://www.ec.gc.ca>, called the "Green Lane".

Among the icons they will find at that site are the following: one with the title "CEPA Environmental Registry" and one with the title "Environmental Law Enforcement". The Registry, which CEPA, 1999 requires the Minister of Environment to create, contains the text of the Act itself, plus information about all aspects of the legislation, including environmental quality guidelines and objectives, release guidelines and codes of practice, existing and proposed regulations, assessments of substances indicating whether or not they are toxic under CEPA, 1999 and many other matters. The "Environmental Law Enforcement" icon provides access to information on enforcement under the Act, including any charges laid for CEPA violations..

### Education and Information

As stated above, under CEPA, 1999, the Minister of Environment is required to create an Environmental Registry. The registry is not a listing of document titles; it is rather a collection of all documents that are required to be published under the Act and its regulations, as well as those that the Minister, in his or her discretion, decides to publish even in the absence of an obligation to do so.

CEPA, 1999 also allows the Minister to give notice of the availability of a document. In cases where a document is very lengthy or has complicated drawings, industrial plans or specifications, it is possible that the registry will contain only notice of the availability of

the document, as well as a contact name or address from which the document may be obtained.

Through the Registry, Environment Canada will either provide or give notice of the availability of the following materials:

- copies of the *Canadian Environmental Protection Act, 1999* and its regulations;
- environmental quality guidelines and objectives, release guidelines, and environmental codes of practice, developed under the Act;
- the Compliance and Enforcement Policy for the Act;
- a list of court actions arising from enforcement of the *Canadian Environmental Protection Act, 1999*, such as:
  - injunctions, indicating the name of the individual, company or government agency, who is the subject of the injunction, the action required under the injunction, and the time schedule to complete the action,
  - convictions under the Act, indicating the identity of the offender, the nature of the offence, and the sentence imposed by the court,
  - court orders following conviction for an offence under the Act, indicating the identity of the offender and a summary of the contents of the order,
  - civil suits instituted by the Crown, such as those to recover reasonable costs of clean-up or those incurred to remedy damage to the environment, and
  - forfeitures of items seized under the Act;
- information on precedent-setting cases under the Act.

In addition, the department may use media releases distributed to newspapers, radio and television stations, to publicize situations where charges have been laid and/or prosecutions have been successful. Law enforcement agencies in Canada and throughout the world recognize that publicizing the laying of charges and the results of prosecutions is an effective means of deterring potential offenders.

### **Technical Information**

As explained above, enforcement officers and CEPA analysts will not be involved in providing technical information to other federal departments, agencies and federal Crown corporations, the private sector, provinces, territories, aboriginal governments and municipalities. This will be an area of endeavour reserved for Environment Canada

personnel who may be engineers, biologists, chemists, geologists or experts in environmental sciences. They may provide technical information on:

- pollution prevention, as well as pollution control;
- measures to prevent releases of substances into the environment; and
- methods for analysis and monitoring.

The department will also use other means to communicate technical information, including:

- publications, such as technical reports and newsletters intended to promote exchange of information between governments and industry nation-wide;
- seminars and conferences;
- training materials; and
- licensing of research developments by Environment Canada to the private sector.

### **Consultation on Regulation Development and Review**

Environment Canada believes that consultation on regulation development and amendment with both the parties to be regulated as well as the beneficiaries of regulation, results in better and more effective regulations for protection of the environment. Environment Canada also recognizes that compliance with regulations is more likely when there has been involvement by those parties in their development or amendment.

Environment Canada scientists and engineers who are responsible for the development of regulations will consult with affected parties at the stage of determining whether a problem exists that requires resolution, as well as during the development of any eventual regulation. In addition, CEPA, 1999 requires the Minister to seek advice or offer to consult on specific regulations. Under CEPA, 1999, the Minister must set up a National Advisory Committee, composed of one representative for each of the federal Ministers of Environment and Health, one representative from each province and territory, and one representative of aboriginal governments for each of the following regions: Atlantic (Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick); Quebec; Ontario; Prairie and Northern (Manitoba, Saskatchewan, Alberta, Northwest Territories and Nunavut); Pacific and Yukon (British Columbia and the Yukon Territory).

Proposed regulations will also be published in the *Canada Gazette* as well as in the CEPA Environmental Registry, at which time affected parties and members of the public have a minimum time of 60 days to comment on the text.

## **Environmental Codes of Practice and Guidelines**

While codes of practice and guidelines are not regulations and do not have the force of law, they can help achieve the objective of the *Canadian Environmental Protection Act, 1999*, namely the protection of the environment. The statute requires the Minister of the Environment to create environmental codes of practice, environmental quality guidelines and release guidelines. Environment Canada will develop these in consultation with interested parties, including provinces, territories, aboriginal governments and aboriginal people, industry and environmental groups. The personnel involved in the development of these guidance documents may be engineers, biologists, chemists, geologists or experts in environmental sciences.

Codes of practice as well as environmental quality and release guidelines can assist the putting in place of management practices that will result in better protection for the environment. Codes focus on substances and the processes and techniques related to their production and use, including activities such as handling, packaging, distribution, transport, and disposal. Environment Canada will base codes of practice on available and practicable technology.

Codes will contain technological information on alternatives to achieve protection of the environment. They may detail procedures, practices or release limits relating to works and undertakings during any phase of development or operation, including siting, design, construction, start-up, closure, and dismantling.

Environmental quality guidelines and release guidelines focus on the ambient environment. Environmental quality guidelines recommend acceptable levels of a particular substance in air, water or soil, to protect a specific use of that component of the environment. These guidelines will serve as:

- “yardsticks” to determine whether the environment and human health are being sufficiently protected; and
- targets for pollution prevention or pollution control programs by industry and government agencies.

Release guidelines will recommend limits for the release of substances into the environment. These guidelines, like codes of practice, will be based on what is acceptable environmental practice, founded on available and practicable technology.

As is the case with proposed regulations, the Minister of Environment is required by CEPA, 1999 to offer to consult on proposed environmental quality guidelines and objectives, release guidelines, and codes of practice. Comments from provincial, territorial and aboriginal governments, those who may use the objectives, guidelines and codes of practice in their manufacturing, commercial or other operations, environmental and labour groups and the public at large help Environment Canada produce useful information. In addition, under the *Canadian Environmental Protection Act, 1999*, the

Minister of Environment is required to publish, in the *Canada Gazette* and in the Environmental Registry, either notice of the availability of codes and guidelines developed under the Act, or the texts themselves.

### **Promotion of Environmental Audits**

Environmental audits are internal evaluations by companies and government agencies, to verify their compliance with legal requirements as well as their own internal policies and standards. They are conducted by companies, government agencies and others on a voluntary basis, and are carried out by either outside consultants or employees of the company or facility from outside the work unit being audited. Audits can identify compliance problems, weaknesses in management systems, or areas of risk. The findings are documented in a written report.

Environment Canada recognizes the power and effectiveness of environmental audits as a management tool for companies and government agencies, and intends to promote their use by industry and others.

To encourage the practice of environmental auditing, inspections and investigations under the *Canadian Environmental Protection Act, 1999* will be conducted in a manner which will not inhibit the practice or quality of auditing. Enforcement officers and CEPA analysts will not request environmental audit reports during routine inspections to verify compliance with the Act.

Access to environmental audit reports may be required when enforcement officers have reasonable grounds to believe that:

- an offence has been committed;
- the audit's findings will be relevant to the particular violation, necessary to its investigation and required as evidence;
- the information being sought through the audit cannot be obtained from other sources through the exercise of the enforcement officer's powers.

In particular reference to the latter criterion, environmental audit reports must not be used to shelter monitoring, compliance or other information that would otherwise be accessible to enforcement officers or analysts under the *Canadian Environmental Protection Act, 1999*.

Any demand for access to environmental audit reports during investigations will be made under the authority of a search warrant. The only exception to the use of a search warrant is exigent circumstances, that is, when the delay necessary to obtain a warrant would likely result in danger to the environment or human life, or the loss or destruction of evidence.



## **Inspection and Investigation**

Enforcement officers appointed under the *Canadian Environmental Protection Act, 1999* carry out two categories of enforcement activity: inspection and investigation. A general discussion of these two types of activity follows.

### **Inspection**

The purpose of an inspection is to verify compliance with the *Canadian Environmental Protection Act, 1999* and its regulations. To conduct an inspection of premises other than a private dwelling, an enforcement officer must have reasonable grounds to believe that, on the premises that he or she intends to enter and inspect, there are activities, materials, substances, records, books, electronic data or other documents that are subject to the Act or relevant to its administration.

Sometimes, an enforcement officer may be refused entry to premises where there are activities, materials, substances, records, etc. that are relevant to the Act. The officer may also find premises that are locked or abandoned. Those premises could be factories, distribution centres or the offices of private companies or federal institutions. For such cases, an enforcement officer may seek an inspection warrant from a justice of the peace. In the inspection warrant, the justice may name any person to accompany the enforcement officer or authorize, in the inspection warrant, the use of any power that the justice deems required, including the use of force to break locks or force open a locked door.

In the case of a private dwelling which the enforcement officer has reasonable and probable grounds to believe may be subject to inspection under CEPA, 1999 or any of its regulations, the officer is required to seek the consent of the occupant, in order to carry out the inspection. Where consent is refused, the officer must obtain an inspection warrant, and can seek, from a justice, authorization for persons to accompany him or her or to use force as described in the previous paragraph.

In the course of an inspection, an enforcement officer may examine substances or products, open and examine receptacles, containers or packages, and take samples. The officer may also examine books, records or electronic data and make copies of them.

If, during an inspection, an enforcement officer must shift to the investigative role, he or she will so indicate to the individual, company or government agency. The enforcement officer will act similarly if, in an emergency, he or she must direct or cause action to be taken following an unauthorized release or to prevent such a release.

If, as described above, an enforcement officer discovers a violation during an inspection, the officer may determine that circumstances are exigent and that he or she must take action on the spot. In exigent circumstances, namely, when the delay necessary to obtain a warrant would likely result in danger to the environment or human life or in the loss or

destruction of evidence, the enforcement officer will begin an investigation immediately and, where necessary, exercise the power to search without a warrant, and to seize and detain items. In all other circumstances, where the enforcement officer has determined that further investigation is required, this will be done under the authority of a search warrant. Investigation of violations is discussed below. The possible responses to violations discovered by enforcement officers are discussed in detail in the chapter of this policy entitled "Responses to Alleged Violations".

### **Inspection Program**

There will be a program of inspections, complemented by spot checks. The schedule of inspections will be determined by the risk that the substance or activity presents to the environment or to human health, and by the compliance record of the individual, company or government agency. In addition, it is generally the case that, when new regulations are brought into effect, they are identified as priorities within Environment Canada's inspection program under CEPA, 1999. Inspection schedules will also be established to verify adherence to:

- warnings;
- directions by enforcement officers;
- Ministerial orders;
- environmental protection compliance orders;
- injunctions;
- environmental alternative measures; and
- court orders upon conviction of an offender.

Ministerial orders as well as directions by enforcement officers, environmental protection compliance orders and environmental protection alternative measures will be discussed in the chapter entitled "Responses to Alleged Violations".

If information or complaints have been brought to the attention of enforcement officers, additional inspections will be carried out as required. In addition, enforcement officers may develop a special inspection schedule when companies or facilities undertake expansion or alteration of a process.

### **Investigation**

An investigation involves gathering, from a variety of sources, evidence and information relevant to a suspected violation. A search is a component of an investigation, and the search power may be used by enforcement officers when fulfilling their duties under the *Canadian Environmental Protection Act, 1999*.

There are two instances in which an enforcement officer will conduct an investigation:

- when he or she has reasonable grounds to believe that an offence has been committed under the Act; or
- when an individual of at least 18 years of age, resident in Canada, petitions the Minister to investigate an alleged violation of the Act.

The only occasion when an enforcement officer will not seek a search warrant is in exigent circumstances as stated above.

During the course of a search with or without a warrant, enforcement officers may seize and detain anything which they reasonably believe was used to commit an offence under the Act, is related to the commission of an offence or will provide evidence of an offence. Enforcement officers will use their powers of seizure and detention, when they believe that the seizure is necessary and in the public interest. Reasons for seizure and detention may include:

- the need to take possession of a substance, equipment or any other thing to prevent danger to the environment, human life or health;
- the need to prevent distribution of a prohibited substance, products containing a prohibited substance, or substances new to Canada, for which the required information has not been provided to the Minister under the Act;
- the need to prevent the export of a substance for which notice of export to the receiving country is required, when that notice has not been provided to the receiving country or to the Minister within the prescribed time;
- the need to prevent further violation of the Act; or
- the need to prevent loss or destruction of evidence.

The enforcement officer may also move the seized substance, product, equipment or thing to a secure location when he or she believes that it is necessary and in the public interest.

## Responses to Alleged Violations

Enforcement officers will examine every suspected violation of which they have knowledge. If, after that examination, they determine that there is insufficient evidence to prove the alleged violation or that the alleged violation did not, in fact, occur, they will take no further enforcement action. If they are able to substantiate that a violation took place and there is sufficient evidence to proceed, they will take action consistent with the criteria in this chapter, and will choose the appropriate response among the different types reviewed here.

### Criteria for Responses to Alleged Violations

Whenever an alleged violation of the *Canadian Environmental Protection Act, 1999* is discovered, enforcement officers will apply the following factors when deciding what enforcement action to take:

- **Nature of the alleged violation** - This includes consideration of the seriousness of the harm or potential harm, the intent of the alleged violator, whether this is a repeated occurrence and whether there are attempts to conceal information or otherwise subvert the objectives and requirements of the Act.
- **Effectiveness in achieving the desired result with the violator** - The desired result is compliance with the Act, within the shortest possible time and with no further occurrence of violation. Factors to be considered include the violator's history of compliance with the Act and, if applicable, with regulations by a provincial, territorial or aboriginal government that are deemed, by Order in Council, to be equivalent to those under CEPA, 1999, willingness to co-operate with enforcement officers, evidence of corrective action already taken, and the existence of enforcement actions under other statutes by other federal authorities or by provincial, territorial or aboriginal governments as a result of the same activity.
- **Consistency in enforcement** - Enforcement officers intend to achieve consistency in their responses to alleged violations. Accordingly, officers will consider how similar situations were handled when deciding what enforcement action to take.

### Responses to Alleged Violations

The following responses are available to deal with alleged violations of the *Canadian Environmental Protection Act, 1999* and its regulations: warnings, directions by enforcement officers, tickets, Ministerial orders, environmental protection compliance orders, detention orders for ships, injunctions, prosecution, environmental protection alternative measures, court orders following conviction, and civil suits by the Crown to recover costs.

While each fact situation will be different in relation to alleged violations of CEPA, 1999, probably the most important factor in determining an enforcement response is the effectiveness of the response in securing compliance as quickly as possible with no recurrence of violation. Therefore, except in circumstances where prosecution will always be pursued as described later in this chapter, the enforcement officer will give first consideration to an enforcement response among warnings, directions, Ministerial orders, detention orders for ships and environmental protection compliance orders, as these do not require a court proceeding, and compliance may be restored in a shorter time frame that would be possible through a court prosecution. A ticket will also be among the measures given first consideration as an enforcement response in the circumstances described at the heading "Tickets". However, a court hearing is always an option that can be elected by an accused who receives a ticket and who wishes to plead not guilty.

Nevertheless, it is important to remember that, where the severity of the environmental harm or risk of environmental harm, the factual circumstances of the alleged offence or the compliance history of the offender are such that prosecution or other court action would provide the most effective deterrent to the violator, the enforcement officer will choose a court proceeding.

## Warnings

Enforcement officers may use warnings:

- when they believe that a violation of the Act is continuing or has occurred; and
- when the degree of harm or potential harm to the environment, human life or health appears to be minimal.

When deciding whether to use warnings or more severe enforcement action, enforcement officers may also consider:

- whether the individual, company or government agency has a good history of compliance with the *Canadian Environmental Protection Act, 1999* and with provincial, territorial or aboriginal government regulations deemed, by Order in Council, to be equivalent to those under the federal Act; and
- whether the individual, company or government agency has made reasonable efforts to remedy or mitigate the consequences of the alleged offence or further offences.

Warnings will always be given in writing. When necessary, however, enforcement officers may initially give a warning orally. This is to be followed as soon as possible by a written warning.

The written warning will contain the following information:

- the section of the Act or regulations involved;
- a description of the alleged offence; and
- a statement that, if the alleged violator does not take necessary action, the enforcement officer will consider taking other steps.

When an enforcement officer uses a warning, it brings an alleged violation to the attention of an alleged violator, in order to promote any necessary action by that person. Warnings do not have the legal force of an order. Furthermore, they are not a finding of guilt or civil liability. Warnings and the circumstances to which they refer will form part of the records of Environment Canada. In addition, warnings will be taken into account in future responses to alleged violations, and may influence the frequency of inspection.

When an alleged violator receives a warning, the individual, company or government entity may wish to provide written comments to the enforcement officer who signed the warning. The enforcement officer will take the comments into consideration and, where appropriate, will respond to the alleged violator who received the warning. The comments and any response to them will be attached to the warning. Both the comments and response will then be placed in the compliance history file of the individual, company or government entity.

### **Directions in the Event of Releases**

Where there is a release of a substance in contravention of regulations under the *Canadian Environmental Protection Act, 1999* or the likelihood of such a release, an enforcement officer may give directions to the person, company or government agency that owns the substance or that has or had charge, management, or control of the substance at the relevant time, or that caused or contributed to the release, to take all reasonable emergency measures:

- to prevent the release if it has not already occurred;
- to remedy any dangerous condition; or
- to reduce any danger to the environment or human life or health that results from the release of the substance or may reasonably be expected to result from the release of the substance.

As the Act already imposes on individuals, companies and government agencies the obligation to take such measures, an enforcement officer will not ordinarily issue such directions unless these obligations are not being met. The directions will be given in

writing, but, during the initial response to an emergency, directions may be given orally and later confirmed in writing.

Failure to comply with a direction by an enforcement officer will lead to prosecution of the individual, company or government agency for this failure. Also, in the event of failure or inability to comply with an enforcement officer's direction, the officer is empowered under the Act to take the action him or herself or to hire qualified experts to take the emergency measures.

### **Tickets**

Tickets are available for offences under CEPA, 1999 where there is minimal or no threat to the environment or human life or health. Where an offence is designated as ticketable, enforcement officers will always issue a ticket, unless they have determined that, in accordance with the criteria of this policy, a warning is the appropriate response. In cases where an alleged ticketable offence continues for more than one day, enforcement officers are able to issue a ticket for every day that the alleged offence continues.

Ticketing regulations to identify which CEPA, 1999 offences are punishable by ticket, the associated fine and procedures for individuals, companies, and government agencies to respond to tickets have been developed under the federal *Contraventions Act*. Examples of ticketable CEPA offences are the failure to provide information or a report as required by regulations made under CEPA, 1999, or the failure to provide information or documents within the stipulated time limit.

Upon being issued a ticket by a CEPA enforcement officer, the accused may, within the time limit stated on the ticket:

- plead guilty and pay the fine to the appropriate court as prescribed on the ticket without making a formal court appearance;
- plead guilty with an explanation and appear in court to request a lesser fine or additional time to pay the fine; or
- submit a plea of not guilty, resulting in formal court proceedings.

If the accused fails to choose an option within the stated time limit, he or she, the company or the government agency involved has waived the right to challenge the ticket. A conviction is then entered against the accused, and provincial or territorial authorities will take measures to collect the outstanding fine in accordance with the applicable provincial or territorial law.

Effectiveness in restoring a violator to compliance is an important criterion in determining the appropriate response to a violation. Consequently, if an enforcement officer has already issued a ticket for an alleged offence – whether it is a single ticket or

several tickets to cover the number of days that an alleged offence continues – and if the same offender commits the same violation under a different fact situation, this is an indication that issuance of a ticket by the enforcement officer was not effective in restoring compliance. Under those circumstances, the enforcement officer will issue an environmental protection compliance order, or consider prosecution for the alleged offence, both of which are described later in this chapter.

### **Ministerial Orders**

The Minister of Environment may issue three types of order under the *Canadian Environmental Protection Act, 1999*. These are orders that:

- prohibit activities involving substances new to Canadian commerce;
- compel the recall, from the marketplace, of a substance, a product containing the substance, a nutrient, a fuel or a vehicle whose emissions are regulated under CEPA, 1999;
- require more information on, or testing of, substances suspected of being toxic, and to prohibit their manufacture or importation, or to limit these two activities, until expiry of the assessment period to determine the risk that they present to the environment.

Only the first two Ministerial orders are for use in response to alleged violations. They are measures for prompt and immediate action to prevent unlawful manufacture, importation, distribution or sale of a substance or a product containing that substance, or to recall the substance, product, nutrient, fuel or motor vehicle from the marketplace. They may be used as responses to alleged violations in themselves or in conjunction with prosecution.

#### ***Prohibition Orders involving Substances New to Canadian Commerce***

The Minister is empowered to prohibit, in writing, any activity involving a substance new to Canadian commerce, when he or she has reasonable grounds to believe that the substance has been manufactured in or imported into Canada in violation of the Act.

The prohibition will remain in effect until expiry of the period prescribed for assessing the substance.

In addition to the prohibition issued by the Minister, if the offence giving rise to the prohibition meets the criteria for prosecution as listed below, charges will be laid by an enforcement officer for the offence of illegal manufacture or importation of the substance.



### ***Recall Orders***

The Minister of Environment is empowered:

- to issue orders to recall a substance or product from the marketplace, where there is a contravention of the provisions of the Act or its regulations governing substances or products, including toxic substances or products containing same; and
- to direct those orders to manufacturers, processors, importers, distributors or retailers.

The Minister has this same power where there is a contravention of the provisions of the Act or its regulations governing nutrients, cleaning products, water conditioners, or fuels. In the case of nutrients, the Minister may direct the order to importers and/or manufacturers; in the case of fuels, the order could be directed to any or all of the following: a producer, processor, importer, retailer or distributor.

The recall order may direct the person named in the document to do any or all of the following:

- give public notice of any danger to the environment, human life or health;
- mail this notice to:
  - manufacturers, distributors or retailers of the substance or product;
  - manufacturers, processors, distributors or retailers of the nutrient, cleaning product or water conditioner;
  - producers, processor, importer, retailer or distributor of the fuel; as well as
  - every individual, company or government agency to whom the substance, product, nutrient or fuel is known to have been delivered or sold.
- replace the item by one that does not pose a danger to the environment, human life or health;
- accept the return of the item and reimburse the purchase price to the purchaser;
- undertake any other measures appropriate for the protection of the environment or human life or health.

The Ministerial order will be issued to ensure removal of the substance or other item listed above from the marketplace. Further, if the alleged offence giving rise to the order meets the criteria for prosecution as listed below, charges for the alleged offence will be laid by an enforcement officer.

## **Detention Orders for Ships**

Enforcement officers have authority under CEPA, 1999 to issue an order directing detention of a ship, where the officer has reasonable grounds to believe that:

- the owner or master of a ship has committed an offence under the Act, and
- the ship was used in connection with the commission of the violation.

An example of those reasonable grounds could be where a ship has been used to import into Canada a substance that is new to Canadian commerce, and the Minister of Environment has not received notification of the import of the substance. In this example, in view of the failure to notify, the Minister has not assessed the new substance to determine whether or not it is toxic within the meaning of CEPA, 1999 or whether the Minister should impose a condition related to its import, use or required reporting in the case of any significant new activity involving the substance. Another example could be an import of a hazardous waste that violates the Act or its regulations. Another example could be a ship that is seeking to dispose of waste at sea and is about to do so, either in the absence of an ocean disposal permit or in violation of the conditions of a permit which has been granted under CEPA, 1999.

Before issuing a detention order for a ship, the enforcement officer will consider whether or not:

- there is a risk of flight by the ship;
- there is a risk of loss or destruction of evidence; or
- off-loading of the cargo that is suspected to be in violation of the Act would require detention of the ship for a period of days.

Also, before issuing such a detention order, the enforcement officer will ensure that the action is in accordance with international and Canadian maritime law.

## **Environmental Protection Compliance Orders**

An enforcement officer is empowered to issue an environmental protection compliance order to:

- prevent a violation from occurring;
- stop or correct one that is occurring or continuing over a period of time; or
- correct an omission where conduct is required by CEPA, 1999 or one of its regulations, and that conduct is not occurring.

It is possible to issue compliance orders to deal with any offence under CEPA, 1999. They are a means to secure an alleged violator's return to compliance, without use of the court system. Examples of instances where an enforcement officer may use an environmental protection compliance order are:

1. previously, the enforcement officer had issued the offender a warning or ticket for the particular offence, but the offender did not return to compliance;
2. in the case of a previous release of a substance in contravention of CEPA regulations, the officer had issued a direction, but the circumstances that resulted in the earlier release continue and a subsequent illegal release is likely;
3. required conduct is not being carried out; for instance, a system required, by regulation, for the continuous or automatic monitoring of emissions is turned off;
4. improper containers required for storage of a toxic substance are being used or proper containers are being used, but they are not labelled as required; or
5. an individual, company or government agency that was required to prepare and implement a pollution prevention plan or an environmental emergency plan failed to do so.

The environmental protection compliance order will direct the alleged violator to take the measures required to return to compliance. The order imposes no financial or other penalty. As noted under the heading "Prosecutions", failure to comply with the EPCO is an offence for which prosecution will be undertaken.

### **Injunctions**

Under the *Canadian Environmental Protection Act, 1999*, the Minister has the authority to seek an injunction, in order to stop or prevent a violation of the legislation. Where a violation has already occurred, in addition to seeking an injunction, and where appropriate under this Compliance and Enforcement Policy, the Minister will pursue prosecution or civil action for recovery of the costs of preventive or corrective measures taken by the Minister.

Enforcement officers will carry out inspections to ensure that the individual, company or government agency cited in the injunction is complying with the terms of the injunction. If the individual, firm or government agency does not comply with the injunction, the Minister will return to the court to seek:

- a contempt of court ruling;

- instruction by the court for the individual, company or government agency to comply within the stated time limit with the injunction; and
- any additional penalty, such as a fine or imprisonment, that the court may see fit to impose in its contempt of court ruling.

### **Prosecution**

Enforcement officers will lay a charge for every alleged violation of the *Canadian Environmental Protection Act, 1999*, except where, in accordance with this policy, they determine that one of the following responses is sufficient and appropriate;

- a warning;
- a ticket under the ticketing regulations of the federal *Contraventions Act*;
- a direction by an enforcement officer;
- an order by the Minister of Environment prohibiting activities involving a substance new to Canadian commerce or a recall order by the Minister; or
- an environmental protection compliance order.

Prosecution will **always** be pursued when:

- there is death of or bodily harm to a person;
- there is serious harm or risk to the environment, human life or health;
- the alleged violator knowingly provided false or misleading information, or made a false or misleading test of a substance in purported compliance with the Act;
- the alleged violator obstructed the enforcement officer or CEPA analyst in the carrying out of his or her duties and responsibilities under the Act;
- the alleged violator interfered with a substance seized by an enforcement officer under the Act;
- the alleged violator concealed or attempted to conceal information after the offence occurred;
- the alleged violator did not take all reasonable measures to comply with:
  - a direction by an enforcement officer;

an order by the Minister prohibiting activities involving substances new to Canadian commerce, manufactured in or imported into Canada in contravention of the Act;

a recall order imposed by the Minister;

an order by the Minister to the individual, company or government agency that provided information on a substance that the Minister of Environment and the Minister of Health suspect is toxic, and

- requiring additional information on or testing of the substance, or
- prohibiting manufacture or importation of the substance, until expiry of the assessment period;

an environmental protection compliance order; or

environmental protection alternative measures.

The Act stipulates that certain offences are to be prosecuted by summary conviction and others, by way of indictment. Other offences under the Act may be prosecuted by either means. In cases where prosecution may take place by either means, it is up to the Crown prosecutor to decide whether to prosecute by way of summary conviction or by way of indictment.

### **Environmental Protection Alternative Measures**

Environmental protection alternative measures are similar to provisions in the *Criminal Code* and in the *Young Offenders Act*, which allow for a negotiated return to compliance without a court trial. Alternative measures under those other two federal Acts are available for individuals but not offenders which are corporations or government bodies. CEPA, 1999 provides for alternative measures that can be applied whether the violator is a corporation, government body or individual.

The choice to use environmental protection alternative measures in a particular case is made by the Attorney General of Canada or an agent of the Attorney General. In practical terms, that means a Crown prosecutor authorizes the use of alternative measures, after consultation with the Minister of Environment who will be represented in such cases by an enforcement officer.

Alternative measures can be used for most offences under CEPA, 1999, except for violations involving:

- injury or death or risk of injury or death;

- a disaster leading to loss of use of the environment;
- knowingly providing false or misleading information to the Minister of Environment, an enforcement officer or a CEPA analyst;
- manufacture, import or use of substances new to Canadian commerce, before the Minister has been notified of them and before they have been assessed to determine whether or not they are toxic or capable of becoming toxic ;
- harassment, discipline, demotion, suspension or dismissal by an employer of an employee who reported a CEPA violation or who refused to carry out an action that would violate CEPA, 1999;
- failure to comply with a recall imposed by the Minister;
- failure to give all reasonable assistance to an enforcement officer or CEPA analyst;
- obstruction of an enforcement officer or CEPA analyst in their conduct of their duties; and
- failure to comply with the conditions of a negotiated environmental protection alternative measures program.

There are pre-requisites to participation by an offender in an environmental protection alternative measures program. First, a charge for the alleged offence must be laid. Then, the Crown prosecutor, after consulting with the enforcement officer responsible for the case, must be satisfied that:

- protection of the environment and human life and health will be satisfied by the use of alternative measures; and
- the accused's compliance history makes it likely that the accused will abide by the negotiated alternative measures and return to compliance with CEPA, 1999.

In addition, the Crown prosecutor will examine whether or not the accused took any corrective action after the violation or preventive measures to ensure that the alleged offence does not occur again, and whether or not the accused was co-operative or attempted to conceal information. The prosecutor will rely upon the enforcement officer to recommend whether or not the two criteria related to protection of the environment and human life or health and the accused's compliance history are met, and to provide evidence of the degree of co-operation and the extent of corrective or preventive measures taken by the violator following commission of the alleged offence.

The accused is not required to plead guilty to the violation, but must, nevertheless, accept responsibility for the offence. The accused and the Crown prosecutor have only 180 days

from the date of the first disclosure of evidence by the Crown to the accused, in which to negotiate environmental protection alternative measures.

If an accused meets all the pre-requisites and agrees to negotiate, but the Crown prosecutor and the accused cannot successfully negotiate alternative measures within the 180 days, the court prosecution will proceed.

If an environmental protection alternative measures agreement is successfully negotiated, it is filed with the court and is a public document. The agreement must also appear in the CEPA Environmental Registry that the Minister of Environment is required to create under s.12 of the Act.

Upon fulfillment of the conditions of the negotiated alternative measures, the court will dismiss the charges against the accused. However, if the accused fails to comply with the negotiated environment protection alternative measures, this is an offence under CEPA, 1999, and, as noted under the heading "Prosecutions", prosecution for the failure to comply will be undertaken.

### **Penalties and Court Orders Upon Conviction**

Upon conviction of an offender for a violation of the *Canadian Environmental Protection Act, 1999*, enforcement officials will, on behalf of the Minister, recommend that Crown prosecutors request penalties that are proportionate to the nature and gravity of the offence. Penalties provided under the Act include fines or imprisonment or both, court orders to accompany a fine or imprisonment, and court orders governing conditional discharge of the offender.

Criteria to guide the courts when imposing penalties or court orders are included in CEPA, 1999. The decision to provide sentencing guidelines in the Act was based on the recommendations of the 1987 Report of the Canadian Sentencing Commission, and is consistent with case law, such as *R. v. United Keno Mines*. Nevertheless, this is guidance only. The courts are not compelled by the Act to follow the CEPA sentencing principles.

Following a conviction, it is a regular occurrence for Crown prosecutors, after consultation with enforcement officers, to recommend a sentence in each case. When making a recommendation to Crown prosecutors with respect to sentencing, enforcement officers will apply the criteria found in CEPA, 1999. Examples of those criteria are:

- the harm or risk of harm caused by the commission of the offence;
- an estimate of the total costs to remedy or reduce the negative effect of any damage caused by commission of the offence;
- whether or not any corrective or preventive action has been taken or proposed by the offender;

- whether the offence was committed intentionally, recklessly or inadvertently;
- whether there was negligence or a lack of concern on the part of the offender;
- what profits or benefits the offender earned as a result of the commission of the offence;
- the offender's compliance history; and
- in the case of an aboriginal offender, any particular circumstances of the aboriginal offender.

In addition to considering the criteria for sentencing found in CEPA, 1999, enforcement officers will recommend a penalty and/or court order that will, in their view, be effective in deterring others from the committing the same or other violations of the Act.

#### **Use of Court Orders Upon Conviction**

Upon conviction of an offender, the enforcement officer responsible for the case may request that, in their sentence, courts include one or more of the orders provided under the statute. The following list is not exhaustive but gives some examples. Orders may be requested to:

- a) prohibit the offender from doing any activity that may result in continuation or repetition of the offence;
- b) direct the offender to correct resulting harm to the environment or to take measures to avoid potential harm;
- c) require the offender to prepare and implement a pollution prevention plan or environmental emergency plan;
- d) direct the offender to carry out environmental effects monitoring or to pay the costs of such monitoring;
- e) require the offender to perform community service;
- f) direct that the offender pay money to environmental, health or other groups that work in the community where the offence was committed; or
- g) require the offender to pay funds to an educational institution for scholarships for students enrolled in environmental studies.



The type of order requested by the enforcement officer will depend on the violation.

Enforcement officers will request orders of type a), when there is likelihood of the offence being repeated by the offender. Type b) court orders will be requested when the damage to the environment is correctable or when the individual, company or government agency convicted of the offence needs to take measures to avoid future harm.

Type c) orders should lead to prevention of further pollution, or implementation of environmental emergency plans when there are sudden and controlled but illegal releases. Enforcement officers will request type d) orders in instances where the offence may have caused serious, negative environmental effects, and it is necessary to monitor what is happening in the receiving environment to determine whether or not it returns to health and, if it does, how long that process takes.

The type e) order directing the offender to perform community service will be requested by enforcement officials when the harm affected a community at large.

As far as type f) orders are concerned, enforcement officers may request payment of funds to further the work of community environmental, health or other groups, in order to increase awareness of the need to protect the environment or to increase knowledge of wildlife or of the need to protect its habitat. Type g) orders focus on the future contributions that students educated on environmental matters may make to the protection of the environment or the prevention of pollution.

Enforcement officials may request more than one order where appropriate. For instance, if a substance was new to Canadian commerce and manufactured in contravention of the Act, and if releases and wastes during the manufacturing process led to environmental damage, enforcement officials may, in addition to any fine or imprisonment imposed, request that the court issue a type a) order directing that the offender cease manufacturing activities that contravene the Act until after the substance has been assessed as required under the statute, as well as a type b) order directing the offender to correct the resulting environmental damage.

Failure to comply with a court order issued under the Act is a violation of the statute. Enforcement officials have three options when choosing a response to this violation: prosecution, civil suit for recovery of monies, and contempt of court proceedings.

In most instances, where a court order is not complied with, enforcement officials will lay charges. A separate offence is committed for each day that the failure to comply continues. In addition, the option of civil suit or contempt of court proceedings may be appropriate.

A civil suit can be used where the court order imposes a financial penalty which the offender fails to pay. Examples are where the offender is directed to compensate the Minister for the cost of preventive or corrective measures that the Minister was obliged to

take as a result of the offence, or where the offender is directed to pay monies to an educational institution for scholarships and fails to do so.

Contempt of court is a procedure by which the courts enforce compliance with their orders. Contempt of court proceedings may be appropriate where failure to comply with the order imposed on the offender would lead to continuing risk or harm to the environment, human life or health. Examples are where the court directs that the offender:

- refrain from any activity that may result in the continuation or repetition of the violation; or
- take specified action to correct harm to the environment, or to avoid future harm.

### **Civil Suit by the Crown to Recover Costs**

The *Canadian Environmental Protection Act, 1999* empowers the Crown to recover costs by civil suit when:

- a) an enforcement officer was required to carry out clean-up or hire qualified experts to do so, because of the unauthorized release of a regulated substance into the environment that resulted in jeopardy to public safety or a danger to the environment, human life or health;
- b) an enforcement officer was obliged to take measures to prevent the unauthorized release of a regulated substance;
- c) an enforcement officer was obliged to take measures where any person fails to comply with an environmental protection compliance order;
- d) the Minister incurs publication costs when he or she publishes the facts related to an offence, because the offender was required by court order to publish these facts, and did not comply with the order;
- e) the Minister is owed compensation, because the offender was required by court order to pay part or all of the costs for preventive or corrective measures (including clean-up) taken by the Minister as a result of the offence, and did not comply with the order.

It is possible to recover costs in cases a), b) and c) when:

- there was no prosecution;
- there was a prosecution, but an order for recovery of such costs was not obtained; or

- prosecution did not result in a conviction.

The defendant would be the individual, company or government agency that owned or had charge of a substance immediately before its initial release into the environment, or that caused or contributed to that release.

In cases d) and e), the offender is clearly identifiable, and the matter of an offence has been proven. These costs arise from court orders upon conviction for a violation of the Act.

Enforcement officers will attempt to obtain recovery of the costs through negotiation. Failing an out of court settlement, the Crown will initiate or proceed with civil action under the legislation.

## **For More Information**

Anyone who has questions about the Compliance and Enforcement Policy or who wishes further information about enforcement procedures should contact one of the following:

### **Environment Canada Headquarters**

Director, Enforcement Branch  
National Programs Directorate  
Environmental Protection Service  
Environment Canada  
Ottawa, Ontario K1A 0H3

### **Regional Offices**

For residents of Newfoundland, Prince Edward Island, Nova Scotia and New Brunswick:

Director, Environmental Protection - Atlantic  
Environment Canada  
45 Alderney Drive  
Dartmouth, Nova Scotia B2Y 2N6

For residents of Quebec:

Director, Environmental Protection - Quebec  
Environment Canada  
105 McGill, 4th Floor  
Montreal, Quebec H2Y 2E7

For residents of Ontario:

Director, Environmental Protection - Ontario  
Environment Canada  
4905 Dufferin Street  
Downsview, Ontario M3H 5T4

For residents of Manitoba, Alberta, Saskatchewan, the Northwest Territories and Nunavut:

Director, Environmental Protection - Prairie and Northern  
Environment Canada  
4999 - 98th Avenue  
Edmonton, Alberta T6B 2X3

For residents of British Columbia and the Yukon:

Director, Environmental Protection - Pacific and Yukon  
Environment Canada  
224 West Esplanade  
North Vancouver, British Columbia V7M 3H7

## Notes

## **National Library of Canada cataloguing in publication data**

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- I. Canada. Environment Canada.**

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**344.71'046**

**C2001-980130-0**



© Minister of Public Works and Government Services Canada 2001

This is Exhibit E referred to in the Affidavit  
of Patrick Whitty

sworn before me on this 6th day

of September, 20 11



Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.



[http://www.ec.gc.ca/lcpe-cepa/52F570CF-DBDA-1686-B047-8AF4261F3C53/fi-fs13\\_eng.pdf](http://www.ec.gc.ca/lcpe-cepa/52F570CF-DBDA-1686-B047-8AF4261F3C53/fi-fs13_eng.pdf)

## **The Canadian Environmental Protection Act (CEPA 1999) and Enforcement**

### **A duty to enforce the law**

Canadians expect their government to provide laws and regulations in order to protect them and their society, and these laws must be effectively enforced. The Parliament of Canada has ensured that CEPA 1999 is enforced by stipulating the Government of Canada's duty of enforcement directly in the Act.

### **The role of enforcement under CEPA 1999**

When regulations are developed under CEPA 1999, stakeholders provide input and comment at various stages. Compliance is easier when those being regulated understand the purpose of regulations and have input into their creation. Environment Canada promotes compliance through fact sheets, manuals, guidelines and technical assistance.

Enforcement is part of the compliance continuum, and part of the goal in achieving the highest level of environmental quality for all Canadians, a goal stated in the Preamble of CEPA 1999. Usually, the first stage of enforcement is inspection by site visit or review of submitted reports as a means of verifying compliance with the Act and its regulations. An effective approach by Environment Canada in providing opportunities for input to the creation of regulations and in compliance promotion should result in a high rate of compliance. In cases of non-compliance, enforcement officers will investigate. If a violation is confirmed, action will be taken using one or more of the enforcement tools available under CEPA 1999.

### **Principles of CEPA enforcement**

Enforcement of CEPA 1999 follows Environment Canada's Compliance and Enforcement Policy. Enforcement respects the following principles:

- Compliance with CEPA 1999 and its regulations is mandatory;
- CEPA enforcement officers apply the Act in a manner that is fair, predictable and consistent.
- CEPA enforcement officers use rules, sanctions and processes securely founded in law.
- CEPA enforcement officers enforce the Act with an emphasis on preventing harm to the environment.
- CEPA enforcement officers examine every suspected violation of which they have knowledge, and take action consistent with the Compliance and Enforcement Policy.
- CEPA enforcement officers encourage Canadians to report CEPA violations to them.

### **Powers of enforcement officers**

Enforcement officers are peace officers for the purposes of enforcing the Act. They also have powers similar to those contained in many other federal statutes that provide for inspections to verify compliance. These include the right to:

- enter premises;
- open containers and examine contents;
- take samples; and
- conduct tests and measurements, and obtain access to information (including data stored on computers).

### **Powers of CEPA analysts**

CEPA analysts can be chemists, biologists, engineers, forensic accountants, or laboratory personnel. They are entitled to accompany enforcement officers on inspections, and they have the power to enter premises, open containers, take samples, conduct tests and measurements, and gain access to information. However, they may not use enforcement tools such as warnings, directions, tickets, or environmental protection compliance orders.

## **Enforcement tools**

CEPA enforcement officers have the following enforcement tools at their disposal:

- warnings to indicate the existence of a violation, so that the alleged offender can take notice and return to compliance;
- directions that enforcement officers may issue to deal with or to prevent illegal releases of regulated substances;
- tickets for offences such as failure to submit written reports;
- environmental protection compliance orders to put an immediate stop to illegal activity, to prevent a violation from occurring or to require action to be taken;
- Environmental Protection Alternative Measures
- prosecution under the authority of a Crown prosecutor.

## **The future of enforcement**

The CEPA 1999 Compliance and Enforcement Policy guides application of the Act by enforcement officers. The achievement of CEPA's goals of protection of the environment and human health through pollution prevention is dependent in large part on effective enforcement of the Act and its regulations.

---


## **Further information:**

### **Internet:**

Additional information on the Canadian Environmental Protection Act, 1999 is available on Environment Canada's Green Lane on the Internet at: [www.ec.gc.ca/CEPARRegistry](http://www.ec.gc.ca/CEPARRegistry)

### **Inquiry Centre:**

351 St. Joseph Boulevard  
Hull, Quebec K1A 0H3  
Telephone: (819) 997-2800  
toll-free 1 800 668-6767  
Fax: (819) 953-2225  
E-mail: [enviroinfo@ec.gc.ca](mailto:enviroinfo@ec.gc.ca)

This is Exhibit F referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 14th day  
of September, 20 11  


Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

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## Environmental Law and Litigation

News and analysis (not advice) by a top Ontario environmental lawyer



# ABSOLUTE DISCHARGE UNDER CEPA

by Dianne Saxe on February 7, 2009



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X

You were searching for "[absolute discharge under cepa](#)". See posts relating to your search »

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On Thursday, an Ontario company received an absolute discharge for unwittingly breaching Section 36 of the *Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations*, under the *Canadian Environmental Protection Act 1999*. 0 tweet 0

This section requires those exporting hazardous waste from Canada to submit confirmation of destruction, within 30 days after the foreign receiver disposes of the waste. No specific format is prescribed. Like many others, RPR Environmental believed that Environment Canada was content to accept Copy 3 of the completed manifest as adequate proof of destruction, especially where the receiver promptly disposed of the waste.

For reasons best known to Environment Canada, they did not communicate their dissatisfaction with this interpretation to the waste industry. Environment Canada could, and should, have written to each of the (highly regulated) professional waste brokers, requesting separate confirmations of destruction. At a minimum, they could have clearly communicated this through industry associations or newsletters.

Instead, they acted like bullies. RPR's first indication of any problem was the arrival of 17 officers in flack jackets with a search warrant. Investigators ransacked their offices (twice), seized hundreds of documents, copied computer disks, terrified employees, left files in a shambles, laid three different sets of charges, and caused years of upheaval. And what the matter ultimately came down to was legitimate confusion about the interpretation of s.36. After all the drama, and much wasted expense (public and private), the company made a \$5,000 donation to a local charity, conducted a training course, and received an absolute discharge with no fine. This is another sad example of cruel and inappropriate enforcement by Environment Canada. As in *Gemtec*, a small, hardworking company had an honest and reasonable understanding of a complex law. It turned out that Environment Canada disagreed with its interpretation. But instead of giving an explanation, or a warning, Environment Canada responded with a sledgehammer. This is like beating a child for breaking an unspoken rule; it's unfair, it's counterproductive, and it's bad public policy.

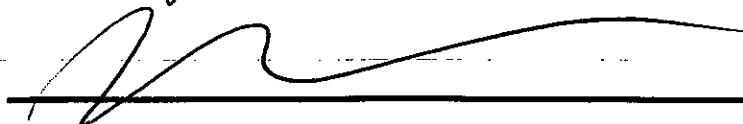
No question, we need environmental enforcement. But we need it to be fair, and proportional to the real fault involved. Environment Canada urgently needs to re-examine its approach to compliance and enforcement. Fundamentally, serious punishment should be reserved for those who had some reason to know that what they were doing was wrong. In areas of disputed interpretation of the law, Environment Canada should explain what it means and give people an opportunity to comply, before it throws the book at them.

Tagged as: [bad public policy](#), [inappropriate enforcement](#)

[Login](#)

- [This blog post](#)
- [All blog posts](#)

This is Exhibit G referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 4th day  
of September, 20 11

  
\_\_\_\_\_

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

05220-A0079112 pages 67-68



## ENFORCEMENT ACTION BRIEFING NOTE

### PROTECTED LAW ENFORCEMENT

**EAB Date:** 2008/03/25

**EAB Update #** 002

- |   |  |  |
|---|--|--|
| <input type="checkbox"/> Initiate Investigation                                     | <input type="checkbox"/> Recommend Prosecution | <input type="checkbox"/> Use of Force        |
| <input type="checkbox"/> Written Warning  | <input type="checkbox"/> Charges Laid          | <input type="checkbox"/> Arrest              |
| <input type="checkbox"/> Direction / EPCO   | <input type="checkbox"/> Court Appearance      | <input type="checkbox"/> Disposition of Case |
| XX Search Warrant   | <input type="checkbox"/> Sentencing            | <input type="checkbox"/> Other _____         |
| <input type="checkbox"/> Justice Canada - Federal Prosecution Service / Issue _____ |  |  |

<b>File Name:</b>	RPR Environmental - Export Complaints, EIHWHRMR, EW	<b>NEMISIS File Number:</b>	3007-2007-12-19-014
-------------------	--	-----------------------------	---------------------

<b>Company/Agency /Individual(s) Name:</b>	RPR Environmental Services Inc. / Patrick WHITTY		
<b>Address/Location:</b>	164-166 South Service Rd.		
<b>City:</b>	Stoney Creek	<b>Province/Terr.:</b>	Ontario

<b>Act(s):</b>	CEPA 1999 - CANADIAN ENVIRONMENTAL PROTECTION ACT					
<b>Regulation(s):</b>	Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations					
<b>Section(s):</b>	11(1)	11(3)(a)	11(6)(a)	36(1)		

<b>Date(s) of incident(s):</b>	14 December 2007		
<b>Location(s) of incident(s):</b>	164-166 South Service Rd. Stoney Creek	<b>Province/Terr.:</b>	Ontario

#### COMPLIANCE HISTORY:

- RPR Environmental has been under investigation in the past for EIHWR alleged violations. See file 300720020924001, 300720020416006 & 300720050916001.
- RPR Environmental was inspected and given verbal warning for a similar alleged violation during a border spot inspection in May 2003. See file 300720030724004.
- RPR Environmental has been given 2 warning letters. See file 300720001123001 and 300720070606003
- Facility appears to have a non-compliance history dealing with EIHWR and EIHWHRMR regulated activities.

#### DESCRIPTION OF INCIDENT(S):

005307

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Information Act / Document divulgué en vertu  
de la Loi sur l'accès à l'information.

s.23

**ENFORCEMENT ACTION / STATUS**

s.23

- On January 10<sup>th</sup>, 2007 a total of 44 charges were laid in the city of Hamilton against RPR Environmental for violations of the EIHWHRM with a scheduled first appearance date of February 28, 2008.
- On February 13, 2008 summons was served on Frances Scandinavo, representative for the company and Patrick Whitty, in relation to the alleged violation set to be heard on February 28, 2008.
- On February 26, 2008 an additional 20 charges were laid in the city of Hamilton against the company and Patrick Whitty for alleged violations of the EIHWHRM with a scheduled first appearance date of February 28, 2008.
- On February 28, 2008 first appearance was remanded to April 17, 2008.
- On March 25, 2008 a Search Warrant was authorized by the Hamilton courts. It is to be executed on Thursday March 27, 2008.

**SENSITIVITIES:** the cross border movement of hazardous waste is a high profile issue and the Program has consistently remained a National Inspection Plan priority.

**MEDIA/PUBLIC AWARENESS:** none known.

**RECOMMENDATION:** per normal procedures this file should not be discussed outside of EC Enforcement, EC Legal Services or the PPSC. Investigation files may involve search warrants, which can take place at any time. Senior management will be advised as soon as possible prior to their execution.

<b>Court Type and Location:</b>		Hamilton, Ontario		<b>Court Case/File Number:</b>	
<b>Originator:</b>	Wells. Ed	<b>Phone:</b>	(416) 739-5902	<b>Region/Division:</b>	Ontario

**ATTACHMENT(S):**

**INITIAL REGIONAL DISTRIBUTION:**      **INFORMED**      **APPROVAL**      **DATE**

Regional Enforcement Manager/Supervisor	_____	2008-03-26	_____
EP-RD	_____	_____	_____
RDG	_____	_____	_____
EB - Regional Support Division	_____	_____	_____
Other (Insert Title)	_____	_____	_____

**HQ DISTRIBUTION:**

005308

002365

This is Exhibit H referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 10<sup>th</sup> day  
of September, 2011  
[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.



*Original*  
~~SECRET~~ (VF)  
CEPA, 1999  
Section 220

**WARRANT TO SEARCH**  
(Canadian Environmental Protection Act, 1999)

CANADA  
PROVINCE OF ONTARIO  
HAMILTON REGION

TO the Enforcement Officers  
in the said region and in the  
Province of Ontario.

WHEREAS it appears on the information of;

Edward Nicholas Wells badge #551  
(Enforcement Officer)

of Toronto  
(Municipality)

that there are reasonable and probable grounds to believe that there are in;  
the buildings and offices of RPR Environmental Inc.  
(place)

Located at;

162 South Service Road, Stoney Creek, ON., L8E 3H6  
(address or location of place)

herein called the premises, certain things, namely:

See Appendix "B" To Warrant To Search And Information To Obtain A Search Warrant

That are being sought as evidence in respect to the commission of an offence against the,  
Canadian Environmental Protection Act, 1999 namely:

See Appendix "C" To Warrant To Search And Information To Obtain A Search Warrant

THEREFORE, this is to authorize and require you to enter into the said place on the date  
of March 27<sup>th</sup>, 2008 between the hours of 08:00 hours and 21:00 hours to receive and  
seize the above things in order that they may be dealt with according to law.

DATED this 25<sup>th</sup> day of March, 2008  
at Hamilton Ontario



(Provincial Judge or Justice of the Peace in and for Ontario)

*Issued at 12:45 P.M.  
March 25/08  
(VF) [Signature]*

This is Exhibit I referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 15th day  
of September, 2011

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

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07032-A0079110 pages 1 - 3

## ENFORCEMENT ACTION BRIEFING NOTE

### PROTECTED LAW ENFORCEMENT

**EAB Date:** 2008/03/26

**EAB Update #** 001

☐ XX Initiate Investigation

☐ Recommend Prosecution

☐ Use of Force

☐ Written Warning

☐ Charges Laid

☐ Arrest

☐ Direction / EPCO

☐ Court Appearance

☐ Disposition of Case

☒ Search Warrant

☐ Sentencing

☐ Other \_\_\_\_\_

☐ Justice Canada - Federal Prosecution Service / Issue: \_\_\_\_\_

<b>File Name:</b>	RPR Environmental, Stoney Creek, ON - Section 17 Request- CEPA 14 Dec 2007, EGW RPR Environmental, Stoney Creek, ON RPR Environmental TMB Complaint	<b>NEMISIS File Number:</b>	3007-2008-01-17-002 3007-2007-12-19-014 3007-2005-09-16-001 3007-2002-04-16-006
-------------------	--	-----------------------------	--

<b>Company/Agency /Individual(s) Name:</b>	RPR Environmental Services Inc./ Patrick WHITTY/ Bailey MYLLEVILLE		
<b>Address/Location:</b>	164-166 South Service Rd.		
<b>City:</b>	Stoney Creek	<b>Province/Terr.:</b>	Ontario

<b>Date(s) of incident(s):</b>	2000/01/01	<b>Province/Terr.:</b>	Ontario
<b>Location(s) of incident(s):</b>	Stoney Creek	<b>Province/Terr.:</b>	Ontario

#### COMPLIANCE HISTORY:

- RPR Environmental has been under investigation in the past for EIHWR alleged violations. See files 300720020416006, 300720050916001 and 300720071219014.
- RPR Environmental was inspected and given verbal warning for a similar alleged violation during a border spot inspection in May 2003. See file 300720030724004.
- Facility appears to have a non-compliance history dealing with EIHWR regulated activities.

#### DESCRIPTION OF INCIDENT(S):

20 December 2007 – a request for investigation was received pursuant to section 17 of CEPA related to alleged violations of the EIHWR during 2000 and 2001. It is alleged that waste generated in the U.S.A. by a furniture manufacturer was transported to Alberta passing through the sites of two Canadian waste brokers, Custom Environmental Services Ltd. (CESL), and 876947 Ontario Ltd., carrying on business under the name of RPR Environmental. The furniture waste was ultimately delivered to an incinerator facility in Wainwright, Alberta. Shortly after the arrival of the waste a fire occurred caused by the ignition of the flammable portion of the furniture waste. It is alleged that the importer of the waste, RPR Environmental reclassified the waste when it was received and misled the Alberta receiver CESL regarding the waste type, resulting in the incinerator fire. It is further alleged that RPR Environmental did not have an import permit for the

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de la Loi sur l'accès à l'information.

waste and improperly classified it on the movement document to transport it from Ontario to Alberta.

**ENFORCEMENT ACTION / STATUS**

**3007-2002-04-16-006 RPR Environmental**

Transboundary Movement Branch (TMB) alleged that RPR Environmental had been exporting various wastes, including UN1992 (waste flammable liquids, poisonous) into the USA without having any valid permits on file for the 2001 calendar year.

Based on a preliminary review of the above requested documents, it was concluded that a site visit had to be scheduled in order to diligently verify this alleged violation.

Inspection result:

Two separate shipments of UN1992 were exported: the first manifested shipment described as "Fuel/Varsol", discovered by myself, indicated a waste flammable liquid with the word "poisonous" rubbed out and "UN1993" appeared to be a 1992 with the number 3 written overtop. This shipment of 100 Litres was traced back to the Generating company (Algonquin College). The original manifest from Algonquin College to RPR indicated that 100 Litres of UN1992 class 3(6.1) was loaded onto the truck.

RPR's "inventory manifest" indicated 100 Litres of UN1992 class 3(6.1), however the manifest concerning the export indicated 100 Litres of UN1993 class 3. It should be noted that RPR did not have a Permit to export UN1992, however they did have a permit to export UN1993.

**3007-2005-09-16-001 RPR Environmental TMB Complaint**

JP indicated the warrant was too sweeping. Task Investigator Edward N. Wells with the rewrite.

Re apply for warrant based on rewritten document. Warrant approved.

Search Warrant executed at 164-168 South Service Road. Number of items seized for evidence.

After approval charges laid against RPR Environmental and the President Patrick WHITTY. First Appearance date November 1, 2007.

Evidence seized during Search Warrant executed on August 9, 2008 documentation returned to RPR Environmental Office Manager France Scandinavo.

**3007-2007-12-19-014 RPR Environmental, Stoney Creek, ON**

Investigators attended at WMD that same week and discovered approximately 567 alleged violations in calendar years 2005, 2006, and 2007.

s.23

It has been determined that a search warrant will be required to collect further evidence in relation to the violations of EIHWHMR. Requests by Crown to RPR Environmental Inc. For informed consent release of the required documentation has been denied.

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de la Loi sur l'accès à l'information.

Information laid against Patrick Whitty and RPR Environmental Inc. For violations of EIHWHRMP related to movement documents. First appearance scheduled for February 28, 2008.

Summons served on RPR Environmental Inc. Representative Frances Scandinavo regarding current charges before the courts against Patrick Whitty and RPR Environmental Inc. To be heard on February 28, 2008.

Case remanded to April 17, 2008 and Disclosure has been requested

s.23

3007-2008-01-17-002 RPR Environmental, Stoney Creek, ON - Section 17 Request- CEPA 14 Dec 2007  
Report received from PYR and currently being reviewed.

On March 25, 2008 file #3007-2005-09-16-001 RPR Environmental TMB Complaint was closed as file was opened under file #3007-2007-12-19-014 & file #3007-2008-01-17-002.

**SENSITIVITIES:** the complainant has requested confidentiality and steps have been taken to ensure the request in honoured.

**MEDIA/PUBLIC AWARENESS:** the incident that generated the complaint (an incinerator fire in Alberta) has been widely publicized.

**RECOMMENDATION:** per normal procedures, this file should not be shared outside of EC enforcement, and the Public Prosecution Service of Canada. Investigation files may result in search warrants being granted at any time. Steps will be taken to advise senior management as soon as possible prior to their execution.

<b>Court Type and Location:</b>		<b>Court Case/File Number:</b>	
<b>Originator:</b>	Wells, Edward May, Bradley	<b>Phone:</b>	(416) 739-5902 (416) 739-5901
<b>Region/Division:</b>		Ontario	

**ATTACHMENT(S):**

<b>INITIAL REGIONAL DISTRIBUTION:</b>	<b>INFORMED</b>	<b>APPROVAL</b>	<b>DATE</b>
Regional Enforcement Manager/Supervisor	_____	_____	March 26, 2008
EP-RD	_____	_____	_____
RDG	_____	_____	_____
EB - Regional Support Division	_____	_____	_____
Other (Insert Title)	_____	_____	_____

**HQ DISTRIBUTION:**

007034

002371

This is Exhibit J referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 6th day  
of September, 20 11  
[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, O.C.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

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04945-A0079618 pages 8 - 9

**Wells,Edward [Ontario]**

**From:** May,Bradley [Ontario]  
**Sent:** Monday, January 21, 2008 12:15 PM  
**To:** Wells,Edward [Ontario]  
**Subject:** FW: Teleconference re: Sec 17 Request for investigation

More

**From:** May,Bradley [Ontario]  
**Sent:** Monday, January 21, 2008 12:14 PM  
**To:** Adkin,Roger [Edm]  
**Subject:** RE: Teleconference re: Sec 17 Request for investigation

s.23

Thanks - one of the things from an investigative perspective is that the complainant says in his letter that "...EC personnel were made aware of the offences on March 31, 2006" (top of page 2).  
is that is when the 2 year summary conviction timeline starts  
(leaving us only until March 31, 2008 to fully investigate and lay charges, if appropriate). Just an fyi at this time.

I will ask Ed to see if intell still has the file here in Ontario.

**From:** Adkin,Roger [Edm]  
**Sent:** Monday, January 21, 2008 11:58 AM  
**To:** May,Bradley [Ontario]  
**Subject:** RE: Teleconference re: Sec 17 Request for investigation

2001 I have not been able to find it or the hard copy, that was the period of time when we, intelligence hadn't started using NEMISIS full time. I will keep digging her. I do have pictures of the facility here that burnt after the explosion.

Mr. Roger Adkin  
Manager Intelligence Unit  
Environment Canada  
200-4999 98th Ave  
Edmonton, Alberta  
Canada  
T6B-2X3  
780-951-8751 office  
780-974-9511 cell  
780-495-2451 Fax

**From:** May,Bradley [Ontario]  
**Sent:** Monday, January 21, 2008 9:33 AM  
**To:** Adkin,Roger [Edm]  
**Subject:** RE: Teleconference re: Sec 17 Request for investigation

I don't suppose you have the NEMISIS number, eh? Let me check - about 2000 - 2001 ?

**From:** Adkin,Roger [Edm]  
**Sent:** Monday, January 21, 2008 11:14 AM  
**To:** May,Bradley [Ontario]  
**Subject:** RE: Teleconference re: Sec 17 Request for investigation

Brad in regards to this call. I had forwarded a Nemisis file to yourself and Mark P about three weeks after the explosion. I followed it up with a paper copy explaining what transpired, port of entry and who was the importer as well as the exporter. For some reason I have been unable to locate it. Do you still have it?

Mr. Roger Adkin

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Information Act / Document divulgué en vertu  
de la Loi sur l'accès à l'information.

Manager Intelligence Unit  
Environment Canada  
200-4999 98th Ave  
Edmonton, Alberta  
Canada  
T6B-2X3  
780-951-8751 office  
780-974-9511 cell  
780-495-2451 Fax

---

**From:** May,Bradley [Ontario]  
**Sent:** Saturday, January 19, 2008 10:24 AM  
**To:** Desmarais,Daniel [NCR]; Adkin,Roger [Edm]; Labossiere,Mike [Edm]; Wells,Edward [Ontario]  
**Cc:** Levitt,Ryan [Edm]  
**Subject:** RE: Teleconference re: Sec 17 Request for investigation

Daniel - What sorts of things would you like to talk about? There's nothing really to update since last week.

---

**From:** Desmarais,Daniel [NCR]  
**Sent:** Friday, January 18, 2008 5:25 PM  
**To:** Adkin,Roger [Edm]; May,Bradley [Ontario]; Labossiere,Mike [Edm]; Wells,Edward [Ontario]  
**Subject:** Teleconference re: Sec 17 Request for investigation  
**When:** Monday, January 21, 2008 3:00 PM-3:30 PM (GMT-05:00) Eastern Time (US & Canada).  
**Where:**

Are you free for a teleconf. Concerning the above subject

15:00 hrs Ottawa time

Dial 1-866-646-2080 code 9940604

Please confirm

Daniel



This is Exhibit K referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 20th day  
of September, 20 11

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

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**From:** Horvath,Julie [NCR]  
**Sent:** September 26, 2008 11:06 AM  
**To:** Wells,Edward Nicholas [Ontario]  
**Subject:** FW: EAB RPR Environmental

**Attachments:** 3007-2007-12-19-014--2.doc

05220-A0079112 page 74

**From:** Frederick,Josee [NCR]  
**Sent:** Thursday, March 27, 2008 10:32 AM  
**To:** Cuillerier,Paul [NCR]; Benocci,Renzo [NCR]  
**Cc:** Tingley,Linda [NCR]; Bombardier,Manon [NCR]; Desmarais,Daniel [NCR]; Horvath,Julie [NCR]; Roussel,Julie [NCR]  
**Subject:** FW: EAB RPR Environmental

**PLEASE SHOW TO PAUL AND RENZO.**

Search Warrant is being executed as we speak.

Merci

*Josée Frederick*  
*Environmental Support Coordinator*  
*Coordonnatrice des activités*  
*Environmental Enforcement Directorate*  
*Dir. Application de la loi en environnement*  
*Phone/Tél: (819) 934-6930*  
*Fax: (819) 953-3459*

**From:** Vanderlaan,Mark [Ontario]  
**Sent:** Thursday, March 27, 2008 9:59 AM  
**To:** Green,Jeffrey [Ontario]; Bell,Michael [Ontario]; EPS - EB,EED; Epstein,Danny [Ontario]; Meaney,John [Ontario]; Vollmershausen,Jim [Ontario]  
**Subject:** EAB RPR Environmental



3007-2007-12-19-0  
14--2.doc (61...

This is Exhibit L referred to in the Affidavit  
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sworn before me on this 14 day  
of September, 20 11

[Signature]

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Deborah Patricia Pigott, a Commissioner, O.C.,  
Province of Ontario, for D. Gordon F. Burton,  
Barrister and Solicitor.  
Expires April 6, 2012.

00229-A0079577 pages 1 - 5

### **Canadian Manifesting Mechanism Will Say**

The Government of Canada is committed to protect human health and the environment and enforce environmental and conservation laws with tough standards and regulations concerning the import into and export out of Canada of hazardous wastes and hazardous recyclable materials.

Canada is a signatory to a number of international agreements which include:

1. the United Nations, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;
2. the OECD (Organization for Cooperation and Economic Development) Council Decision concerning the control of transfrontier movements of wastes destined for recovery operations; and
3. the Canada - USA Agreement on the Transboundary Movement of Hazardous Waste.

On August 28, 1992, Canada ratified the Basel Convention. The Basel Convention controls the transboundary movements of hazardous wastes and hazardous recyclable materials, and promotes their environmentally sound management. The Convention also restricts transboundary movements to take place between Basel Party countries only.

Since March 1992, the transboundary movements of hazardous wastes destined for recycling operations between Member countries of the Organization for Economic Cooperation and Development (OECD) have been supervised and controlled according to OECD Council Decision C(92)39/FINAL. The OECD Decision provides a framework to control transboundary movement of hazardous recyclable materials within the OECD area, in an environmentally sound and economically efficient manner. This Decision was subsequently revised and incorporated into the new OECD Council Decision C(2001)107/FINAL, which was adopted and came into force for OECD member countries in May 2001.

The Canada-U.S.A. Agreement, which came into effect in November 1986 and was later amended in 1992, is intended to ensure that hazardous waste and municipal solid waste destined for final disposal crossing the Canada-U.S. border comply with each country's domestic law and the provisions of the Agreement. It confirms basic principles recognized by both countries for the proper control of transboundary movements of hazardous wastes and other wastes, including a prior informed consent regime.

It should be noted that both the OECD Council Decision and the Canada-USA Agreement are recognized under Article 11 of the Basel Convention as multi-lateral and bilateral agreements which provide an equivalent level of control as required under the Convention itself. This is an important point, since the USA although signing the Convention has never ratified it and implemented the

requirements through its domestic legislation. Therefore, the USA is not a Party to the Convention. However, due to the recognition of the OECD Decision and the Canada-USA Agreement as Article 11 agreements has allowed the border to remain open to the transboundary movement of hazardous waste and hazardous recyclable materials with the United States.

In 1992, the Federal Canadian Government of Canada complied with its international obligations through the implementation of domestic legislation. The *Export and Import of Hazardous Wastes Regulations* (EIHWR)<sup>1</sup> pursuant to the Canadian Environmental Protection Act (CEPA 1988) were the means by which the conditions and articles set out in the international agreements to which Canada is a party were implemented domestically. These Regulations strictly controlled the international movement of hazardous waste and hazardous recyclable material into and out of Canada, including transits through Canadian territory.

The keystone of the EIHWR and the new *Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations* (EIHWHRMR) is the prior informed consent (PIC) mechanism which is also an essential component of all three of the international agreements to which Canada is a party.

The PIC provisions in the EIHWR require the Canadian importer to submit a notice for intended imports of hazardous waste or hazardous recyclable material destined for disposal or recycling/recovery operations respectively, before any movements can take place. The notice allows Environment Canada to determine who the parties are in the proposed transaction (generator/foreign exporter, carriers and importer/receiver), identify the hazardous waste(s)/hazardous recyclable(s) and ensure that the appropriate documentation is in place to cover the proposed shipments, such as contracts between the parties and evidence of sufficient insurance coverage in the event of an accident or mishap.

In Canada, the management of hazardous waste and hazardous recyclable materials is a shared responsibility. The Government of Canada regulates international movements of hazardous wastes and hazardous recyclable materials, while the provincial and territorial governments control generators, waste management/recycling facilities and transportation within their jurisdictions. The provinces and territories also have regulations that set out requirements for the licensing and the issuance of operating permits for waste management and recycling facilities.

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<sup>1</sup> The *Export and Import of Hazardous Wastes Regulations* (EIHWR) were in force from November 26, 1992 until November 1, 2005, at which time they were revoked and replaced by the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* (EIHWHRMR). Consequently, the text is written in the past tense with respect to the EIHWR, although the controls remain in force through the new Regulations.

In the case of imports, the PIC mechanism allows the provinces to review the import notice information and provide consent based on the strict controls that they have placed on the operational permits for the facility before the transportation of the hazardous wastes/recyclables. The provinces/territories also provide confirmation of the authorization of the carriers involved in the transaction within their jurisdictions. The entire review and consent process takes place before an import permit can be issued under CEPA 1999 and any movement can take place.

Exports of hazardous waste or hazardous recyclable materials out of Canada to a foreign country, including the United States are subject to the notification and permit conditions set out in CEPA 1999, and the Regulations.

The PIC provisions also apply to exports. Under the Act and Regulations, a Canadian export notice needs to be completed by the exporter and submitted to Environment Canada. Once the notice has been reviewed, as well as meeting the contract and insurance requirements, the notice is forwarded to the foreign competent authority for their consent. No permit will be issued until the authorities of the country of destination have authorized the movement and have confirmed that the final disposal or recycling of the hazardous waste or hazardous recyclable material is authorized.

The second keystone of the EIHWR and the EIHWHRM is the manifest movement tracking provisions. Both the Basel Convention and the OECD Council Decision require Parties to track the transboundary movements through a movement document which is signed by each person who takes charge of the hazardous waste or hazardous recyclable material upon receipt or delivery. The OECD Decision has set timelines for the distribution of the movement document. The Decision requires that the completed and signed movement document be returned by the importer to the competent authorities concerned and the exporter within three days of receipt of the hazardous recyclables by the authorized receiving facility.

In Canada, the EIHWR required the importer to ensure that a copy of the manifest, with Part A completed by the person who exported the hazardous waste from the country of export and Part B completed by the first authorized carrier, was sent, within three days after the manifest was provided to the first authorized carrier, to

- (a) the Minister; and
- (b) the authorities of the province of import.

In addition, the EIHWR required the importer, within three days after receiving the hazardous waste at the authorized facility, to complete and sign Part C of the manifest and send copies of the completed manifest to

- (a) the Minister;
- (b) the authorities of the province of import;

- (c) the person who exports the hazardous waste from the country of export; and
- (d) every carrier of the hazardous waste.

In the case of exports, the same responsibilities and timelines were placed on the Canadian exporter, in order to track the movements of hazardous waste or hazardous recyclable material out of Canada.

The notice and prior informed mechanism work in conjunction with the manifest/movement document tracking system. The notice is a means by which all affected competent authorities are provided the opportunity to review the proposed transactions and provide consent, before any movements take place. All of the review and confirmations are done up front through the notice. This affords the provinces and foreign competent authorities as proposed importing destinations to ensure that the receiving facilities are authorized to perform the disposal or recycling operations set out in the notice. The competent authorities can also ensure that the hazardous waste and hazardous recyclable materials can be disposed of, treated, or recovered and will be managed in a manner that is environmentally sound which protects human health and the environment. While the manifest/movement document is the check in the entire regime to ensure that the transaction actually has taken place as proposed and allowed in the permit.

Hazardous waste and hazardous recyclable material exhibit hazardous properties or contain hazardous constituents which can pose an immediate and acute hazard to the environment or human health. Other hazardous contaminants or constituents in the waste or recyclable may only be released into the environment or effect human health over a long period of time. In any case, if the hazardous waste or hazardous recyclable material is mismanaged or the disposal/recycling operations take place at a facility which is not authorized to perform those functions or does not have adequate environmental or emission controls in place, this could result in the release of the hazardous substances into the environment with a detrimental impact on human health and the natural environment.

The manifest tracking system does not eliminate nor remove the hazard characteristics of the waste or recyclable material. The manifest is a means of controlling the risk posed by the movement of the hazardous waste and hazardous recyclable material. In addition, the manifest/movement document is a means by which Environment Canada can take steps to ensure and verify that the hazardous waste or hazardous recyclable material was received at the authorized facility as was approved in the permit issued by the Minister.

The failure to return the manifest in the required time set out in the Regulations allows for a critical period of time to elapse during which the mismanagement of a hazardous waste or hazardous recyclable material can take place. During this


period of time, the impact to the environment or human health may occur and be acute.

Prolonged mismanagement, including improper storage, would allow for the introduction of the hazardous constituents into the environment, which may require increased clean-up costs to mitigate the damage depending on the length of time taken before the release can be halted. In the case, of chronic effects on human health, these effects may not manifest themselves for many years into the future. At that time, these chronic effects will put greater pressures on the healthcare system and will impact on the quality of life of Canadians.


In addition to the potential impacts on human health and the environment, failure to comply promptly with the manifest requirements will affect Canada's ability to comply with its international obligations.

Prepared by:  
Joachim Wittwer, BSc., CChem.  
Head, Operations Section  
Waste Management Division  
(formerly Transboundary Movement Branch)  
Environment Canada

Note: Other international companies do submit copies of the movement documents as required under the international instruments, such as the OECD Council Decision. For example, ENUSA Industrias Avandas, S.A. located in Salamanca, Spain forwarded copy 1 of OECD movement document to Environment Canada as an international shipment prepared to leave (E005965) for Canada. Although the OECD movement document is not a Canadian regulatory requirement, it is clear that companies can and do meet the submission requirements for the tracking of the hazardous waste or hazardous recyclable material movements internationally.

 18/07/07



This is Exhibit M referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 6th day  
of September, 20 11  


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Environment  
Canada

Environnement  
Canada

Canada

[Home](#) > [International Agreements](#) > [Can-USA Agreement](#) > Can-USA Agreement Text

## Canada - U.S.A. Agreement

### Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste (consolidated text)

**In case of discrepancy between this webpage and the printed Agreement, the Agreement will prevail.**

The Government of Canada (Canada), and the Government of the United States of America (the United States), hereinafter called "The Parties":

**Recognizing** that severe health and environmental damage may result from the improper treatment, storage, and disposal of hazardous waste and other waste;

**Seeking** to ensure that the treatment, storage, and disposal of hazardous waste and other waste are conducted so as to reduce the risks to public health, property and environmental quality;

**Recognizing** that the close trading relationship and the long common border between the United States and Canada engender opportunities for a generator of hazardous waste and other waste to benefit from using the nearest appropriate disposal facility, which may involve the transboundary shipment of hazardous waste and other waste;

**Believing** that a bilateral agreement is needed to facilitate the control of transboundary shipments of hazardous waste and other waste between the United States and Canada;

**Reaffirming** Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm, which asserts that states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction;

**Taking** into account Organization for Economic Co-operation and Development (OECD) Council Decisions and Recommendations on transfrontier movements of hazardous wastes, the United Nations Environment Program Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Waste, and resolutions of the London Dumping Convention,

Have agreed as follows:

#### Article 1 - Definitions

For the purposes of this Agreement:

##### **Designated Authority**

means, in the case of the US Environmental Protection Agency (US EPA) and, in the case of Canada, the Department of the Environment.

##### **Hazardous Waste**

means with respect to Canada, hazardous waste, and with respect to the United States, hazardous waste subject to a manifest requirement in the United States, as defined by their respective national legislations and implementing regulations.

##### **Country of Export**

means the country from which the shipment of hazardous waste originated.

##### **Country of Import**

means the country to which hazardous waste and other waste is sent for the purpose of treatment, storage (with the exception of short-term storage incidental to transportation) or disposal.

##### **Country of Transit**

means the country which is neither the country of export nor the country of import, through whose land territory or internal waters hazardous waste and other waste is transported, or in whose ports such waste is unloaded for further transportation.

**Consignee**

means the treatment, storage (with the exception of short-term storage incidental to transportation) or disposal facility in the country of import and the name of the person operating the facility.

**Exporter**

means, in the case of the United States, the person defined as exporter, and in the case of Canada, the person defined as consignor, under their respective national laws and regulations governing hazardous waste and other waste.

**Other Waste**

means Municipal Solid Waste (MSW) that is sent for final disposal or for incineration with energy recovery, and residues arising from the incineration of such waste, as defined by the Parties' respective national legislation and implementing regulations, but excluding waste covered under paragraph (b) of this Article.

**Article 2 - General Obligation**

The parties shall permit the export, import, and transit of hazardous waste and other waste across their common border for treatment, storage, or disposal pursuant to the terms of their domestic laws, regulations and administrative practices, and the provisions of this Agreement.

**Article 3 - Notification to the Importing Country**

1. The designated authority of the country of export shall notify the designated authority of the country of import of proposed transboundary shipments of hazardous waste and other waste.
2. The notice referred to in paragraph (a) of this article may cover an individual shipment or a series of shipments extending over a twelve month or lesser period and shall contain the following information:
  1. The exporter's name, address and telephone number, and if required in the country of export, the identification number.
  2. for each hazardous waste and other waste type and for each consignee:
    1. A description of the hazardous waste and other waste to be exported, as identified by the waste identification number, the classification and the shipping name as required on the manifest in the country of export;
    2. The estimated frequency or rate at which such waste is to be exported and the period of time over which such waste is to be exported;
    3. The estimated total quantity of the hazardous waste and other waste in units as specified by the manifest required in the country of export;
    4. The point of entry into the country of import;
    5. The name and address of the transporter(s) and the means of transportation, such as the mode of transportation (air, highway, rail, water, etc.) and type(s) of container (drums, boxes, tanks, etc.);
    6. A description of the manner in which the waste will be treated, stored or disposed of in the importing country;
    7. The name and site address of the consignee;
    8. An approximate date of the first shipment to each consignee, if available.
3. The designated authority of the country of import shall have 30 days from the date of receipt of the notice provided pursuant to the date of receipt of the notice provided pursuant to paragraphs (a) and (b) of this article to respond to such notice, indicating its consent (conditional or not) or its objection to the export. Such response will be transmitted to the designated authority of the country of export. The date of receipt of the notice will be identified in an acknowledgement of receipt made immediately by the designated authority of the country of import to the country of export.
4. If no response is received by the designated authority of the country of export within the 30 day period referred to in paragraph (c) of this article, the country of import shall be considered as having no objection to the export of hazardous waste and other waste described in the notice and the export may take place conditional upon the persons

importing the hazardous waste and other waste complying with all the applicable laws of the country of import.

5. The country of import shall have the right to amend the terms of the proposed shipment(s) as described in the notice.
6. The consent of the country of import, whether express, tacit, or conditional, provided pursuant to paragraphs (c) and (d) of this article, may be withdrawn or modified for good cause. The Parties will withdraw or modify such consent insofar as possible at the most appropriate time for the persons concerned.
7. For the purposes of this Article and Article 5, manifest-related requirements may, with respect to other waste, be substituted by alternative tracking requirements.

#### **Article 4 - Notification to the Transit Country**

1. The designated authority of the country of export shall notify the designated authority of the country of transit of the proposed shipment of hazardous waste and other waste at least 7 days prior to the date of the shipment. The notice shall include the information specified in paragraph (b) of Article 3, with the following exceptions:
  1. The points of entry into and departure from the country of transit shall be provided in lieu of the entry point(s) into the country of import; and
  2. A description of the approximate length of time the hazardous waste and other waste will remain in the country of transit and the nature of its handling while there shall be submitted instead of a description of the treatment, storage, or disposal of the waste in the country of import.

#### **Article 5 - Cooperative Efforts**

1. The Parties will cooperate to ensure, to the extent possible, that all transboundary shipments of hazardous waste and other waste comply with the manifest requirements of both countries.
2. The Parties will cooperate in monitoring and spot-checking transboundary shipments of hazardous waste and other waste to ensure, to the extent possible, that such shipments conform to the requirements of the applicable legislation and of this Agreement.
3. To the extent any implementing laws and regulations are necessary to comply with this Agreement, the Parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the Parties will make best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The Parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such laws and regulations.

#### **Article 6 - Readmission of Exports**

The country of export shall readmit any shipment of hazardous waste and other waste that may be returned by the country of import or transit.

#### **Article 7 - Enforcement**

The Parties shall ensure, to the extent possible, that within their respective jurisdictions, their domestic laws and regulations are enforced with respect to the transportation, storage, treatment and disposal of transboundary shipments of hazardous waste and other waste.

#### **Article 8 - Protection of Confidential Information**

If the provision of technical information pursuant to articles 3 and 4 would require the disclosure of information covered by agreement(s) of confidentiality between a Party and an exporter, the country of export shall make every effort to obtain the consent of the concerned person for the purpose of conveying any such information to the country of import or transit. The country of import or transit shall make every effort to protect the confidentiality of such information conveyed.

#### **Article 9 - Insurance**

The Parties may require, as a condition of entry, that any transboundary movement of hazardous waste and other waste be covered by insurance or other financial guarantee in respect to damage

to third parties caused during the entire movement of hazardous waste and other waste, including loading and unloading.

#### **Article 10 - Effects on International Agreements**

Nothing in this Agreement shall be deemed to diminish the obligations of the Parties with respect to disposal of hazardous waste and other waste at sea contained in the 1972 London Dumping Convention.

#### **Article 11 - Domestic Law**

The provisions of this Agreement shall be subject to the applicable laws and regulations of the Parties.

#### **Article 12 - Amendment**

This Agreement may be amended by mutual written consent of the Parties or their authorized representatives.

#### **Article 13 - Entry into Force**

This Agreement shall enter into force on November 8, 1986 and continue in force for five years. It will automatically be renewed for additional five year periods unless either Party gives written notice of termination to the other at least three months prior to the expiration of any five year period. In any five year period, this Agreement may be terminated upon one year written notice given by one Party to the other.

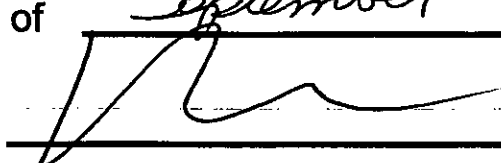
**In witness where of**, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

**Done** at Ottawa, in duplicate, this 28th day of October, 1986, in the English and French languages, both texts being equally authentic.

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Creation date: 2010-01-12  
Last updated : 2010-07-25  
Last reviewed: 2010-07-25

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This is Exhibit N referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 25th day  
of September, 20 11  


Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Merton,  
Barrister and Solicitor.  
Expires April 6, 2012.



Public Prosecution  
Service of Canada

Service des poursuites  
pénales du Canada

Canada

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### The Federal Prosecution Service DESKBOOK

[ [Previous](#) | [Table of Contents](#) | [Next](#) ]

## Part XII NEW POLICIES Chapter 56

### Table of Contents

#### 56 REGULATORY PROSECUTIONS

56.1 BACKGROUND

56.2 PURPOSE

56.3 THE DECISION TO PROSECUTE IN THE REGULATORY OFFENCE  
CONTEXT

56.4 THE ROLES AND RESPONSIBILITIES OF COUNSEL

56.4.1 FPS Counsel

56.4.2 Department Legal Services Counsel

56.4.3 Legal Agents/Agent Supervisors

56.5 SENTENCING IN REGULATORY PROSECUTIONS

### 56 REGULATORY PROSECUTIONS

#### 56.1 Background

In 1971, the Supreme Court of Canada recognized that there exists in Canadian law "a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public"<sup>1</sup>. Such offences are generally referred to as "regulatory" offences, and a study by the Law Reform Commission in 1986 estimated the number of such offences in federal legislation alone to be in excess of 97,000.<sup>2</sup>

The creation of regulatory offences is generally considered to be a desirable way of advancing governmental policy objectives. In *R. v. Wholesale Travel*<sup>3</sup>, Cory J. stated:

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

The fact that regulatory offences focus on the prevention of future harms requires that FPS counsel<sup>4</sup> pay particular attention to the policy objectives being pursued by the investigative agencies<sup>5</sup>. Departmental counsel from Legal Services ("LS counsel") are particularly sensitive to the nature, philosophy and objectives of the regulatory program, and FPS counsel are expected to work in partnership with them so that all counsel can take full advantage of their respective expertise.

## 56.2 Purpose

This policy has three main objectives:

- a. To further articulate the considerations relevant to the decision to prosecute in the regulatory offence context;
- b. To promote greater understanding of the respective roles and responsibilities of FPS counsel, LS counsel and investigators in regulatory Departments and agencies;
- c. To address special considerations relevant to sentencing in the regulatory offence context.

## 56.3 The Process of Risk Assessment

The Decision to Prosecute policy<sup>6</sup> requires a two part assessment of a case by FPS counsel: first, FPS counsel must consider whether the evidence is sufficient, and second, whether the public interest requires prosecution. That policy further notes that in the regulatory prosecution context, the "public interest" considerations include the regulatory goals of the legislation and stresses that consultation with the regulatory agency is necessary in determining those goals<sup>7</sup>.

It is more common in the regulatory context for FPS counsel to be able to apply the Decision to Prosecute policy before any charges have been laid. Indeed it is desirable because it can permit extensive consultation among FPS counsel, the investigative agency, LS counsel and others as to whether prosecution would in fact be the instrument of choice for dealing with alleged misconduct. Many federal departments have, within their governing legislation, a range of remedial options, from warnings to civil proceedings to administrative measures. It is important to bear in mind the admonition of the Supreme Court<sup>8</sup> that:

[t]he criminal law is, however, a weapon of last resort intended for use only in cases where the conduct is so inconsistent with the shared morality of society so as to warrant public condemnation and punishment.

The FPS approach is in accordance with these words, as has been noted:

[W]here preventative measures to promote compliance with a regulatory regime or a compliance program have failed, and non-compliance has occurred, referral for prosecution should not be automatic: it should only occur as a last resort. In fact, prosecution should only be considered at the end of the unsuccessful application of an Alternate Dispute Resolution strategy (ADR). And such alternative measures will be considered both before charges are laid and after they are laid.

Before charges are laid, measures such as warning and pre-charge diversion approach must be considered. ... After charges are laid, measures such as post-charge diversion are still available<sup>9</sup>.

This is not to suggest that most or all regulatory offences can be treated by some means other than prosecution<sup>10</sup>; in fact, in many circumstances, no effective alternative to prosecution may exist, or the available alternative (e.g., a warning) may be completely unsuitable. On occasion, the investigation will be of such a nature that it will require the early involvement of FPS counsel and require application of the



Megacase Management policy<sup>11</sup>. LS counsel may play an important role in identifying such investigations.

## 56.4 The Roles and Responsibilities of Counsel

Pursuant to the *Department of Justice Act*<sup>12</sup>, counsel acting on behalf of the Attorney General of Canada have the obligation to "advise the heads of the several departments of the Government on all matters of law connected with such departments" (s.5 (b)), and to "have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada" (s.5 (d)). While FPS counsel have responsibility for the eventual conduct of litigation, the advisory function is a shared responsibility among FPS counsel, LS counsel (sometimes more than one legal service) and others, such as counsel in the Human Rights Law Section.

Consultation is thus an essential feature of our approach to regulatory prosecutions. As a former Deputy Attorney General has stated:

In regulatory prosecutions, departments often have strong views about the enforcement of their regulatory schemes. They are entitled to know that we understand the rationale behind the relevant legislation. I would suggest as well that there is absolutely nothing improper or even questionable about the law enforcement arm of other departments wanting to influence the exercise of prosecutorial discretion, as long as no improper considerations of a political or other nature are brought to bear upon prosecutors. I would also argue that there is a lot of room for open communications between prosecutors and regulatory departments and agencies around the public interest in proceeding with particular prosecutions, with the views of the department responsible for the legislation given due weight by the Department of Justice<sup>13</sup>.

It is important to outline in a general way what the respective responsibilities are for counsel with respect to the prosecution function.

### 56.4.1 FPS Counsel

It is the responsibility of FPS counsel to:

- Provide legal advice as requested during the course of an investigation, or about matters of ongoing concern that may affect specific prosecutions, or prosecutions generally. This may commonly arise, for example, where advice is needed on subjects such as search and seizure or disclosure. In so doing, it will be important to consult with the investigator and/or LS counsel to determine whether legal advice on the same subject matter has already been given, and to attempt to ensure that the Department of Justice speaks with one voice on such matters as the legality of particular investigative techniques. Where legal advice is sought on an issue that will have general application to the investigative agency's enabling legislation, LS counsel must be consulted before the advice is given.
- Conduct the prosecution on behalf of the Crown. This includes making the final decision as to what charges will be prosecuted, whether to elect to proceed by indictment, what witnesses will be called, what sentence will be sought if the case results in conviction, and whether an appeal should be launched from acquittal or sentence. In exercising all of these functions FPS counsel are expected to consult in a timely way with the investigative agency, LS counsel and others as the need arises. Consultation is particularly important prior to making a decision not to prosecute a particular case<sup>14</sup>. It is good practice to document the reasons why a decision is made not to prosecute and to inform LS counsel and the investigative agency.

- Identify possible training needs for the investigative agency, and participate in training when requested. Consultation with LS counsel may help determine whether such training should be local or national. Training is a responsibility of the FPS as a whole, so FPS counsel will be expected to inform their managers and LS counsel as to what training may benefit the investigative agency (e.g., how to prepare a prosecution brief). FPS counsel should be particularly vigilant in identifying areas in which immediate training is desirable to ensure that the effectiveness of prosecutions is not compromised.

#### **56.4.2 Department Legal Services Counsel**

It is the responsibility of LS Counsel to:

- Assist investigators and agencies in developing alternatives to prosecution consistent with the client department's compliance and enforcement policies. LS counsel may also work with investigators and/or FPS counsel on such alternatives in specific cases.
- Be the primary point of contact for investigative agencies and FPS counsel for the provision of legal advice on matters relating to the agency's enabling legislation. Where the advice sought concerns general enforcement issues, LS counsel will be expected to exercise judgment as to when legal advice that may have broad implications for prosecutions (e.g. with respect to the legality of an investigative technique) will require consultation with the FPS, other legal services, the Human Rights Law Section or other parts of the Department of Justice before rendering the requested legal advice. Where the advice sought concerns an investigation likely to lead to a prosecution, as stated above, the advice should be obtained from FPS counsel.
- Assist investigators with the preparation of a prosecution brief, where appropriate.
- Consult with FPS counsel on prosecution issues, and facilitate communications between FPS counsel and the investigative agency. In some circumstances, such as where LS counsel has played a critical advisory role in a lengthy investigation, it may be appropriate for LS counsel to be part of the prosecution team.
- In consultation with FPS counsel, identify possible training needs for the investigative agency, and participate in such training when requested. As is true for FPS counsel, it is crucial that LS counsel identify areas in which training is necessary so that prosecutions are not compromised. It may be desirable for LS counsel to assist the investigative agency in the creation of policy or guidelines on enforcement issues.

#### **56.4.3 Legal Agents/Agent Supervisors**

FPS Agent Supervisors should ensure that legal agents adhere to their duties of consultation under this policy. In some circumstances, such as where there is a difference of opinion as to what legal advice should be given or where an agent has decided that a matter should not be prosecuted, the Agent Supervisor should be directly involved in dealings with the investigative agency and/or LS counsel.

#### **56.5 Sentencing in Regulatory Prosecutions**

Because, as emphasized above, the intrinsic goal of regulatory prosecutions is to procure compliance so as to prevent future harm, it is incumbent on FPS counsel to explore dispositions which may help achieve the regulator's goal. Fines and/or imprisonment, the usual dispositions in criminal matters, may be only part of a sentence that seeks to deter others, deter the particular offender(s), and to attempt to undo the harm caused. FPS counsel should explore with the investigative agency and/or LS counsel as appropriate a range of possible dispositions that may achieve the agency's goals of compliance and protection of the public where the statutory regime affords scope for such dispositions.

Fines are widely used in regulatory offences. Before recommending that a fine be imposed, FPS counsel should take every reasonable measure to ensure that the fine is an appropriate disposition, which will necessarily include forming an opinion as to whether an offender is capable of paying the fine<sup>15</sup>. Where possible, FPS counsel should, as part of the negotiations for resolving the file by way of a fine, arrange with the defence for the payment of the fine on the day of sentencing. If the money to pay is not immediately available, but will be in the near future, FPS counsel should seek to have the sentencing proceedings take place on that day.

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<sup>1</sup> R. v. Pierce Fisheries, [1971] S.C.R. 5 at 13

<sup>2</sup> Law Reform Commission, *Policy Implementation, Compliance and Administrative Law* (Working Paper #51), Ottawa: 1986, at 38. It should be emphasized, however that "regulatory" statutes may nevertheless include "criminal" offences: tax evasion under the *Income Tax Act* is one such example. See, in this regard, the comments of the Supreme Court in R. v. Jarvis, [2002] 3 S.C.R. 757 at para.63.

<sup>3</sup> [1991] 3 S.C.R. 154 at 219.

<sup>4</sup> In this chapter, the term "FPS Counsel" is used instead of "Crown counsel" to distinguish prosecutors from counsel working with Legal Services.

<sup>5</sup> The term "investigative agency" may include "regulatory agencies" in this chapter.

<sup>6</sup> Part V, Chapter 15

<sup>7</sup> It should be emphasized that in considering the public interest in regulatory matters, the "irrelevant criteria" identified in the Decision to Prosecute policy—e.g. race, political advantage—are equally irrelevant.

<sup>8</sup> R. v. Hinchey, [1996] 3 S.C.R. 1128 at para. 35

<sup>9</sup> Speech by D.A. Bellemare, Q.C., to the Instrument Choice Symposium, Ottawa, March 26, 2002.

<sup>10</sup> The specific context of "R. v. R." prosecutions is dealt with in Chapter 32.

<sup>11</sup> See Chapter 54, "Megacase Management."

<sup>12</sup> R.S.C. 1985, c.J-2.

<sup>13</sup> Speech by Morris Rosenberg at the XXth annual FPS Conference, June 29, 2000, Mont Saint-Anne, Quebec.

<sup>14</sup> In this regard, see Chapter 15, "The Decision to Prosecute" in which the importance of consultation and communication in these circumstances is stressed.

<sup>15</sup> See also Part XII, c.57, "Fine Recovery."

[ [Previous](#) | [Table of Contents](#) | [Next](#) ]

Date Modified: 2008-12-24

This is Exhibit 0 referred to in the Affidavit  
of Patrick Whitty  
sworn before me on this 14 day  
of September, 2011  
[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

04731-A0079616 page 128

Document Released Under the Access to  
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**Wells,Edward [Ontario]**

**From:** Wells,Edward Nicholas [Ontario]  
**Sent:** Friday, March 14, 2008 11:38 AM  
**To:** 'Meaney, John'  
**Cc:** Wells,Edward [Ontario]  
**Subject:** Fyi: 3007-2007-12-19-014

John,

There is a planned Search Warrant execution on RPR Environmental Inc., located at 164-166 South Service Road, Stoney Creek, Ontario on March 27, 2008. This search warrant has been requested by the Crown and PPSC. The Crown has reviewed the Warrant and authorized it.

**Edward N. Wells #551**  
Investigator  
Environmental Enforcement Division  
Environment Canada, Ontario Region  
Phone: (416) 739 5900  
Cell: (289) 259-4233  
Fax: (416) 739 4903

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## NOTICE


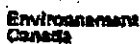


### PURSUANT TO SECTION 5(1) of the LIBEL AND SLANDER ACT, R.S.O. 1990, c. L.12

TO: Environment Canada  
The Honourable Peter Kent, Minister of Environment  
The Honourable John Baird, Minister of Foreign Affairs and former Minister of Environment  
The Honourable Jim Prentice, former Minister of Environment  
Gordon Owen, Chief Enforcement Officer, Environment Canada  
Manon Bombardier, National Director, Environmental Enforcement, Environment Canada  
Renzo Benocci, Director, Canadian Industrial Security Directorate, PWGSC and former National Director, Environmental Enforcement, Environment Canada  
Mark Vanderlaan, Director, Environmental Enforcement, Ontario Region  
Bradley May, Manager, Adaptation and Impacts Research and former Manager, Toronto Region, Environmental Enforcement, Environment Canada  
Edward Wells, Investigator, Environment Canada  
Edward N. Wells, Investigator, Environment Canada

1049585 Ontario Inc. (o/a RPR Environmental Services), 876947 Ontario Limited (o/a RPR Environmental) RPR Environmental Inc. (hereafter collectively the "RPR Group of Companies"), and Patrick Whitty hereby give you notice pursuant to section 5(1) of the *Libel and Slander Act*, R.S.O. 1990, c. L.12 that they intend to commence an action against you.

Defamatory statements concerning the RPR Group of Companies and Patrick Whitty were originally published on an Environment Canada internet site on or about December 29, 2008 at <http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=38D59E7D-1>, and the defamatory statements have been continuously published every day thereafter up to the date of this Notice.

The false and defamatory article is as follows:



[Home](#) > [Enforcement](#) > [Enforcement Notifications](#)

**December 29, 2008**

**Violation of Reporting Requirements Results in Fine**

**HAMILTON, Ontario** - RPR Environmental Services Inc. of Stoney Creek, Ontario pleaded guilty in the Ontario Court of Justice to multiple counts of violating the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*. The Regulations were made under the *Canadian Environmental Protection Act, 1999*. The charges against the company related to export violations that were committed in 2005, 2006 and 2007. The company was ordered to pay a fine of \$7,500 to the Environmental Damages Fund.

In addition to the payment, the Court made two orders aimed at increasing industry awareness. The Court ordered RPR Environmental Services Inc.'s Chief Executive Officer, Patrick Whitty, to offer a training session to members of the industry. The Court also ordered the company to write an article identifying the pitfalls of contravening the Regulations.

The article contains the following statements which were and are false and defamatory:

1. That RPR Environmental Services Inc. (which is a reference to one or more of 1049585 Ontario Limited o/a RPR Environmental Services, and/or 876947 Ontario Limited o/a RPR Environmental and/or RPR Environmental Inc.) pleaded guilty to multiple counts of violating the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*;
2. That the RPR Group of Companies or one or some of them pleaded guilty to charges related to export violations that were committed in 2005, 2006 and 2007;
3. That the RPR Group of Companies or one or some of them was ordered to pay a fine of \$7,500 to the Environmental Damages Fund;
4. That the Court made two orders against the RPR Group of Companies or one or some of them aimed at increasing industry awareness, in addition to ordering payment of a fine;

3

5. That the Court ordered Patrick Whitty to offer a training session to members of the industry.
6. That the Court ordered the RPR Group of Companies or one or some of them to write an article identifying the pitfalls of contravening the Regulations.

The false and defamatory imputation that RPR Environmental and Patrick Whitty have repeatedly flaunted or breached the law, created a risk to the environment, admitted guilt or were found guilty for multiple violations over the span of several years, or otherwise acted in a manner that is illegal, environmentally irresponsible, and contrary to public welfare further arises by way of implication from the entire article.

Notably, the article was initially published on or about December 29, 2008, which was before RPR Environmental Inc. entered any plea in the matter at issue (which it did under duress months later), and before an plea agreement was concluded or approved by a court (which provided for an absolute discharge on one count on a minor charge and dismissal of all other charges). It was wholly improper and malicious for the egregiously false article to be published at that time, and it remains wholly improper for the false article to remain in the public domain on an Environment Canada web site.

You are directed to take immediate steps to:

- Remove the false and defamatory article from the internet forthwith;
- Apologize to the RPR Group of Companies and to Patrick Whitty for publishing the defamatory article;
- Publish a full apology and retraction of the statements in the defamatory article in a conspicuous location on the Environment Canada web site, acknowledging that the statements in the article concerning the RPR Group of Companies and Patrick Whitty were and are false;
- Cease and desist from publication of defamatory statements concerning the RPR Group of Companies and Patrick Whitty by any means whatsoever;



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ZBOGAR ADVOCATE

PAGE 07/07

4

- Compensate the RPR Group of Companies and Patrick Whitty for their costs of dealing with this defamation and their substantial losses that have resulted from the defamation.

September 20, 2011



Vilko Žbogar

**ŽBOGAR ADVOCATE**

51 Crossovers St.  
Toronto ON  
M4E 3X2

**Vilko Žbogar**

Tel. 416.855.6710

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[vzbogar@ZbogarAdvocate.ca](mailto:vzbogar@ZbogarAdvocate.ca)

Lawyer for 1049585 Ontario Inc., 876947  
Ontario Limited, RPR Environmental Inc.,  
and Patrick Whitty

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**MCU / UCM**

**Ministerial Correspondence Unit / Unité de la correspondance ministérielle**  
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**Document Date / Date du document:** 2011-09-27  
**Date of Receipt / Reçu le:** 2011-09-30

**MCU # / # UCM:** 2011-014019

**Author / Auteur:** Mr. Patrick Whitty

**Doc Type / Type de Doc:** F

**Subject / Sujet:** 110008  
Justice - Notice of Litigation

164 South Service Road  
Stoney Creek ON L8E 3H6

**Due Date / Date d'échéance:**

**Sector's Due Date / Date d'échéance du secteur:**

**Assigned To / Assigné à:** LB-ADAG

**Assigned Date / Assigné le:** 2011-10-03

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**INSTRUCTIONS / DIRECTIVES:**

- ☐ By email / par courriel
- ☐ By letter / par lettre
- ☐ Enclosure(s) / pièce(s) jointe(s)
- ☐ Courtesy copy (c.c.) / copie conforme (c.c.)
- ☐ Standard reply / lettre type
- ☐ Modified standard reply / lettre type modifiée
- ☐ Based on letter / Basée sur la lettre  
signed on / signée le

**Comments / Remarques:**

F.C.

**INSTRUCTIONS**

- D: ☐ Draft response / Faire un projet de réponse
- A: ☐ Further letter to be combined with a previous document (see comments) / Nouvelle lettre à joindre à un document précédent (voir remarques)
- F: ☐ Action at your discretion / Donner suite à votre discrétion
- ☐ Further letter to be combined with a previous document (see comments) / Nouvelle lettre à joindre à un document précédent (voir remarques)
- I: ☐ For your information (no action required) / À titre d'information (aucune mesure requise)

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110008

FORM 69 - Rule 69

## NOTICE OF CONSTITUTIONAL QUESTION

Federal Court of Canada

Between:

**Patrick Whitty**

Applicant

And

**Anthony Bratschitsch**

Intervenor

And

**The Chief Enforcement Officer, Environmental Enforcement,  
Environment Canada and The Attorney General of Canada**

Respondents

### NOTICE OF CONSTITUTIONAL QUESTION

The applicant, Patrick Whitty, intends to question the constitutional validity, applicability and effect of Section 36 of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations (herein after referred to as the "EIHWHRMR") under the Canadian Environmental Protection Act, 1999 (herein after referred to as the "CEPA 1999" or "The Act").

The applicant also wishes to claim a remedy under the Canadian Charter of Rights and Freedoms (herein after referred to as "The Charter").

Essentially, the applicant is trying to avoid the repeat possibility of being imprisoned due to missing American documentation.

It should be noted that the "documentation" being referred to – Certificates of Destruction - does not exist in a formal manner, i.e. pre-described form or certificate.

The applicant is submitting this Notice of Constitutional Question in reference to his Application for Judicial Review on the same matter.

The applicant claims that he has personally suffered from the numerous actions of government officials who have, in his opinion, abused their power by misapplying the provisions of The Act.

The applicant urges the Federal Court to review this issue because he has no other means or recourse against the alleged abusive use of enforcement activities by the Enforcement Branch of Environment Canada (herein after referred to as "ECE").

The applicant intends to show that the enforcement officials either ignored or were not trained in their own enforcement procedures and, also, accidentally or purposefully circumvented sections of Part 10 of CEPA 1999, which prevented him from defending himself in a fair manner, as was intended by The Act.

As a result, the applicant alleges that his rights under The Charter were violated by breaches of fundamental justice.

The applicant also wishes to identify to the Court that, in his opinion, such action was used by ECE outside the scope of The Act, which was designed to protect the environment through the use of enforcement in a manner that is "fair, predictable and consistent".

The applicant alleges that ECE maliciously prosecuted him with at least seven investigations – many of them time-barred – during the course of one year with many of them carrying the threat of criminal charges.

The applicant recognizes that his allegation of malicious prosecution should be presented to the proper court, however, he is making this statement to underline the urgency that the Federal Court reviews and makes a ruling on this matter.

By doing so, the applicant believes that a Federal Court ruling would ensure that his – and other Canadians' – rights under the Charter are not abused in the future and, also, that the true intentions of The Act be properly enforced.

The applicant is asking for reasonable relief that would reduce or eliminate the risk of his rights being abused again while not diminishing the impact or effect of The Act.

Basis of the applicant's belief:

The below four reasons are the basis of the applicant's belief that any person in Canada should not face the prospect of imprisonment if there are circumstances in the United States, such as facility closures, inefficiencies or apathy, that restrict or prevents the issuance or release of documents that are not required by American laws or regulations and of which are also not required by any of Canada's signatory international agreements relating to the transboundary movement of hazardous waste and of which does not contain a mens rea by any party to commit any offence of any law in any jurisdiction.

The above statement also applies to any Canadian entity, i.e. commercial, institutional, etc., facing other forms of punishment under the same circumstances.

The four reasons for the applicant's request are that Section 36:

- i. has been arbitrary applied in a manner that violated the principles of fundamental justice and has had the effect of threatening the right to liberty of a person as guaranteed by Section 7 of The Charter. **[Relating to "The Charter"]**
- ii. effects a conflict of law into different jurisdictions where there is no renvoi, provision or forum to apply or enforce the laws of one jurisdiction onto another. **[Relating to "Conflict of Law"]**
- iii. when applied to the USA, contravenes and does not comply with the principles of the three relevant international agreements concerning the transboundary movement of hazardous waste, especially The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste (herein after referred to as "The Bilateral Agreement"). **[Relating to "Contravention of 'The Bilateral Agreement'"]**
- iv. relies on circumstantial evidence, unfairly refers guilt onto a person or entity that is not beyond reasonable doubt and places the burden of proof onto the person or entity **[Relating to "Reasonable Doubt"]**

Such an occurrence did happen, without precedence.

With this occurrence, the applicant, a Canadian citizen residing within Canada, did suffer from the threat of the loss of liberty during a twelve-month period by the actions of officials of ECE.

The applicant does not know if this occurrence has since been repeated elsewhere in Canada because a search in Environment Canada's registry did not reveal similar cases and also because requests for information through the Access to Information Act are still in process.

The applicant contends that the unprecedented prosecution of the alleged violations of Section 36 was a procedural "tool" used by ECE to beat and bully the applicant into submission outside the scope of The Act.

In that this type of occurrence violates fundamental principles of Canadian law, the applicant wishes to ensure that this situation is never allowed to happen again and seeks the proposed remedy as requested in the following paragraphs.

Relief requested by applicant:

The applicant requests relief from the court as it deems necessary under the Canadian Charter of Rights and Freedoms, as per:

***24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.***

In addition, the applicant also requests relief from the court as it deems necessary under the *Federal Courts Act*, as per:

**18. (1)** Subject to section 28, the Federal Court has exclusive original jurisdiction

- (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
- (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Therefore, the applicant additionally requests relief as stated in S. 18. (1)(a) of the *Federal Courts Act* in the form of:

- (i) an injunction against Environment Canada Enforcement Branch's enforcement of Section 36 when the authorized receiver of hazardous and non-hazardous wastes is in the United States of America, and or
- (ii) declaratory relief that the enforcement of S. 36 in instances when the authorized receiver is in the USA is outside the rules of natural justice and procedural fairness, and
- (iii) any other form of relief that the Court deems fair and necessary.

The question is to be argued on:

\_\_\_\_\_, at \_\_\_\_\_, at \_\_\_\_\_  
(Day) (Date) (Time) (Place)

The following are the material facts giving rise to the constitutional question:

i.) **Relating to "The Charter":**

The applicant believes that Section 36 poses an unconstitutional threat to a person's right to liberty under The Charter due to recent activity by ECE.

The applicant refers to *R v. RPR ENVIRONMENTAL INC. AND PATRICK WHITTY* (Ontario Court of Justice) in which ECE laid 63 counts of criminal charges in 2008 involving summary conviction against the Canadian exporter of hazardous wastes and the company director.

The charges were based on that the RPR ENVIRONMENTAL INC. (herein referred to as "The Company") did not obtain Certificates of Destruction within the time period prescribed by provisions of Section 36 (Item 2).

Part of the punishment possibly resulting from the prosecution of those charges was the imprisonment of the director, Patrick Whitty, under Section 272. (2) of CEPA 1999 (Item 5), thereby, depriving that person of his right to liberty.

ii.) **Relating to "Conflict of Law":**

The Company and its director were arbitrarily charged for a criminal offence due to the action or omission of another party in the United States when all parties – the exporter, the director and the authorized American disposal facilities – had acted in a proper moral and legal manner as prescribed by international agreements and in compliance to all laws of the jurisdictions where they operate and reside.

Canadian laws and regulations have no jurisdiction in the United States unless there is renvoi, forums or international agreements to seek cooperation within the United States for their enforcement.

In this case, there are international agreements between the two countries, however, Section 3" is not provided for in any of them.

Therefore, the applicant submits that Section 36 provides for a "conflict of law" and is not legal and is not constitutional.

iii.) **Relating to "Contravention of 'The Bilateral Agreement'":**

Section 36 first came into force through EIHWHRMR on November 1, 2005, many years after the three relevant international agreements (Item 8) were signed by Canada and the other parties.

Of the three international agreements, one in particular – the Canada-USA Agreement - is intended to ensure that hazardous waste destined for final disposal crossing the Canada-USA border comply with each country's domestic law and the provisions of The Bilateral Agreement.

The Bilateral Agreement confirms basic principles recognized by both countries for the proper control of transboundary movements of hazardous wastes, including a prior informed consent (PIC) regime.

Certificates of Destruction are not a requirement under any of the three recognized international agreements – including The Bilateral Agreement - governing the transboundary shipment of hazardous wastes that Canada is a signatory to.

iv.) Relating to "Reasonable Doubt"

In this case, The Company and its director, being in business for then eighteen years and very experienced with the transboundary movement of hazardous wastes and relevant regulations, did its best to comply with Section 36.

However, The Company and its director only had the means of requesting the voluntary release of Certificates of Destruction from the American facilities.

While the Americans are generally willing to honour these requests, there are instances when the Certificates of Destruction will not be made available, such as facility closures, trade disputes or, simply, apathy.

Such failure to provide the Certificates of Destruction would not place the American facility in any violation of any domestic law or international agreement.

The applicant believes that there would be substantial reasonable doubt of guilt on a Canadian exporter and director under such circumstances.

Items relating to both Material Facts and Legal Basis

The following items provide information relating to both the material facts and the legal basis of the constitutional question:

1. Section 36. (1) of EIHWHRMR states:  
*"Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled*  
*(a) in accordance with the export or import permit;*



- (b) in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and*
- (c) Within the period referred to in paragraph 9(o) or 16(n)."*

**Note:** the word "confirmation" in the fifth line of above Item 1 is described in practice as "**Certificate of Destruction**" and is so referred to in this document.

2. Section 9. (o) of EIHWHRMR states:  
*"in the case of operation D13, D14, or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the authorities of the jurisdiction in which the authorized facility is located require shorter time periods, in which case those time periods apply"*
3. Section 185(1) of CEPA 1999 states:  
*"No person shall import, export or convey in transit a hazardous waste or hazardous recyclable material, or prescribed non-hazardous waste for final disposal, except*
  - (a) after notifying the Minister and paying the prescribed fee;*
  - (b) after receiving from the Minister which-ever one of the following permits is applicable:*
    - i. an import or export permit that, except in a case of a permit issued under subsection (4), states that the authorities of the country of destination and, if applicable, of the country of transit have authorized the movement, and that the authorities of the jurisdiction of destination have authorized the final disposal or recycling of the waste or material, or*
    - ii. a transit permit that states the Minister has authorized the movement; and**(b) In accordance with the prescribed conditions."*
4. Section 272. (1) of CEPA 1999 states:  
*"Every person commits an offence who contravenes*
  - (a) a provision of the Act or the regulations*
  - (b) an obligation or a prohibition arising from the Act or the regulations"*
5. Section 272. (2) of CEPA 1999 states:  
*"Every person who commits an offence under subsection (1) is liable*
  - (a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both; and*
  - (b) on summary conviction, to a fine of not more than \$300,000 or to*

*imprisonment for a term of not more than six months, or to both."*

6. Section 280(1) of CEPA 1999 states:  
*"Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted."*
7. Section 280.1(1) of CEPA 1999 states:  
*"Every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with*
  - (a) this Act and the regulations; and*
  - (b) orders and directions of, and prohibitions and requirements imposed by, the Minister and enforcement officers and review officers"*
8. Canada is a signatory to the following international agreements governing the transboundary movement of hazardous waste:
  - (a) The United Nations Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1992);
  - (b) The Organization for Cooperation and Economic Development (OECD) Council Decision concerning the control of Transfrontier movements of wastes destined for recovery operations (revised 2001);
  - (c) The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste (amended 1992).

The following is the legal basis for the constitutional question:

The applicant states that ECE's application of the provisions of Section 36 against an entity or a person in the United States is:

- (a) constitutionally invalid in that an entity or person would be held liable for the action or omission of an unrelated party in a foreign jurisdiction;
- (b) constitutionally invalid because a person can be charged with a penal offence that would threaten that person's right to liberty without the means of defence, akin to being charged with an absolute liability punishable by imprisonment;
- (c) not applicable in the absence of a mens rea to commit an offence that would cause harm to human health or to the environment or to circumvent any law of any jurisdiction;

- (d) as per (b), has the effect of violating a person's right to liberty as guaranteed under The Charter
- (e) invalid because it does not conform to the principles of the three relevant international agreements and contravenes the right to maintain local jurisdiction
- (f) not legal in that it places an entity or a person under guilt in a situation that is not beyond reasonable doubt and does not rely on solid proof or evidence.

i.) **Relating to "The Charter":**

If an American disposal facility, authorized to receive and dispose hazardous wastes from a Canadian exporter, is not able to, or chooses not to supply a Certificate of Destruction within the prescribed time period of Section 36 to the Canadian exporter, that same facility has not violated any domestic law or international regulation that it is bound to.

Yet, in the case of the above, the provisions within Section 36 would place a Canadian exporter and any of its directors in the position of committing an offence under Sections 272(1), 280(1) and 280.1(1) of CEPA 1999 which provide for the possibility of imprisonment.

The punitive application of Section 36 determines that the exporter and directors are at fault for failing to submit Certificates of Destruction even though the exporter and directors have no provenance or Chain of Custody with those documents.

Canadian directors would then be subjected to the threat of their rights to liberty of persons as guaranteed by Section 7 of The Charter with the threat of imprisonment.

The 1985 Supreme Court decision *Re B.C. Motor Vehicle Act* stated that imprisonment violates a person's liberty and an absolute liability offence is not in accordance with the principles of fundamental justice.

ii.) **Relating to "Conflict of Law":**

Extraterritorial jurisdiction is governed by international law, rather than being at the absolute discretion of individual states and that jurisdiction "*cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention*", see *R. v. Hape* SCC 26 (para. 65).

Therefore, the provisions of Section 36 should not be applied into the USA because it does not comply with the principles of the three relevant international agreements concerning the transboundary movement of hazardous waste.

In this case, the party having provenance and Chain of Custody of the Certificates of Destruction would be American facilities that are in full compliance with their local laws and the international agreements.

As far as American law is concerned, there is no mens rea or actus reus.

The applicant states that the expectation that an offence was incurred by a Canadian working and residing in Canada due to the omission of an American in the United States is a conflict of law and renders Section 36 as inapplicable.

iii.) **Relating to "Contravention of 'The Bilateral Agreement'"**:

Regarding *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste*:

Article 2- General Obligation states:

*"The parties shall permit the export, import, and transit of hazardous waste and other waste across their common border for treatment, storage, or disposal pursuant to the terms of their domestic laws, regulations and administrative practices, and the provisions of this agreement."*

The issuance of Certificates of Destruction by an authorized American facility is not pursuant to any American domestic law and the facility is not compelled to produce one.

If the American facility does not provide a Certificate of Destruction to the Canadian exporter for whatever reason, that means that the Canadian exporter has never been involved in the Chain of Custody of a Certificate of Destruction – a document that is not legislated to have to be in existence and a document that the Canadian exporter is not capable of authoring.

In fact, there is no standard form for Certificates of Destruction for Section 36, EIHWHRM and CEPA 1999.

Yet, Section 36 creates a situation where a company and its directors can be held liable for not obtaining a foreign document, whether it exists or not, outside its Chain of Custody.

In such cases, there is an absence of mens rea by the exporter and its directors to commit an offence and an absence of actus reus by the only possible authors

of Destructions of Certificates.

Furthermore, the requirement for Certificates of Destruction from authorized American facilities is not necessary to achieve the objectives and principles of the three international agreements governing the transboundary shipment of hazardous wastes.

The reason for this is that one of the major components of the three international agreements is the "prior informed consent regime" (PIC).

For many years, the PIC has been very effective in achieving the principles of the three international agreements.

Under CEPA 1999 and EIHWHRMR, a Canadian export notice needs to be completed by the exporter and to be submitted to Environment Canada.

Once the notice has been reviewed, as well as meeting the contract and insurance requirements, the notice is forwarded to the competent American authority for their consent.

In this case, no permit will be issued until the American authority has authorized the movement and has confirmed that the final disposal of the hazardous waste is authorized.

The PIC is an effective, time-tested process that has not required Certificates of Destruction before and is not recognized and used by the Americans now.

There would be no loss of effect to protecting human health or the environment by applying one of the requested remedies.

Article 5 – Cooperative Efforts states:

1. *The parties will cooperate to ensure, to the extent possible, that all transboundary shipments of hazardous waste and other waste comply with the **manifest requirements** of both countries.*
2. *The parties will cooperate in monitoring and spot-checking transboundary shipments of hazardous waste and other waste to ensure, to the extent possible, that such shipments conform to the requirements of the applicable legislation and of this Agreement.*
3. *To the extent any implementing laws and regulations are necessary to comply with this Agreement, the parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the Parties will make best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The Parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such laws and regulations."*

Certificates of Destruction are not a "manifest requirement" under CEPA 1999 or EIHWHRMR and, therefore, are not a requirement for any of the three relevant international agreements including The Bilateral Agreement.

Article 7 – Enforcement states:

*"The Parties shall ensure, to the extent possible, that within their respective jurisdictions, their domestic laws and regulations are enforced with respect to the transportation, storage, treatment and disposal of transboundary shipments of hazardous waste and other waste."*

The applicant contends that it is sufficient that the Americans apply their own enforcement of their local laws and their obligations under the three international agreements without the need of the intrusion of the provisions of Section 36.

iv.) Relating to "Reasonable Doubt"

In *R. v. Gibbons*, 2003 ABPC 114, the court reiterated the legal concept of reasonable doubt (paragraph 20) namely,

- (i) *the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;*
- (ii) *the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;*
- (iii) *a reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense;*
- (iv) *it is logically connected to the evidence or absence of evidence;*
- (v) *it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and*
- (vi) *more is required than proof that the accused is probably guilty (emphasis added)*

The application of Section 36 unfairly places an inference of guilt onto an exporter and a person in Canada when an American facility does not provide a Certificate of Destruction for whatever the reason.

For its provisions to be effective, ECE perhaps assumes that the Canadian exporter has found means outside of United States law or The Bilateral Agreement to compel the American facility to produce Certificates of Destruction solely to comply with a uniquely Canadian regulation.

It is also possible that ECE assumes that it has sufficient reason to believe that the exporter and its directors have committed offences under CEPA 1999 if Environment Canada does not receive the Certificates of Destruction which can only originate in the United States.

The above assumptions are not reasonable.

September 2, 2011



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September 27, 2011

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~~VIA FACSIMILE~~

*Registered Mail*

Re: Constitutional Question attached to Federal Court File T-1295-11  
Between: Patrick Whitty, Applicant, and Anthony Bratschitsch, Intervenor;  
And The Chief Enforcement Officer, Environmental Enforcement,  
Environment Canada and The Attorney General of Canada, Respondents

I am serving the accompanying Constitutional Question as per the Federal  
Courts Rules.

Yours truly,



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Fax (905) 662-3828

*16 pages*

2011 09 30 13 36  
DEPT OF JUSTICE  
MINISTRE DE LA JUSTICE

File No. T-1295-11

IN THE FEDERAL COURT

BETWEEN

**PATRICK WHITTY**

Applicant

-and-

**THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA AND THE ATTORNEY  
GENERAL OF CANADA**

Respondents

**NOTICE OF DISCONTINUANCE**

**ZBOGAR ADVOCATE**

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Solicitor for the Applicant

File No. T-1295-11

IN THE FEDERAL COURT

BETWEEN

**PATRICK WHITTY**

Applicant

-and-

**THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA AND THE ATTORNEY  
GENERAL OF CANADA**

Respondents

**NOTICE OF DISCONTINUANCE**

The plaintiff wholly discontinues this application in the Federal Court.

November 23, 2011



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Solicitor for the Respondents

**Page 2420**

**is withheld pursuant to section  
est retenue en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



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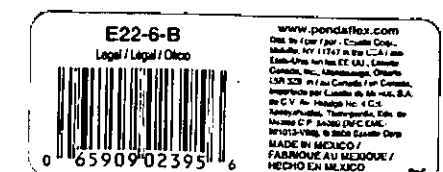
CIVIL LAW

BRATSCHITSCH, Anthony v. Attorney General of Canada et al

Box 21  
Skid  
2012-PSDI-1

COURT FILE NUMBER

T-2112-10



BRATISCH / TSCH, A. v AGC et al

2-595438



T-2112-10

FORM 301- Rule 301

**NOTICE OF APPLICATION**

Federal Court of Canada

Between:

Anthony Bratschitsch

Applicant

And

The Attorney General of Canada and The Chief Enforcement Officer,  
Environmental Enforcement, Environment Canada

Respondents

**NOTICE OF APPLICATION**

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on page 6.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: **DEC 20 2010**

Issued by: **ABIGAIL GRIMES**  
**REGISTRY OFFICER**  
**AGENT DU GREFFE**  
(Registry Officer)

Address of local office: **180 Queen Street West** **180, rue Queen Ouest**  
**Suite 200** **bureau 200**  
**Toronto, Ontario** **Toronto, Ontario**  
**M5V 3L6** **M5V 3L6**

TO:

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Environmental Enforcement  
National Enforcement Headquarters  
Environment Canada  
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Gatineau, Quebec  
K1A 0H3

The Attorney General of Canada  
Department of Justice  
284 Wellington St.  
Ottawa, ON  
K1A 0H8

## APPLICATION

This is an application for judicial review in respect of:

The Canadian Environmental Protection Act, 1999 and Environmental Enforcement, Environment Canada

The applicant, Anthony Bratschitsch, requests the judicial review of the validity of Section 36 (herein after referred to as the "Section 36") of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations (herein after referred to as the "EIHWHRMR") under the Canadian Environmental Protection Act, 1999 (herein after referred to as the "CEPA 1999").

This is a matter that consists of the prospect of persons in Canada facing the possibilities of imprisonment due to circumstances beyond their control and occurring outside Canada.

This matter also applies to Canadian entities, i.e. commercial, institutional, etc. (herein after referred to as the "entity"), facing other forms of punishment under the same circumstances.

Since at least one Canadian and at least one entity have already faced such prospects, which occurred without precedence, the applicant is applying to the court for remedies.

The applicant seeks public interest standing as established by the Supreme Court of Canada in cases such as *Chaouilli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 and *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147 in that:

1. The issue raises serious legal questions;
2. The applicant has a genuine interest as a citizen in the resolution of the questions; and
3. That there is no other reasonable and effective means in which the questions may be brought to court.

The applicant is a Canadian citizen employed as a consultant in the industry affected by Section 36.

The applicant makes a reference to *R v. RPR ENVIRONMENTAL INC. AND PATRICK WHITTY* (Ontario Court of Justice) in which the Enforcement Branch of Environment Canada (herein after referred to as the "ECE") laid 63 counts of charges in 2008 involving summary conviction against the Canadian exporter of hazardous wastes and a company director, Patrick Whitty.

The ECE charges were based on that the RPR ENVIRONMENTAL INC. (herein referred to as the "Company") did not obtain "confirmations", i.e. "Certificates of Destruction" (herein referred to as the "Certificates"), within the time period prescribed by provisions of Section 36.

All of the Certificates described in the charges were to be drawn from authorized disposal facilities in the United States.

However, there are circumstances in the United States, such as facility closures, inefficiencies or apathy that may restrict or prevent the issuance or release of the Certificates.

American law or regulations or any relevant international agreement between Canada and the USA does not require the Certificates.

In this case, a Canadian citizen, Patrick Whitty, residing within Canada did suffer from the threat of the loss of liberty during a twelve-month period by the actions of a Canadian government body, ECE.

As well, the Company faced punitive penalties.

The applicant does not know if this occurrence has since been repeated elsewhere in Canada because a search in Environment Canada's registry did not reveal similar cases and also because requests for information through the Access to Information Act are still in process.

The below items are relevant to this matter:

1. Section 36. (1) of "EIHWHRMR" states:  
*"Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled*
  - (a) in accordance with the export or import permit;*
  - (b) in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and*
  - (c) Within the period referred to in paragraph 9(o) or 16(n)."*

(Note: the word "confirmation" in the fifth line of above Item 1 has been described in this document as a "Certificate of Destruction".)

2. Section 9. (o) of "EIHWHRMR" states:  
*"In the case of operation D13, D14, or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the authorities of the jurisdiction in which the authorized facility is located require shorter time periods, in which case those time periods apply"*
3. Section 185(1) of "CEPA 1999" states:  
*"No person shall import, export or convey in transit a hazardous waste or hazardous recyclable material, or prescribed non-hazardous waste for final disposal, except*
  - (a) after notifying the Minister and paying the prescribed fee;*
  - (b) after receiving from the Minister which-ever one of the following permits is applicable:*
    - i. an import or export permit that, except in a case of a permit issued under subsection (4), states that the authorities of the country of destination and, if applicable, of the country of transit have authorized the movement, and that the authorities of the jurisdiction of destination have authorized the final disposal or recycling of the waste or material, or*
    - ii. a transit permit that states the Minister has authorized the movement; and*
    - iii. In accordance with the prescribed conditions."*
4. Section 272. (1) of "CEPA 1999" states:  
*"Every person commits an offence who contravenes*
  - (a) a provision of the Act or the regulations*
  - (b) an obligation or a prohibition arising from the Act or the regulations"*
5. Section 272. (2) of "CEPA 1999" states:  
*"Every person who commits an offence under subsection (1) is liable*
  - (a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both; and*
  - (b) on summary conviction, to a fine of not more than \$300,000 or to imprisonment for a term of not more than six months, or to both."*

6. Section 280(1) of "CEPA 1999" states:  
*"Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted."*
7. Section 280.1(1) of "CEPA 1999" states:  
*"Every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with*
  - (a) this Act and the regulations; and*
  - (b) orders and directions of, and prohibitions and requirements imposed by, the Minister and enforcement officers and review officers"*
8. Canada is a signatory to the following international agreements governing the transboundary movement of hazardous waste:
  - (a) The United Nations Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1992);
  - (b) The Organization for Cooperation and Economic Development (OECD) Council Decision concerning the control of Transfrontier movements of wastes destined for recovery operations (revised 2001);
  - (c) The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992 (herein after referred to as the "Bilateral Agreement").

### The applicant makes application for:

The applicant requests relief from the court as it deems necessary under the Canadian Charter of Rights and Freedoms (herein after referred to as the "Charter"), as per:

**24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.**

The applicant also requests a remedy that, within Section 36 of the EIHWHRRM under CEPA 1999, the phrase "**exporter or importer**" be removed and that the words "**authorized facility of disposal or recycling**" be added in its place or, simply, that Section 36 be struck in its entirety from EIHWHRRM.

## The grounds for the application are:

The applicant submits that the standard of review is based on correctness concerning questions of law and questions of jurisdiction (*Dunsmuir v. New Brunswick*, 2008 SCC 9, paragraph 50).

Concerning the request for a judicial review for potential matters of the same nature, the applicant cites *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147, paragraph 69:

"Moreover, the absence of a "decision" is not an absolute bar to an application for judicial review under the *Federal Courts Act*, and the role of the court has been found to extend beyond the review of formal decisions, and to include the review of a "diverse range of administrative action that does not amount to a 'decision or order' ..."

The applicant argues that:

### A) Section 36 has the effect of violating a person's right to liberty as guaranteed under Section 7 of the "Charter"

If an American disposal facility, authorized to receive and dispose hazardous wastes from a Canadian exporter, is not able to, or chooses not to supply a Certificate of Destruction within the prescribed time period of Section 36 to the Canadian exporter, that same American facility has not violated any domestic law or international regulation that it is bound to.

Yet, in the case of the above, the provisions within Section 36 would place a Canadian exporter and any of its directors in the position of committing an offence under Sections 272(1), 272(2), 280(1) and 280.1(1) of CEPA 1999 which provide for the possibility of imprisonment.

Section 36 unfairly places the exporter and directors at fault for failing to submit the Certificates even though the exporter and directors have no provenance or Chain of Custody with those documents.

Canadian directors would then be subjected to the threat of their rights to liberty of persons as guaranteed by Section 7 of the "Charter".

B) Section 36 is not valid due to jurisdictional issues:

Extraterritorial jurisdiction is governed by international law, rather than being at the absolute discretion of individual states and that jurisdiction *"cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention"*, see *R. v. Hape* SCC 26 (para. 65).

Therefore, Section 36 is invalid because it is not provided for and does not comply with the principles of the three relevant international agreements concerning the transboundary movement of hazardous waste.

The "Bilateral Agreement" which is used to bridge the other two international agreements, stipulates:

Article 2- General Obligation:

*"The parties shall permit the export, import, and transit of hazardous waste and other waste across their common border for treatment, storage, or disposal pursuant to the terms of their **domestic laws, regulations and administrative practices**, and the provisions of this agreement."*

The issuance of Certificates by an authorized American facility is not pursuant to any American domestic rules and the facility is not compelled to produce them.

Furthermore, if the American facility does not provide a Certificate to the Canadian exporter for whatever reason, that means that the Canadian exporter has never been involved in the Chain of Custody of the Certificate – a document that the Canadian exporter is not capable of authoring.

In fact, there is no standard form for Certificates under Section 36, EIHWHRM or CEPA 1999.

Yet, Section 36 creates a situation where a company and its directors can be held liable for not obtaining a foreign document, whether it exists or not, outside its Chain of Custody.

In such cases, there is an absence of mens rea by the exporter and its directors to commit an offence while, at the same time, there is also an absence of actus reus by the only possible authors of the Certificates – the American facilities.

Therefore, Section 36 deems that a serious violation worthy of penal punishment has been committed outside of domestic laws and international agreements.



Furthermore, the requirement for Certificates from authorized American facilities is not necessary to achieve the objectives and principles of the three international agreements governing the transboundary shipment of hazardous wastes.

The reason for this is that one of the major components of the three international agreements is the "prior informed consent regime" (PIC).

For many years, the PIC has been very effective in achieving the principles of the three international agreements.

Under CEPA 1999 and EIHWHRM, a Canadian export notice needs to be completed by the exporter and to be submitted to Environment Canada.

Once the notice has been reviewed, as well as meeting the contract and insurance requirements, the notice is forwarded to the competent American authority for their consent.

In this case, no permit will be issued until the American authority has authorized the movement and has confirmed that the final disposal of the hazardous waste is authorized.

The PIC is an effective, time-tested process that has not required Certificates of Destruction before and is not recognized and used by the Americans now.

Therefore, there would be no loss of effect to protecting human health or the environment by applying the requested remedies.

The "Bilateral Agreement" also states:

Article 5 – Cooperative Efforts:

1. *The parties will cooperate to ensure, to the extent possible, that all transboundary shipments of hazardous waste and other waste comply with the **manifest requirements** of both countries.*
2. *The parties will cooperate in monitoring and spot-checking transboundary shipments of hazardous waste and other waste to ensure, to the extent possible, that such shipments conform to the requirements of the applicable legislation and of this Agreement.*
3. *To the extent any implementing laws and regulations are necessary to comply with this Agreement, the parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the Parties will make best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The Parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such laws and regulations."*

Certificates are not a "manifest requirement" under CEPA 1999 or EIHWHRM and, therefore, are not a requirement for any of the three relevant international agreements including the "Bilateral Agreement".

Should the remedy of replacing the phrase "**exporter or importer**" within Section 36. (1) of EIHWHRM with the words "authorized facility of disposal or recycling", the Canadian party to the "Bilateral Agreement" would have to comply with Article 5, section 3 (above).

The "Bilateral Agreement" also states:

Article 7 – Enforcement:

*"The Parties shall ensure, to the extent possible, that within their respective jurisdictions, their domestic laws and regulations are enforced with respect to the transportation, storage, treatment and disposal of transboundary shipments of hazardous waste and other waste."*

The applicant contends that it is sufficient that the Americans apply their own enforcement of their local laws and their obligations under the three international agreements without the need of the intrusion of the provisions of Section 36.

C) Section 36 violates Canadians' expectations of fair justice

In *R. v. Gibbons, 2003 ABPC 114*, the court reiterated the legal concept of reasonable doubt (paragraph 20) namely,

- (i) *the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;*
- (ii) *the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;*
- (iii) *a reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense;*
- (iv) *it is logically connected to the evidence or absence of evidence;*
- (v) *it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and*
- (vi) *more is required than proof that the accused is probably guilty (emphasis added)*

The application of Section 36 clearly places an inference of guilt onto an exporter and a person in Canada when an American facility does not provide a Certificate for whatever the reason.

This is not fair.

This application will be supported by the following material:

1. Canada Gazette Part II, Volume 139, No. 11: Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations
2. The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992

December 19, 2010



(Signature of applicant)

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel (289) 260-1153

SOR/2004-283, ss. 35 and 38

FORM 305 – NOTICE OF APPEARANCE – APPLICATION  
Federal Court Rules, 1998, Rule 305

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

Respondents

**NOTICE OF APPEARANCE**

The Respondents intend to oppose this application.

January 6, 2011



Myles J. Kirvan  
Deputy Attorney General of Canada  
Per: Michael J. Sims  
Department of Justice  
Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6  
Tel: (416) 952-7116  
Fax: (416) 973-4323

Solicitor for the Respondents

TO: Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel. (289) 260-1153

Applicant

FORM 146A – AFFIDAVIT OF SERVICE  
Federal Court Rules, 1998, Rule 146

T-2176-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH on his own behalf  
and on behalf of 876947 ONTARIO LIMITED  
O/A RPR ENVIRONMENTAL AND PATRICK WHITTY**

Applicants

and

**ATTORNEY GENERAL OF CANADA as represented by  
THE MINISTER OF THE ENVIRONMENT AND  
RENZO A. BENOCCHI AND BRADLEY MAY**


Respondents

**AFFIDAVIT OF SERVICE**

I, Diane Dyke, Legal Assistant, of the City of Toronto, in the Province of  
Ontario SWEAR THAT:

I served Anthony Bratschitsch with the Notice of Appearance of the  
Respondents by sending a copy by regular mail on Thursday, January  
6, 2011 to 163 Governors Road, Dundas, Ontario L9H 6L6 the last  
address for service provided by Anthony Bratschitsch.

SWORN before me at the City of  
Toronto in the Province of  
Ontario on January 07, 2011.

  
\_\_\_\_\_  
Commissioner for Taking Affidavits

  
\_\_\_\_\_  
Diane Dyke

January 24, 2011

**Sent by Registered Parcel Mail**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-595438  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10  
Affidavit and Exhibits

Dear Mr. Sims,

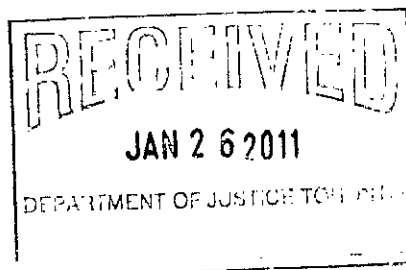
I wish to serve this Affidavit with Exhibits.

If needed, I can be contacted at (289) 260-1153.

Yours truly,



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6



T-2112-10

FORM 80A - Rule 80

## AFFIDAVIT

FEDERAL COURT

BETWEEN:

ANTHONY BRATSCHITSCH

Applicant

and

THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA AND THE ATTORNEY  
GENERAL OF CANADA

Respondents

### AFFIDAVIT OF ANTHONY BRATSCHITSCH

I, Anthony Bratschitsch, of the Town of Dundas, in the amalgamated City of Hamilton, in the Province of Ontario SWEAR THAT:

1. I am a Canadian citizen and I am employed as a consultant in the environmental waste industry affected by Section 36 of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* (EIHWHRMR). The EIHWHRMR, published in the Canada Gazette, is provided as **Exhibit A**. Section 36 is found on page 1220;
2. I am very knowledgeable of EIHWHRMR, the *Canadian Environmental Protection Act, 1999* (CEPA 1999) and the three relevant international agreements affecting the transboundary movement of hazardous wastes referred to in Item No. 8 in the Application. One of those three international agreements, *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, Amended 1992*, commonly known as "The Bilateral Agreement", is used to bridge the discrepancies of the other two international agreements to accommodate Canadian and American requirements. A copy of The Bilateral Agreement has been provided from Environment Canada's web site as **Exhibit B**;

3. I am also very knowledgeable of the typical operating procedures used by the hazardous waste industry that is utilized to achieve regulatory compliance, such as manifesting and tracking procedures;
4. I have known and provided industry-related services to Mr. Patrick Whitty and the three companies that he co-owns, including RPR Environmental Inc. (RPR), since 1998;
5. I am very knowledgeable of the facts involving the particular Environment Canada Enforcement (ECE) investigation of RPR and Mr. Whitty concerning alleged violations of Section 36 and of the subsequent prosecution. The ECE investigation file number (3007-2007-12-19-014) is shown on a copy of an ECE power point slide. This is **Exhibit C**.
6. The ECE Section 36 investigation and prosecution of RPR is a matter of public information and is of significant concern to the industry, for the reasons including fairness, predictability and consistency. **Exhibit D** is an internet publication by a reknown environmental law practioner, Dr. Dianne Saxe, detailing the Section 36 violation and her own reaction to it. Also, Environment Canada published an internet Enforcement Notification, last modified on August 11, 2009 (**Exhibit E**);
7. Dr. Saxe's internet publication refers to ECE enforcement and compliance in this manner (last paragraph) :

***We need it to be fair, and proportional to the real fault involved.***

As explained in the Application, the Canadian exporter has no control over the issuance of confirmations, commonly described as Certificates of Destruction, from the United States.

As a result, there is a perception in the industry of, at least, unfairness in the enforcement of Section 36 on Canadian exporters.

It is also my belief that there is no real fault because American legislation does not require the issuance of those Certificates, as explained in the Application.

8. Section 2.(1)(o) of CEPA 1999 states

*2. (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),*

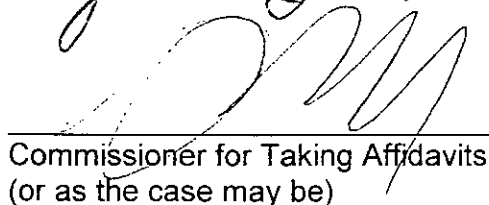
*(o) apply and enforce this Act in a fair, predictable and consistent manner.*




9. The *Canadian Manifesting Mechanism Will Say* of Mr. Joachim Wittwer, Head of Operations Section, Waste Management Division of Environment Canada succinctly describes the functions and applications of various mechanisms used to ensure compliance with CEPA 1999 and The Bilateral Agreement for the transboundary movement of hazardous waste. Mr. Wittwer's document also refers to the importance of each country's domestic legislation. As stated in the Application, the Certificates of Destruction specified in Section 36 of EIHWHMR are not part of The Bilateral Agreement. Mr. Wittwer's Will Say also does not make any reference to confirmations or Certificates of Destruction. It is clear that the confirmations or Certificates of Destruction are not a requirement of the international agreements governing the transboundary movement of hazardous wastes. Mr. Wittwer's Will Say is provided as **Exhibit F**.

Sworn (or Affirmed) before me at the City of Hamilton in the Province of Ontario

on January 24, 2011 (date).

  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

  
Anthony Bratschitsch  
(Signature of Deponent)

Exhibits :

- A. Canada Gazette Part II, Volume 139, No. 11: *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*
- B. *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992*
- C. Environment Canada Enforcement power point slide identifying investigation file and Section 36 investigation
- D. Internet publication by Dr. Dianne Saxe publishing information about concerns over the fairness of the enforcement of the Section 36 regulation
- E. Internet Publication by Environment Canada
- F. *Canadian Manifesting Mechanism Will Say* of Joachim Wittwer, Head of Operations Section, Waste Management Division of Environment Canada

This is Exhibit A referred to in the Affidavit  
of Anthony Brabichuk  
sworn before me on this 24<sup>th</sup> day  
of January, 2011  
[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

Vol. 139, No. 11

Vol. 139, n° 11

# Canada Gazette



# Gazette du Canada

## Part II

## Partie II

OTTAWA, WEDNESDAY, JUNE 1, 2005

OTTAWA, LE MERCREDI 1<sup>er</sup> JUIN 2005

Statutory Instruments 2005

Textes réglementaires 2005

SOR/2005-131 to 159 and SI/2005-43 to 53

DORS/2005-131 à 159 et TR/2005-43 à 53

Pages 1036 to 1356

Pages 1036 à 1356

### NOTICE TO READERS

The *Canada Gazette* Part II is published under authority of the *Statutory Instruments Act* on January 12, 2005, and at least every second Wednesday thereafter.

Part II of the *Canada Gazette* contains all "regulations" as defined in the *Statutory Instruments Act* and certain other classes of statutory instruments and documents required to be published therein. However, certain regulations and classes of regulations are exempted from publication by section 15 of the *Statutory Instruments Regulations* made pursuant to section 20 of the *Statutory Instruments Act*.

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The *Canada Gazette* is also available free of charge on the Internet at <http://canadagazette.gc.ca>. It is accessible in PDF (Portable Document Format) and in HTML (HyperText Mark-up Language) as the alternate format.

Copies of Statutory Instruments that have been registered with the Clerk of the Privy Council are available, in both official languages, for inspection and sale at Room 418, Blackburn Building, 85 Sparks Street, Ottawa, Canada.

### AVIS AU LECTEUR

La *Gazette du Canada* Partie II est publiée en vertu de la *Loi sur les textes réglementaires* le 12 janvier 2005, et au moins tous les deux mercredis par la suite.

La Partie II de la *Gazette du Canada* est le recueil des « règlements » définis comme tels dans la loi précitée et de certaines autres catégories de textes réglementaires et de documents qu'il est prescrit d'y publier. Cependant, certains règlements et catégories de règlements sont soustraits à la publication par l'article 15 du *Règlement sur les textes réglementaires*, établi en vertu de l'article 20 de la *Loi sur les textes réglementaires*.

On peut consulter la *Gazette du Canada* Partie II dans la plupart des bibliothèques.

Pour les résidents du Canada, le prix de l'abonnement annuel à la *Gazette du Canada* Partie II est de 67,50 \$ et le prix d'un exemplaire, de 3,50 \$. Pour les résidents d'autres pays, le prix de l'abonnement est de 67,50 \$US et le prix d'un exemplaire, de 3,50 \$US. Veuillez adresser les commandes à : Publications du gouvernement du Canada, Travaux publics et Services gouvernementaux Canada, Ottawa, Canada K1A 0S5.

La *Gazette du Canada* est aussi disponible gratuitement sur Internet au <http://gazetteducanada.gc.ca>. La publication y est accessible en format PDF (Portable Document Format) et en HTML (langage hypertexte) comme média substitut.

Des exemplaires des textes réglementaires enregistrés par le greffier du Conseil privé sont à la disposition du public, dans les deux langues officielles, pour examen et vente à la Pièce 418, Édifice Blackburn, 85, rue Sparks, Ottawa, Canada.

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* **SORDORS/2005-149**

Registration  
SOR/2005-149 May 17, 2005

Enregistrement  
DORS/2005-149 Le 17 mai 2005

CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999

LOI CANADIENNE SUR LA PROTECTION DE  
L'ENVIRONNEMENT (1999)

**Export and Import of Hazardous Waste and  
Hazardous Recyclable Material Regulations**

**Règlement sur l'exportation et l'importation de  
déchets dangereux et de matières recyclables  
dangereuses**

P.C. 2005-930 May 17, 2005

C.P. 2005-930 Le 17 mai 2005

Whereas, pursuant to subsection 332(1)<sup>a</sup> of the *Canadian Environmental Protection Act, 1999*<sup>b</sup>, the Minister of the Environment published in the *Canada Gazette*, Part I, on March 20, 2004 a copy of the proposed *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, substantially in the annexed form, and persons were given an opportunity to file comments with respect to the proposed Regulations or to file a notice of objection requesting that a board of review be established and stating the reasons for the objection;

Attendu que, conformément au paragraphe 332(1)<sup>a</sup> de la *Loi canadienne sur la protection de l'environnement (1999)*<sup>b</sup>, le ministre de l'Environnement a fait publier dans la *Gazette du Canada* Partie I, le 20 mars 2004, le projet de règlement intitulé *Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuses*, conforme en substance au texte ci-après, et que les intéressés ont ainsi eu la possibilité de présenter leurs observations à cet égard ou un avis d'opposition motivé demandant la constitution d'une commission de révision,

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to section 191 of the *Canadian Environmental Protection Act, 1999*<sup>b</sup>, hereby makes the annexed *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*.

À ces causes, sur recommandation du ministre de l'Environnement et en vertu de l'article 191 de la *Loi canadienne sur la protection de l'environnement (1999)*<sup>b</sup>, Son Excellence la Gouverneure générale en conseil prend le *Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuses*, ci-après.

<sup>a</sup> S.C. 2004, c. 15, s. 31  
<sup>b</sup> S.C. 1999, c. 33

<sup>a</sup> L.C. 2004, ch. 15, art. 31  
<sup>b</sup> L.C. 1999, ch. 33

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

**EXPORT AND IMPORT OF HAZARDOUS WASTE  
AND HAZARDOUS RECYCLABLE  
MATERIAL REGULATIONS**

**TABLE OF CONTENTS**

**Interpretation**

- 1 Hazardous Waste
- 2 Hazardous Recyclable Material
- 3 *Transportation of Dangerous Goods Regulations*
- 4 Definitions

**PART 1**

**Notice**

- 5 Application
- 6-7 Notice Procedure
- 8 Content of Notice

**PART 2**

**Export**

- 9 Conditions
- 10-14 Movement Document

**PART 3**

**Import**

- 15 Department of National Defence Exemption
- 16 Conditions
- 17-21 Movement Document

**PART 4**

**Transit**

- 22 Conditions
- 23-27 Movement Document - Transits Through Canada
- 28-32 Movement Document - Transits Through a Country Other than Canada

**PART 5**

**Returns**

- 33 Application
- 34 Returns to Canada
- 35 Returns to the Country of Export

**PART 6**

**Miscellaneous Matters**

- 36 Confirmation of Disposal or Recycling
- 37 Liability Insurance
- 38 Export Reduction Plans
- 39 Environmentally Sound Management

**Consequential matters**

- 40 Consequential Amendment

**Repeal**

- 41 Repeal

**Coming into Force**

- 42 Coming into Force

**RÈGLEMENT SUR L'EXPORTATION ET  
L'IMPORTATION DE DÉCHETS DANGEREUX ET DE  
MATIÈRES RECYCLABLES DANGEREUSES**

**TABLE DES MATIÈRES**

**Définitions et interprétation**

- 1 Déchet dangereux
- 2 Matière recyclable dangereuse
- 3 *Règlement sur le transport des marchandises dangereuses*
- 4 Définitions

**PARTIE 1**

**Notification**

- 5 Champ d'application
- 6-7 Procédure de notification
- 8 Éléments de la notification

**PARTIE 2**

**Exportation**

- 9 Conditions
- 10-14 Document de mouvement

**PARTIE 3**

**Importations**

- 15 Exemption visant le ministère de la Défense nationale
- 16 Conditions
- 17-21 Document de mouvement

**PARTIE 4**

**Transit**

- 22 Conditions
- 23-27 Document de mouvement pour les transits au Canada
- 28-32 Document de mouvement pour les transits dans un pays autre que le Canada

**PARTIE 5**

**Renvois**

- 33 Champ d'application
- 34 Renvoi au Canada
- 35 Renvoi au pays d'exportation

**PARTIE 6**

**Dispositions générales**

- 36 Déclaration d'élimination ou de recyclage
- 37 Assurance responsabilité
- 38 Plans de réduction des exportations de déchets
- 39 Gestion écologiquement rationnelle

**Modification corrélative**

- 40 Modification corrélative

**Abrogation**

- 41 Abrogation

**Entrée en vigueur**

- 42 Entrée en vigueur

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* **SOR/DORS/2005-149**

TABLE OF CONTENTS — <i>Continued</i>		TABLE DES MATIÈRES ( <i>suite</i> )	
Schedule 1	Disposal Operations for Hazardous Waste	Annexe 1	Opérations d'élimination des déchets dangereux
Schedule 2	Recycling Operations for Hazardous Recyclable Material	Annexe 2	Opérations de recyclage des matières recyclables dangereuses
Schedule 3	Hazardous Wastes and Hazardous Recyclable Materials	Annexe 3	Déchets dangereux et matières recyclables dangereuses
Schedule 4	Part 1 - Hazardous Wastes and Hazardous Recyclable Materials from Non-Specific Sources	Annexe 4	Partie 1 – Déchets dangereux et matières recyclables dangereuses de sources non spécifiques
	Part 2 - Hazardous Wastes and Hazardous Recyclable Materials from Specific Sources		Partie 2 – Déchets dangereux et matières recyclables dangereuses de sources spécifiques
Schedule 5	Environmentally Hazardous Substances	Annexe 5	Matières dangereuses pour l'environnement
Schedule 6	Hazardous Constituents Controlled under Leachate Test and Regulated Limits	Annexe 6	Constituants dangereux faisant l'objet d'un contrôle au moyen de l'épreuve relative aux lixiviats et des limites réglementaires
Schedule 7	Part 1 - Acute Hazardous Waste and Hazardous Recyclable Material Chemicals	Annexe 7	Partie 1 – Déchets dangereux et matières recyclables dangereuses (substances chimiques aiguës)
	Part 2 – Hazardous Waste and Hazardous Recyclable Material Chemicals		Partie 2 – Déchets dangereux et matières recyclables dangereuses (substances chimiques)
Schedule 8	Excluded Materials		
Schedule 9	Movement Document	Annexe 8	Matières exclues
Schedule 10	Persistent Organic Pollutants	Annexe 9	Document de mouvement
		Annexe 10	Substances polluantes organiques persistantes

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

**EXPORT AND IMPORT OF HAZARDOUS  
WASTE AND HAZARDOUS RECYCLABLE  
MATERIAL REGULATIONS**

**DEFINITIONS AND INTERPRETATION**

Definition of  
"hazardous  
waste"

1. (1) In Division 8 of Part 7 and Part 10 of the Act and in these Regulations, "hazardous waste" means anything that is intended to be disposed of using one of the operations set out in Schedule 1 and that

- (a) is set out in column 2 of Schedule 3;
- (b) is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (c) is set out in column 2 of Schedule 4 and is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (d) is set out in column 1 of Schedule 5 in a concentration equal to or greater than the applicable concentration set out in column 2 of that Schedule;
- (e) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure*, July 1992, in *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, Third Edition, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3;
- (f) is set out in column 2 of Schedule 7, is pure or is the only active ingredient, and is unused; or
- (g) according to information that Canada has received from the United States or in accordance with the Convention, is considered or defined as hazardous under the legislation of the country receiving it and is prohibited by that country from being imported or conveyed in transit.

Exclusion

(2) The definition "hazardous waste" in subsection (1) does not include anything that is

- (a) exported, imported or conveyed in transit in a quantity of less than 5 kg or 5 L per shipment or, in the case of mercury, in a quantity of less than 50 mL per shipment, other than anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*;
- (b) collected from households in the course of regular municipal waste collection services; or
- (c) part of the exporter's or importer's personal effects or household effects not resulting from commercial use.

**RÈGLEMENT SUR L'EXPORTATION  
ET L'IMPORTATION DE DÉCHETS  
DANGEREUX ET DE MATIÈRES  
RECYCLABLES DANGEREUSES**

**DÉFINITIONS ET INTERPRÉTATION**

Définition de  
« déchet  
dangereux »

1. (1) Pour l'application de la section 8 de la partie 7 et de la partie 10 de la Loi et du présent règlement, « déchet dangereux » s'entend de toute chose qui est destinée à être éliminée selon une opération prévue à l'annexe 1 et qui répond à l'une ou l'autre des conditions suivantes :

- a) elle figure à la colonne 2 de l'annexe 3;
- b) elle est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- c) elle figure à la colonne 2 de l'annexe 4 et est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- d) elle figure à la colonne 1 de l'annexe 5 et se trouve dans une concentration égale ou supérieure à la concentration applicable prévue à la colonne 2 de cette annexe;
- e) produit un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de cette annexe, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, 3<sup>e</sup> édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3;
- f) elle figure à la colonne 2 de l'annexe 7, elle est pure ou est le seul ingrédient actif, et elle est inutilisée;
- g) selon les informations que le Canada a obtenues des États-Unis ou aux termes de la Convention, elle est considérée ou définie comme dangereuse par la législation du pays où elle est destinée et son importation ou son transit est interdit dans ce pays.

(2) Ne sont pas considérés comme des déchets dangereux :

- a) les déchets qui sont exportés ou importés ou qui transitent en une quantité inférieure à 5 kg ou 5 L par envoi ou, dans le cas de mercure, en une quantité inférieure à 50 mL par envoi, sauf ceux qui sont compris dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*;
- b) ceux qui sont enlevés dans le cours normal des services municipaux d'enlèvement des ordures ménagères;

Exceptions

Definition of  
"hazardous  
recyclable  
material"

2. (1) In Division 8 of Part 7 and Part 10 of the Act and in these Regulations, "hazardous recyclable material" means anything that is intended to be recycled using one of the operations set out in Schedule 2 and that

- (a) is set out in column 2 of Schedule 3;
- (b) is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (c) is set out in column 2 of Schedule 4 and is included in at least one of Classes 2 to 6, 8 or 9 of the *Transportation of Dangerous Goods Regulations*;
- (d) is set out in column 1 of Schedule 5 in a concentration equal to or greater than the applicable concentration set out in column 2 of that Schedule;
- (e) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure*, July 1992, in *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, Third Edition, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3;
- (f) is set out in column 2 of Schedule 7, is pure or is the only active ingredient, and is unused; or
- (g) according to information that Canada has received from the United States or in accordance with the Convention, is considered or defined as hazardous under the legislation of the country receiving it and is prohibited by that country from being imported or conveyed in transit.

Exclusion

(2) The definition "hazardous recyclable material" in subsection (1) does not include anything that is

- (a) exported, imported or conveyed in transit in a quantity of less than 5 kg or 5 L per shipment or, in the case of mercury, in a quantity of less than 50 mL per shipment, other than anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*;
- (b) collected from households in the course of regular municipal waste collection services;
- (c) part of the exporter's or importer's personal effects or household effects not resulting from commercial use;
- (d) exported to, imported from, or conveyed in transit through a country that is a party to OECD Decision C(2001)107/Final and that

c) ceux qui font partie des effets personnels ou des articles ménagers de l'exportateur ou de l'importateur et qui ne résultent pas d'un usage commercial.

2. (1) Pour l'application de la section 8 de la partie 7 et de la partie 10 de la Loi et du présent règlement, « matière recyclable dangereuse » s'entend de toute chose qui est destinée à être recyclée selon une opération prévue à l'annexe 2 et qui répond à l'une ou l'autre des conditions suivantes :

- a) elle figure à la colonne 2 de l'annexe 3;
- b) elle est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- c) elle figure à la colonne 2 de l'annexe 4 et est comprise dans au moins une des classes 2 à 6, 8 et 9 du *Règlement sur le transport des marchandises dangereuses*;
- d) elle figure à la colonne 1 de l'annexe 5 et se trouve dans une concentration égale ou supérieure à la concentration applicable prévue à la colonne 2 de cette annexe;
- e) elle produit un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de cette annexe, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, 3<sup>e</sup> édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3;
- f) elle figure à la colonne 2 de l'annexe 7, elle est pure ou est le seul ingrédient actif, et elle est inutilisée;
- g) selon les informations que le Canada a obtenues des États-Unis ou aux termes de la Convention, elle est considérée ou définie comme dangereuse par la législation du pays où elle est destinée et son importation ou son transit est interdit dans ce pays.

Définition de  
« matière  
recyclable  
dangereuse »

(2) Ne sont pas considérées comme des matières recyclables dangereuses :

- a) les matières qui sont exportées ou importées ou qui transitent en une quantité inférieure à 5 kg ou 5 L par envoi ou, dans le cas de mercure, en une quantité inférieure à 50 mL par envoi, sauf celles qui sont comprises dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*;
- b) celles qui sont enlevées dans le cours normal des services municipaux d'enlèvement des ordures ménagères;
- c) celles qui font partie des effets personnels ou des articles ménagers de l'exportateur ou de l'importateur et qui ne résultent pas d'un usage commercial;

Exceptions



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

- (i) is in a quantity of 25 kg or 25 L or less,
  - (ii) is exported or imported for the purpose of conducting measurements, tests or research with respect to the recycling of that material,
  - (iii) is accompanied by a shipping document, as defined in section 1.4 of the *Transportation of Dangerous Goods Regulations*, that includes the name and address of the exporter or importer and the words "test samples" or "échantillons d'épreuve", and
  - (iv) is not and does not contain an infectious substance as defined in section 1.4 of the *Transportation of Dangerous Goods Regulations*; or
- (e) exported to, imported from, or conveyed in transit through a country that is a party to OECD Decision C(2001)107/Final and that
- (i) is set out in Schedule 8,
  - (ii) produces a leachate containing a constituent set out in column 2 of Schedule 6 in a concentration equal to or greater than the applicable concentration set out in column 3 of that Schedule, determined in accordance with *Method 1311, Toxicity Characteristic Leaching Procedure*, July 1992, in *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods, Third Edition*, SW-846, November 1986, published by the United States Environmental Protection Agency, which, for the purposes of this definition, shall be read without reference to section 7.1.3, and
  - (iii) is intended to be recycled at an authorized facility in the country of import using one of the operations set out in Schedule 2.

d) celles qui sont exportées dans un pays partie à la décision C(2001)107/Final de l'OCDE, qui en sont importées ou qui y transitent, et qui, à la fois :

- (i) le sont en une quantité de 25 kg ou moins ou de 25 L ou moins,
- (ii) sont exportées ou importées aux fins d'évaluation, d'essai ou de recherche concernant leur recyclage,
- (iii) sont accompagnées d'un document d'expédition, au sens de l'article 1.4 du *Règlement sur le transport des marchandises dangereuses*, qui porte les nom et adresse de l'exportateur ou de l'importateur, selon le cas, et la mention « échantillons d'épreuve » ou « test samples »,
- (iv) ne sont pas des matières infectieuses au sens de l'article 1.4 du *Règlement sur le transport des marchandises dangereuses*, et n'en contiennent aucune;

e) celles qui sont exportées dans un pays partie à la décision C(2001)107/Final de l'OCDE, qui en sont importées ou qui y transitent, et qui, à la fois :

- (i) figurent à l'annexe 8,
- (ii) produisent un lixiviat qui contient un constituant figurant à la colonne 2 de l'annexe 6 en une concentration égale ou supérieure à la concentration applicable prévue à la colonne 3 de l'annexe 6, la concentration étant déterminée selon la méthode intitulée *Method 1311, Toxicity Characteristic Leaching Procedure*, publiée en juillet 1992 dans le document intitulé *Test Methods for Evaluating Solid Waste, Volume 1C: Laboratory Manual, Physical/Chemical Methods*, 3<sup>e</sup> édition, SW-846, publié en novembre 1986 par la United States Environmental Protection Agency et qui, pour l'application de la présente définition, se lit sans le renvoi à l'article 7.1.3,
- (iii) sont destinées à être recyclées dans une installation agréée dans le pays d'importation selon une opération prévue à l'annexe 2.

*Transportation of Dangerous Goods Regulations*

3. For the purposes of sections 1 and 2, references to the *Transportation of Dangerous Goods Regulations* shall be read as follows:

- (a) the reference to "public safety" in subparagraph 2.43(b)(i) shall be read as a reference to "the environment and human health"; and
- (b) subparagraph 2.43(b)(i) shall be read without reference to "during transport".

3. Pour l'application de la définition de « déchet dangereux » prévue à l'article 1 et de la définition de « matière recyclable dangereuse » prévue à l'article 2, le *Règlement sur le transport des marchandises dangereuses* se lit avec les adaptations suivantes :

- a) « la santé publique » est remplacé par « l'environnement et la santé humaine », au sous-alinéa 2.43b)(i);
- b) « pendant le transport » est supprimé au sous-alinéa 2.43b)(i).

*Règlement sur le transport des marchandises dangereuses*

Definitions

4. The following definitions apply in Division 8 of Part 7 of the Act and in these Regulations.

"Act" means the *Canadian Environmental Protection Act, 1999*.

"authorities of the country" means the competent authorities designated in the *Compilation of Country Fact Sheets (CFS)*, Basel Convention

4. Les définitions qui suivent s'appliquent à la section 8 de la partie 7 de la Loi et au présent règlement.

« accord Canada-États-Unis » L'Accord entre le gouvernement du Canada et le gouvernement des États-Unis d'Amérique concernant les déplacements transfrontaliers de déchets dangereux,

Definitions

« accord Canada-États-Unis »  
"Canada-USA Agreement"

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

	Series No. 01/04, as amended from time to time, and the United States Environmental Protection Agency.	entré en vigueur le 8 novembre 1986, avec ses modifications successives.	
"authorized carrier" « transporteur agréé »	"authorized carrier" means a carrier that is authorized by the authorities of the jurisdiction in which the waste or material is transported, to transport the hazardous waste or hazardous recyclable material that is to be exported, imported or conveyed in transit.	"autorités du pays" Les autorités compétentes mentionnées dans le <i>Compilation of Country Fact Sheets (CFS), Basel Convention Series No. 01/04</i> , avec ses modifications successives, ou la United States Environmental Protection Agency.	"autorités du pays" "authorities of the country"
"authorized facility" « installation agréée »	"authorized facility" means a facility that is authorized by the authorities of the jurisdiction in which the facility is located to (a) dispose of the hazardous waste being exported or imported using an operation set out in Schedule 1; or (b) recycle the hazardous recyclable material being exported or imported using an operation set out in Schedule 2.	"Convention" La Convention de Bâle sur le contrôle des mouvements transfrontières de déchets dangereux et de leur élimination, entrée en vigueur le 5 mai 1992.	"Convention" "Convention"
"Canada-USA Agreement" « accord Canada - États-Unis »	"Canada-USA Agreement" means the Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, which entered into force on November 8, 1986, as amended from time to time.	"décision C(94)152/Final de l'OCDE" La décision C(88)90/Final de l'Organisation de coopération et de développement économiques intitulée <i>Décision du conseil sur les mouvements transfrontières de déchets dangereux</i> , en date du 27 mai 1988 et modifiée par la décision C(94)152/Final intitulée <i>Décision du conseil portant amendement à la décision sur les mouvements transfrontières de déchets dangereux</i> , en date du 28 juillet 1994.	"décision C(94)152/Final de l'OCDE" "OECD Decision C(94)152/Final"
"Convention" « Convention »	"Convention" means the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which entered into force on May 5, 1992.	"décision C(2001)107/Final de l'OCDE" La décision C(2001)107/Final de l'Organisation de coopération et de développement économiques intitulée <i>Décision du conseil concernant la révision de la décision C(92)39/Final sur le contrôle des mouvements transfrontières de déchets destinés à des opérations de valorisation</i> , en date du 21 mai 2002.	"décision C(2001)107/Final de l'OCDE" "OECD Decision C(2001)107/Final"
"foreign exporter" « expéditeur étranger »	"foreign exporter" means the person who exports hazardous waste or hazardous recyclable material from a country other than Canada.	"destinataire étranger" Toute personne qui importe des déchets dangereux ou des matières recyclables dangereuses dans un pays autre que le Canada.	"destinataire étranger" "foreign receiver"
"foreign receiver" « destinataire étranger »	"foreign receiver" means the person who imports hazardous waste or hazardous recyclable material into a country other than Canada.	"document de mouvement" Document établi en la forme prévue à l'annexe 9.	"document de mouvement" "movement document"
"movement document" « document de mouvement »	"movement document" means the form set out in Schedule 9.	"expéditeur étranger" Toute personne qui exporte des déchets dangereux ou des matières recyclables dangereuses d'un pays autre que le Canada.	"expéditeur étranger" "foreign exporter"
"notice" « notification »	"notice" means the notice of export, import or transit referred to in paragraph 185(1)(a) of the Act.	"installation agréée" Installation qui est autorisée par les autorités du territoire où elle est située à, selon le cas : a) éliminer des déchets dangereux exportés ou importés selon une opération prévue à l'annexe 1; b) recycler des matières recyclables dangereuses exportées ou importées selon une opération prévue à l'annexe 2.	"installation agréée" "authorized facility"
"OECD Decision C(94)152/Final" « décision C(94)152/Final de l'OCDE »	"OECD Decision C(94)152/Final" means Decision C(88)90/Final of the Organization for Economic Co-operation and Development, <i>Decision of the Council on Transboundary Movements of Hazardous Wastes</i> , dated May 27, 1988, as amended by Decision C(94)152/Final, <i>Decision of the Council Amending the Decision on Transboundary Movements of Hazardous Wastes</i> , dated July 28, 1994.	"Loi" La Loi canadienne sur la protection de l'environnement (1999).	"Loi" "Act"
"OECD Decision C(2001)107/Final" « décision C(2001)107/Final de l'OCDE »	"OECD Decision C(2001)107/Final" means Decision C(2001)107/Final of the Organization for Economic Co-operation and Development, <i>Decision of the Council Concerning the Revision of Decision C(92)39/FINAL on the Control of Transboundary Movements of Wastes Destined for Recovery Operations</i> , dated May 21, 2002.	"notification" La notification préalable visée à l'alinéa 185(1)a) de la Loi.	"notification" "notice"
"permit" « permis »	"permit" means the export, import or transit permit referred to in paragraph 185(1)(b) of the Act.	"numéro d'immatriculation" Numéro qui est attribué par une province ou un pays et qui atteste du droit d'exercer une activité se rapportant aux déchets dangereux ou aux matières recyclables dangereuses.	"numéro d'immatriculation" "registration number"

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

"registration  
number"  
« numéro  
d'immatricu-  
lation »

"registration number" means the number assigned by a province or country indicating the authority to undertake an activity with respect to a hazardous waste or hazardous recyclable material.

« permis » Tout permis d'exportation, d'importation ou de transit visé à l'alinéa 185(1)b) de la Loi.

« permis »  
"permit"

« transporteur agréé » Transporteur autorisé, par les autorités du territoire où il effectue le transport, à transporter des déchets dangereux ou des matières recyclables dangereuses en vue de leur exportation, importation ou transit.

« transporteur  
agréé »  
"authorized  
carrier"

## PART I

### NOTICE

#### Application

Application

5. This Part applies to the export, import and transit of hazardous waste and hazardous recyclable material other than returns of that waste or material under Part 5.

#### Notice Procedure

Notice  
reference  
number

6. The Minister shall provide a notice reference number to any person who requests one for the purpose of submitting a notice.

Delivery of  
notice

7. (1) The person that proposes to export, import or convey in transit a hazardous waste or hazardous recyclable material must submit a notice to the Minister in writing within 12 months before the export, import or transit.

Separate  
notices

(2) In the case of an export or import, the notice must not include both hazardous waste and hazardous recyclable material.

Notice for  
multiple  
hazardous  
wastes or  
hazardous  
recyclable  
materials

(3) The notice may provide for more than one hazardous waste or more than one hazardous recyclable material, as the case may be, if they

(a) are to be shipped

(i) to the same authorized facility at the same location,

(ii) through the same port of exit or the same port of entry, and

(iii) within the same 12-month period;

(b) are to be reported to the same customs office;

(c) originate from the same person and the same facility; and

(d) in the case of an export or import, have essentially the same physical and chemical characteristics.

Language

(4) In the case of an export or a transit where the French or English language is not acceptable to the authorities of the country of import or transit, the person who submits the notice must submit it in the French or English language and in a language used by those authorities.

Application for  
permit

(5) The notice shall serve as an application for a permit.

New notice

(6) A person must submit a new notice to the Minister if there is a change to any of the information contained in the permit, except that the person

## PARTIE I

### NOTIFICATION

#### Champ d'application

Champ  
d'application

5. La présente partie s'applique à l'exportation, à l'importation et au transit de déchets dangereux et de matières recyclables dangereuses, sauf s'il s'agit d'un renvoi visé à la partie 5.

#### Procédure de notification

6. Le ministre attribue un numéro de référence à quiconque en fait la demande pour une notification.

Numéro de  
référence de la  
notification

7. (1) Quiconque projette d'exporter, d'importer ou de faire transiter des déchets dangereux ou des matières recyclables dangereuses doit présenter au ministre une notification écrite, dans les douze mois précédant l'exportation, l'importation ou le transit.

Notification

(2) Dans le cas d'une exportation ou d'une importation, la notification ne peut viser à la fois des déchets dangereux et des matières recyclables dangereuses.

Objet de la  
notification

(3) La notification peut viser plusieurs déchets dangereux ou matières recyclables dangereuses, selon le cas, s'ils satisfont aux conditions suivantes :

Notification  
visant plus d'un  
déchet ou d'une  
matière

a) ils seront expédiés, à la fois :

(i) à la même installation agréée et au même endroit,

(ii) par le même point de sortie ou d'entrée,

(iii) durant la même période de douze mois;

b) ils seront déclarés au même bureau de douane;

c) ils proviennent de la même personne et de la même installation;

d) dans le cas d'une exportation ou d'une importation, ils ont essentiellement les mêmes propriétés physiques et chimiques.

(4) Dans le cas d'une exportation ou d'un transit, si l'utilisation du français ou de l'anglais n'est pas jugée acceptable par les autorités du pays d'importation ou de transit, l'auteur de la notification rédige celle-ci en français ou en anglais et dans une langue utilisée par ces autorités.

Langue

(5) La notification tient lieu de demande de permis.

Demande de  
permis

(6) Une nouvelle notification doit être présentée en cas de modification d'un renseignement figurant au permis. Toutefois, la présentation au ministre

Nouvelle  
notification

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* **SOR/DORS/2005-149**

who submitted the notice may advise the Minister in writing of a change to quantity of hazardous waste or hazardous recyclable material or the number of shipments, or may add authorized carriers, ports of exit or entry or customs offices.

#### *Content of Notice*

Content

8. The person who submits the notice must include the following information in the notice:

- (a) the notice reference number provided by the Minister under section 6;
- (b) the name, registration number, civic, mailing and electronic addresses and telephone and facsimile numbers of, and the name of the contact person for,
  - (i) the person submitting the notice,
  - (ii) the foreign receiver or the foreign exporter, as the case may be,
  - (iii) the facility from which the hazardous waste or hazardous recyclable material will be shipped,
  - (iv) the authorized carriers that will transport the hazardous waste or hazardous recyclable material, and
  - (v) all authorized facilities that will receive the hazardous waste or hazardous recyclable material;
- (c) all modes of transport that will be used;
- (d) the proposed number of shipments;
- (e) the port of exit or the port of entry through which the export or import will take place, as the case may be and, in the case of a transit, the port of exit and entry through which the transit will take place;
- (f) the customs office at which the hazardous waste or hazardous recyclable material is to be reported, if applicable;
- (g) the proposed date of the first and last shipments or, in the case of a transit, the proposed dates of entry of the first shipment and exit of the last shipment;
- (h) the name of each insurance company and the policy number for each insurance policy required under these Regulations;
- (i) the countries of transit through which the hazardous waste or hazardous recyclable material will be conveyed and the length of time it will be in each country of transit;
- (j) the following information with respect to each hazardous waste or hazardous recyclable material, namely,
  - (i) the International Waste Identification Code under OECD Decision C(94)152/Final, substituting the disposal or recycling code with the disposal or recycling code set out in column 1 of Schedule 1 or 2 to these Regulations for the applicable operation set out in column 2 of that Schedule and, if the hazardous waste or hazardous recyclable material is a gas, substituting the letter G for the letter L, P or S in the International Waste Identification Code,

d'un simple avis écrit suffit dans le cas d'une modification de la quantité de déchets ou de matières ou du nombre d'envois ou de l'ajout d'un transporteur agréé, d'un point de sortie ou d'entrée ou d'un bureau de douane.

#### *Éléments de la notification*

8. L'auteur de la notification doit y inscrire les renseignements suivants :

- a) le numéro de référence attribué par le ministre aux termes de l'article 6;
- b) les nom, numéro d'immatriculation, adresses municipale, postale et électronique et numéros de téléphone et de télécopieur des personnes et installations ci-après, ainsi que le nom de leur personne-ressource :
  - (i) l'auteur de la notification,
  - (ii) le destinataire étranger ou l'expéditeur étranger, selon le cas,
  - (iii) l'installation d'où proviendront les déchets dangereux ou les matières recyclables dangereuses,
  - (iv) les transporteurs agréés qui effectueront le transport,
  - (v) toutes les installations agréées où les déchets ou les matières seront reçus;
- c) les moyens de transport qui seront utilisés;
- d) le nombre d'envois prévus;
- e) le point de sortie ou d'entrée prévu pour l'exportation ou l'importation, selon le cas, ou, dans le cas d'un transit, les points de sortie et d'entrée prévus;
- f) le bureau de douane où seront déclarés les déchets ou les matières, le cas échéant;
- g) la date prévue pour les premier et dernier envois ou, dans le cas d'un transit, la date d'entrée prévue pour le premier envoi et la date de sortie prévue pour le dernier envoi;
- h) le numéro de chaque police d'assurance exigée par le présent règlement, ainsi que le nom de l'assureur;
- i) tout pays de transit des déchets ou des matières, ainsi que la durée du transit dans chaque pays;
- j) relativement à chaque déchet ou matière :
  - (i) le code international d'identification des déchets applicable selon la décision C(94)152/Final de l'OCDE, sauf que son code d'élimination ou de recyclage est remplacé par celui prévu à la colonne 1 des annexes 1 ou 2 du présent règlement pour l'opération applicable figurant à la colonne 2, et que les lettres « L », « P » ou « S » sont remplacées par la lettre « G » si le déchet ou la matière est un gaz,
  - (ii) si le pays d'importation, d'exportation ou de transit n'est pas partie à la décision C(2001)107/Final de l'OCDE, le code applicable figurant à la liste A de l'annexe VIII de la Convention, avec ses modifications successives,

- (ii) for hazardous waste, or for hazardous recyclable material that will be exported to, imported from or transited through a country that is not a party to OECD Decision C(2001)107/Final, the applicable code set out in List A of Annex VIII of the Convention, as amended from time to time,
- (iii) for hazardous recyclable material that will be exported to, imported from or transited through a country that is a party to OECD Decision C(2001)107/Final, the applicable code set out in Part II of Appendix 4 to that Decision,
- (iv) the tariff item and the statistical suffix set out in the *Customs Tariff Departmental Consolidation*, published by the Canada Border Services Agency, as amended from time to time,
- (v) the applicable identification number set out in column 1 of Schedule 3, 4 or 7 for the hazardous waste or hazardous recyclable material set out in column 2 of that Schedule, or the applicable hazardous constituent code number set out in column 1 of Schedule 6 for the hazardous constituent set out in column 2 of that Schedule,
- (vi) the following information set out in the applicable schedules to the *Transportation of Dangerous Goods Regulations*, namely:
  - (A) the applicable UN number set out in column 1 of Schedule 1 or column 5 of Schedule 3,
  - (B) the applicable class set out in column 3 of Schedule 1 or the primary class set out in column 4 of Schedule 3, and
  - (C) the applicable packing group and risk group set out in column 4 of Schedule 1,
- (vii) the total quantity in kilograms or litres of each hazardous waste or hazardous recyclable material,
- (viii) the applicable disposal or recycling code set out in column 1 of Schedule 1 or 2 for every applicable operation set out in column 2 of that Schedule, and the name and description of the processes to be employed with respect to those operations, and
- (ix) in the case of an export, the options considered for reducing or phasing out the export of the hazardous waste and the reason that the final disposal is taking place outside Canada;
- (k) the name, quantity and concentration of any persistent organic pollutant set out in column 2 of Schedule 10 that is contained in the hazardous waste or hazardous recyclable material, if the concentration is equal to or greater than the concentration set out in column 3;
- (l) distinct line item numbers for each hazardous waste or hazardous recyclable material;
- (m) in the case of an export or import, a copy of the contract or series of contracts, excluding financial information, or the statement referred to in paragraph 9(f) or 16(e); and
- (iii) si le pays d'importation, d'exportation ou de transit est partie à la décision C(2001)107/Final de l'OCDE, le code applicable figurant à la partie II de l'appendice 4 de la décision,
- (iv) le numéro tarifaire et le suffixe de statistique selon la *Codification ministérielle du Tarif des douanes*, publiée par l'Agence des services frontaliers du Canada, avec ses modifications successives,
- (v) le numéro d'identification applicable prévu à la colonne 1 des annexes 3, 4 ou 7 pour le déchet ou la matière figurant à la colonne 2 ou le numéro de code du constituant dangereux applicable prévu à la colonne 1 de l'annexe 6 pour le constituant dangereux figurant à la colonne 2,
- (vi) les renseignements ci-après, tirés des annexes applicables du *Règlement sur le transport des marchandises dangereuses* :
  - (A) le numéro UN applicable prévu à la colonne 1 de l'annexe 1 ou à la colonne 5 de l'annexe 3,
  - (B) la classe applicable prévue à la colonne 3 de l'annexe 1 ou la classe primaire applicable prévue à la colonne 4 de l'annexe 3,
  - (C) le groupe d'emballage/groupe de risque applicable prévu à la colonne 4 de l'annexe 1,
- (vii) le poids en kilogrammes ou le volume en litres de chaque déchet ou matière,
- (viii) le code d'élimination ou de recyclage prévu à la colonne 1 des annexes 1 ou 2 pour toutes les opérations applicables figurant à la colonne 2, ainsi que le nom et la description du processus qui sera mis en œuvre,
- (ix) dans le cas d'une exportation, les solutions qui ont été envisagées en vue de réduire ou de supprimer les exportations de déchets et les raisons pour lesquelles l'élimination a lieu à l'étranger;
- k) les nom, quantité et concentration de toute substance polluante organique persistante visée à la colonne 2 de l'annexe 10 qui se trouve dans les déchets ou les matières, si la concentration est égale ou supérieure à la concentration applicable prévue à la colonne 3;
- l) un numéro de ligne distinct pour chaque déchet ou matière;
- m) dans le cas d'une exportation ou d'une importation, une copie du contrat ou de la série de contrats, sans les renseignements financiers, ou de la déclaration qui sont visés aux alinéas 9f) ou 16e);
- n) une déclaration signée et datée par l'auteur de la notification, comportant ce qui suit :
  - (i) dans le cas d'une exportation ou d'une importation, une mention que le contrat ou la série de contrats visé aux alinéas 9f) ou 16e) est en vigueur,

(n) a statement signed and dated by the person submitting the notice indicating that

(i) in the case of an export or import, the contract or series of contracts referred to in paragraph 9(f) or 16(e) is in force,

(ii) in the case of an export or import, if the hazardous waste cannot be disposed of or the hazardous recyclable material cannot be recycled in accordance with the export or import permit, the exporter or importer will implement the alternative arrangements required under Part 5 or, if alternative arrangements cannot be made, the exporter or importer will return the waste or material to the facility from which it originated in accordance with section 34 or 35,

(iii) the insurance policy referred to in section 37 will cover the period referred to in that section, and

(iv) the information in the notice is complete and correct.

## PART 2

### EXPORT

#### Conditions

Conditions of  
export

9. An exporter may export hazardous waste and hazardous recyclable material if

(a) at the time of the export

(i) the export is not prohibited under the laws of Canada,

(ii) the country of import is a party to the Convention, the Canada-USA Agreement or OECD Decision C(2001)107/Final and the import of the hazardous waste or hazardous recyclable material is not prohibited by that country, and

(iii) the country of transit does not prohibit the transit of the hazardous waste or hazardous recyclable material;

(b) the hazardous waste or hazardous recyclable material is not to be disposed of or recycled south of 60° south latitude;

(c) in the case of biomedical wastes set out in column 2 of Schedule 3 or anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*, the export is only for the purposes of disposal;

(d) the exporter is a resident of Canada or, in the case of a corporation, has a place of business in Canada;

(e) the exporter

(i) is the owner or operator of the facility from which the hazardous waste or hazardous recyclable material is exported, or

(ii) buys and sells hazardous recyclable material for the purposes of recycling and exports it to a country that is a party to OECD Decision C(2001)107/Final;

(ii) dans le cas d'une exportation ou d'une importation, si les déchets ne peuvent être éliminés ou les matières ne peuvent être recyclées conformément au permis d'exportation ou d'importation, un engagement de l'exportateur ou de l'importateur à mettre en œuvre les mesures de renvoi prévues à la partie 5 ou, à défaut, à ramener les déchets ou les matières à l'installation d'origine conformément aux articles 34 ou 35,

(iii) un engagement à maintenir en vigueur la police d'assurance visée à l'article 37 pour la période prévue à cet article,

(iv) une mention portant que les renseignements figurant à la notification sont complets et exacts.

## PARTIE 2

### EXPORTATIONS

#### Conditions

Conditions

9. L'exportation de déchets dangereux ou de matières recyclables dangereuses est assujettie aux conditions suivantes :

a) au moment de l'exportation :

(i) les lois du Canada n'en interdisent pas l'exportation,

(ii) le pays d'importation est partie à la Convention, à l'accord Canada - États-Unis ou à la décision C(2001)107/Final de l'OCDE et n'en interdit pas l'importation,

(iii) le pays de transit n'en interdit pas le transit;

b) l'élimination ou le recyclage n'aura pas lieu au sud du 60° degré de latitude Sud;

c) dans le cas d'un déchet biomédical figurant à la colonne 2 de l'annexe 3 ou de toute chose comprise dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*, le déchet ou la chose est exporté pour être éliminé;

d) l'exportateur est un résident du Canada ou, s'il s'agit d'une personne morale, il a un établissement au Canada;

e) l'exportateur, selon le cas :

(i) est le propriétaire ou l'exploitant de l'installation d'où les déchets ou les matières sont exportés,

(ii) achète ou vend, à des fins de recyclage, des matières exportées dans un pays qui est partie à la décision C(2001)107/Final de l'OCDE;

f) il existe un contrat ou une série de contrats écrit et signé par l'exportateur, le destinataire

(f) there is a signed, written contract or a series of contracts among the exporter, the foreign receiver and the authorized facilities or, if any of those persons are the same legal entity, a written statement signed by that entity, that

(i) describes the hazardous waste or hazardous recyclable material,

(ii) sets out the quantity of hazardous waste or hazardous recyclable material to be exported,

(iii) indicates that the hazardous waste will be disposed of, or the hazardous recyclable material will be recycled, in accordance with the export permit,

(iv) describes the operation set out in Schedule 1 or 2 that will be used,

(v) requires the foreign receiver to complete Part C of the movement document, or authorizes the exporter to complete Part C on the foreign receiver's behalf if the waste or material is not considered or defined as hazardous under the legislation of the country of import, and to provide a copy of the movement document and a copy of the export permit to the exporter on delivery of the hazardous waste or hazardous recyclable material to the authorized facility, and

(vi) requires the foreign receiver

(A) to complete the disposal of the hazardous waste or recycling of the hazardous recyclable material within the time set out in paragraph (o),

(B) to submit written confirmation to the exporter of the disposal of the hazardous waste or recycling of the hazardous recyclable material within 30 days after the day on which the disposal or recycling is completed, and

(C) to take all practicable measures to assist the exporter in fulfilling the terms of the exporter's obligations under these Regulations if delivery is not accepted by the authorized facility named in the export permit, or if the authorized facility cannot, or refuses to, dispose of the hazardous waste or recycle the hazardous recyclable material in accordance with the export permit;

(g) the exporter and the authorized carrier if other than Her Majesty in right of Canada or of a province are insured in accordance with section 37;

(h) the hazardous waste or hazardous recyclable material is transported by the authorized carriers named in the export permit;

(i) the applicable safety mark is displayed on each shipment of hazardous waste or hazardous recyclable material in accordance with Part 4 of the *Transportation of Dangerous Goods Regulations*;

(j) the hazardous waste or hazardous recyclable material is exported through the port of exit named in the export permit;

étranger et l'installation agréée ou, dans le cas où deux ou trois de ces personnes sont la même entité juridique, il existe une déclaration écrite et signée par celle-ci :

(i) décrivant les déchets ou les matières,

(ii) indiquant la quantité de déchets ou de matières qui sera exportée,

(iii) portant que l'élimination ou le recyclage sera effectué conformément au permis d'exportation,

(iv) décrivant l'opération visée aux annexes 1 ou 2 qui sera utilisée,

(v) stipulant que le destinataire étranger doit remplir la partie C du document de mouvement – ou, si les déchets ou les matières ne sont pas considérés ou définis comme dangereux selon les lois du pays d'importation, autorisant l'exportateur à signer la partie C en son nom – et remettre une copie du document de mouvement et du permis d'exportation à l'exportateur lors de la livraison des déchets ou des matières à l'installation agréée,

(vi) stipulant que le destinataire étranger doit :

(A) achever l'élimination ou le recyclage dans le délai prévu à l'alinéa o),

(B) remettre à l'exportateur une confirmation écrite de l'élimination ou du recyclage dans les trente jours suivant l'achèvement de l'opération,

(C) prendre toutes les mesures possibles pour aider l'exportateur à remplir ses obligations au titre du présent règlement si l'installation agréée indiquée dans le permis d'exportation n'accepte pas les déchets ou les matières ou si elle est incapable ou refuse de les éliminer ou de les recycler conformément au permis d'exportation;

g) l'exportateur et le transporteur agréé, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détiennent l'assurance responsabilité visée à l'article 37;

h) le transport des déchets ou des matières est effectué par les transporteurs agréés nommés dans le permis d'exportation;

i) chaque envoi de déchets ou de matières porte une indication de danger conforme aux exigences de la partie 4 du *Règlement sur le transport des marchandises dangereuses*;

j) l'exportation se fait via le point de sortie indiqué dans le permis d'exportation;

k) la quantité de déchets ou de matières n'excède pas celle prévue dans le permis d'exportation;

l) une copie du permis d'exportation et une copie du document de mouvement rempli conformément aux articles 11 à 13 :

(i) accompagnent les déchets ou les matières,

(ii) sont déposées par l'exportateur ou le transporteur agréé au bureau de douane où les déchets et les matières doivent être déclarés en vertu de l'article 95 de la *Loi sur les douanes*;

(k) the quantity of hazardous waste or hazardous recyclable material exported does not exceed the quantity set out in the export permit;

(l) a copy of the export permit and a copy of the movement document completed in accordance with sections 11 to 13

(i) accompanies the hazardous waste or hazardous recyclable material, and

(ii) is deposited by the exporter or the authorized carrier at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under section 95 of the *Customs Act*;

(m) the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at the authorized facility named in the export permit using the disposal or recycling operation set out in the export permit;

(n) after operation D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2 is completed, the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at an authorized facility using an operation set out in Schedule 1 or 2 other than operation D13, D14 or D17 or R12, R13 or R16;

(o) in the case of operation D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the authorities of the jurisdiction in which the authorized facility is located require shorter time periods, in which case those time periods apply; and

(p) in the event that the hazardous waste or hazardous recyclable material is exported but is not accepted by the authorized facility named in the export permit, or if the authorized facility cannot, or refuses to, dispose of or recycle it in accordance with the export permit, the exporter

(i) immediately notifies the Minister, the foreign receiver and the authorities of the country of import of the non-acceptance or refusal and the reason for it,

(ii) if necessary, stores the hazardous waste or hazardous recyclable material in a facility authorized to store the waste or material by the authorities of the jurisdiction in which the facility is located, and

(iii) within 90 days after the day on which the Minister is notified, makes arrangements to return the hazardous waste or hazardous recyclable material to the facility in Canada from which it was shipped in accordance with section 34 or makes arrangements for the disposal of the waste or the recycling of the material in the country of import at an authorized facility other than the one named in the export permit and provides the Minister with the name and address of that facility and the name of a contact person.

m) l'élimination ou le recyclage est effectué dans l'installation agréée indiquée dans le permis d'exportation, selon l'opération qui y est indiquée;

n) une fois les opérations D13, D14 ou D17 figurant à l'annexe 1 ou les opérations R12, R13 ou R16 figurant à l'annexe 2 achevées, l'élimination ou le recyclage est effectué dans une installation agréée, selon une opération prévue aux annexes 1 ou 2, autre que D13, D14 ou D17 ou R12, R13 ou R16;

o) dans le cas de l'une ou l'autre des opérations D13, D14 ou D17 figurant à l'annexe 1 ou des opérations R12, R13 ou R16 figurant à l'annexe 2, elle est achevée dans les cent quatre-vingts jours suivant l'acceptation des déchets ou des matières par l'installation agréée ou, dans le cas d'une autre opération, elle est achevée dans l'année suivant cette acceptation, ou dans toute autre période plus courte exigée par les autorités du territoire où est située l'installation agréée;

p) si l'installation agréée indiquée dans le permis d'exportation n'accepte pas les déchets ou les matières ou est incapable ou refuse de les éliminer ou de les recycler conformément au permis :

(i) l'exportateur en avise aussitôt le ministre, le destinataire étranger et les autorités du pays d'importation, en précisant la raison du refus,

(ii) il les entrepose, au besoin, dans une installation autorisée à ces fins par les autorités du territoire où l'installation est située,

(iii) dans les quatre-vingt-dix jours suivant l'avis au ministre, il prend les arrangements en vue de leur renvoi à l'installation d'où ils proviennent au Canada, conformément à l'article 34, ou en vue de leur élimination ou recyclage dans le pays d'importation, dans une installation agréée autre que celle indiquée dans le permis, et communique au ministre les nom et adresse de l'installation ainsi que le nom d'une personne-ressource de celle-ci.



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

	<i>Movement Document</i>	<i>Document de mouvement</i>	
Movement document reference number	10. The Minister shall provide a movement document reference number to an exporter who requests one for the purpose of completing a movement document.	10. Le ministre attribue un numéro de référence à tout exportateur qui en fait la demande pour un document de mouvement.	Numéro de référence
Exporter	11. (1) Prior to shipping the hazardous waste or hazardous recyclable material, the exporter must complete Part A of a movement document, indicate the movement document reference number and provide a copy of the movement document and a copy of the export permit to the first authorized carrier.	11. (1) Avant l'expédition de déchets dangereux ou de matières recyclables dangereuses, l'exportateur remplit la partie A d'un document de mouvement, en indiquant le numéro de référence attribué par le ministre, et remet une copie du document et du permis d'exportation au premier transporteur agréé.	Exportateur
First authorized carrier	(2) Immediately on receipt of the movement document, the first authorized carrier must complete Part B of the movement document and provide a copy to the exporter.	(2) Sur réception du document de mouvement, le premier transporteur agréé en remplit la partie B et remet sans délai une copie de celui-ci à l'exportateur.	Premier transporteur agréé
Copy of movement document	(3) Within three working days after the day on which the hazardous waste or hazardous recyclable material is shipped, the exporter must send a copy of the movement document completed in accordance with subsections (1) and (2) to (a) the Minister; and (b) the authorities of the province of export, if they require it.	(3) Dans les trois jours ouvrables suivant le jour de l'expédition des déchets ou des matières, l'exportateur envoie une copie du document de mouvement rempli conformément aux paragraphes (1) et (2) : a) au ministre; b) aux autorités de la province d'exportation, si elles l'exigent.	Copie du document de mouvement
Authorized carriers	(4) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the export permit to the next authorized carrier or the foreign receiver, as the case may be, on delivery of the waste or material to that carrier or the foreign receiver.	(4) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis d'exportation, au transporteur agréé suivant ou au destinataire étranger, selon le cas, lors de la livraison.	Autres transporteurs agréés
Exporter	(5) The exporter must ensure that (a) every authorized carrier that transports the hazardous waste or hazardous recyclable material completes Part B of the movement document; and (b) the foreign receiver completes Part C of the movement document, unless the exporter is authorized to do so on the foreign receiver's behalf under the contract referred to in paragraph 9(f).	(5) L'exportateur veille à ce que : a) tous les transporteurs agréés ayant transporté les déchets ou les matières remplissent la partie B du document de mouvement; b) le destinataire étranger remplisse la partie C du document de mouvement, à moins que l'exportateur soit autorisé à la signer au nom de celui-ci aux termes du contrat visé à l'alinéa 9f).	Exportateur
Copy of movement document	(6) Within three working days after the day on which the hazardous waste or hazardous recyclable material is delivered to the authorized facility, the exporter must send a copy of the completed movement document to (a) the Minister; (b) the authorities of the province of export, if they require it; and (c) every authorized carrier of the hazardous waste or hazardous recyclable material.	(6) Dans les trois jours ouvrables suivant la livraison des déchets ou des matières à l'installation agréée, l'exportateur envoie une copie du document de mouvement rempli : a) au ministre; b) aux autorités de la province d'exportation, si elles l'exigent; c) à tout transporteur agréé ayant transporté les déchets ou les matières.	Copie du document de mouvement
Rail consist	12. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.	12. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.	Feuille de train
Unit of measure	13. The exporter must ensure that the quantity of hazardous waste or hazardous recyclable material indicated in the movement document is in the same unit of measure as is used in the export permit.	13. L'exportateur veille à ce que les quantités de déchets dangereux ou de matières recyclables dangereuses indiquées dans le document de mouvement soient exprimées au moyen de la même unité	Unité de mesure

Retention of  
movement  
document

14. The exporter and every authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the day on which the hazardous waste or hazardous recyclable material is exported.

de mesure que celle utilisée dans le permis d'exportation.

14. L'exportateur et les transporteurs agréés conservent une copie du document de mouvement à leur principal établissement au Canada pour une période de trois ans suivant la date de l'exportation.

### PART 3

#### IMPORT

##### *Department of National Defence Exemption*

Exemption

15. This Part does not apply to the Department of National Defence if the hazardous waste or hazardous recyclable material is

- (a) generated by that Department in the course of an operation conducted by it outside Canada;
- (b) transported from the site of operation to a defence establishment as defined in subsection 2(1) of the *National Defence Act*; and
- (c) transported under the sole direction or control of the Minister of National Defence as described in section 1.20 of the *Transportation of Dangerous Goods Regulations*, as though the hazardous waste or hazardous recyclable material is a dangerous good under those Regulations.

##### *Conditions*

Conditions of  
import

16. An importer may import hazardous waste or hazardous recyclable material if

- (a) at the time of the import
  - (i) the import is not prohibited under the laws of Canada,
  - (ii) the country of export is a party to the Convention, the Canada-USA Agreement or OECD Decision C(2001)107/Final, and
  - (iii) the country of transit does not prohibit the transit of the hazardous waste or hazardous recyclable material;
- (b) in the case of biomedical wastes set out in column 2 of Schedule 3 or anything that is included in Class 6.2 of the *Transportation of Dangerous Goods Regulations*, the import is only for the purposes of disposal;
- (c) the importer is a resident of Canada or, in the case of a corporation, has a place of business in Canada;
- (d) the importer
  - (i) is the owner or operator of the authorized facility named in the import permit, or
  - (ii) buys and sells hazardous recyclable material for the purposes of recycling;
- (e) there is a signed, written contract or a series of contracts among the importer, the foreign exporter and the authorized facilities or, if any of

### PARTIE 3

#### IMPORTATIONS

##### *Exemption visant le ministère de la Défense nationale*

Conservation

15. La présente partie ne s'applique pas à l'importation par le ministère de la Défense nationale de déchets dangereux ou de matières recyclables dangereuses, si ceux-ci sont à la fois :

- a) produits par le ministère dans le cadre d'une opération menée par celui-ci à l'extérieur du Canada;
- b) transportés du lieu de l'opération à un établissement de défense au sens du paragraphe 2(1) de la *Loi sur la défense nationale*;
- c) transportés sous la seule responsabilité du ministre de la Défense nationale, selon l'article 1.20 du *Règlement sur le transport des marchandises dangereuses*, comme s'il s'agissait de marchandises dangereuses visées par ce règlement.

##### *Conditions*

16. L'importation de déchets dangereux ou de matières recyclables dangereuses est assujettie aux conditions suivantes :

- a) au moment de l'importation :
  - (i) les lois du Canada n'en interdisent pas l'importation,
  - (ii) le pays d'exportation est partie à la Convention, à l'accord Canada - États-Unis ou à la décision C(2001)107/Final de l'OCDE,
  - (iii) le pays de transit n'en interdit pas le transit;
- b) dans le cas d'un déchet biomédical figurant à la colonne 2 de l'annexe 3 ou de toute chose comprise dans la classe 6.2 du *Règlement sur le transport des marchandises dangereuses*, le déchet ou la chose est importé pour être éliminé;
- c) l'importateur est un résident du Canada ou, s'il s'agit d'une personne morale, il a un établissement au Canada;
- d) l'importateur, selon le cas :
  - (i) est le propriétaire ou l'exploitant de l'installation agréée visée par le permis d'importation,
  - (ii) achète ou vend des matières à des fins de recyclage;
- e) il existe un contrat ou une série de contrats écrit et signé par l'importateur, l'expéditeur

those persons are the same legal entity, a written statement signed by that entity, that

- (i) describes the hazardous waste or hazardous recyclable material,
- (ii) sets out the quantity of hazardous waste or hazardous recyclable material to be imported,
- (iii) indicates that the hazardous waste will be disposed of, or the hazardous recyclable material will be recycled, in accordance with the import permit,
- (iv) describes the operation set out in Schedule 1 or 2 that will be used,
- (v) requires the foreign exporter to complete Part A of the movement document, or authorizes the importer to complete Part A on the foreign exporter's behalf if the waste or material is not considered or defined as hazardous under the legislation of the country of export, and to provide a copy of it and a copy of the import permit to the first authorized carrier prior to the shipment of the hazardous waste or hazardous recyclable material,
- (vi) requires the foreign exporter
  - (A) to send a copy of the movement document to the importer once Part A is completed by the foreign exporter, Part B is completed by the first authorized carrier and the hazardous waste or hazardous recyclable material has been shipped, and
  - (B) to take all practicable measures to assist the importer in fulfilling the terms of the importer's obligations under these Regulations if delivery is not accepted by the authorized facility named in the import permit, or if the authorized facility cannot, or refuses to, dispose of the hazardous waste or recycle the hazardous recyclable material in accordance with the import permit;
- (f) the importer and the authorized carrier if other than Her Majesty in right of Canada or of a province are insured in accordance with section 37;
- (g) the hazardous waste or hazardous recyclable material is transported by the authorized carriers named in the import permit;
- (h) the applicable safety mark is displayed on each shipment of hazardous waste or hazardous recyclable material in accordance with Part 4 of the *Transportation of Dangerous Goods Regulations*;
- (i) the hazardous waste or hazardous recyclable material is imported through the port of entry named in the import permit;
- (j) the quantity of hazardous waste or hazardous recyclable material imported does not exceed the quantity set out in the import permit;
- (k) a copy of the import permit and a copy of the movement document completed in accordance with sections 18 to 20
  - (i) accompanies the hazardous waste or hazardous recyclable material, and

étranger et l'installation agréée ou, dans le cas où deux ou trois de ces personnes sont la même entité juridique, il existe une déclaration écrite et signée par celle-ci :

- (i) décrivant les déchets ou les matières,
- (ii) indiquant la quantité de déchets ou de matières qui sera importée,
- (iii) portant que l'élimination ou le recyclage sera effectué conformément au permis d'importation,
- (iv) décrivant l'opération visée aux annexes 1 ou 2 qui sera utilisée,
- (v) stipulant que l'expéditeur étranger doit remplir la partie A du document de mouvement – ou, si les déchets ou les matières ne sont pas considérés ou définis comme dangereux selon les lois du pays d'exportation, autorisant l'importateur à remplir la partie A en son nom – et remettre une copie du document de mouvement et du permis d'importation au premier transporteur agréé avant l'expédition des déchets ou des matières,
- (vi) stipulant que l'expéditeur étranger doit :
  - (A) remettre une copie du document de mouvement à l'importateur une fois qu'il a rempli la partie A, que le premier transporteur agréé a rempli la partie B et que les déchets ou des matières ont été expédiés,
  - (B) prendre toutes les mesures possibles pour aider l'importateur à remplir ses obligations au titre du présent règlement si l'installation agréée indiquée dans le permis d'importation n'accepte pas les déchets ou les matières ou si elle est incapable ou refuse de les éliminer ou de les recycler conformément au permis d'importation;
- f) l'importateur et le transporteur agréé, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détiennent l'assurance responsabilité visée à l'article 37;
- g) le transport des déchets ou des matières est effectué par les transporteurs agréés nommés dans le permis d'importation;
- h) chaque envoi de déchets ou de matières porte une indication de danger conforme aux exigences de la partie 4 du *Règlement sur le transport des marchandises dangereuses*;
- i) l'importation se fait via le point d'entrée indiqué dans le permis d'importation;
- j) la quantité de déchets ou de matières importés n'excède pas celle prévue dans le permis d'importation;
- k) une copie du permis d'importation et une copie du document de mouvement rempli conformément aux articles 18 à 20 :
  - (i) accompagnent les déchets ou les matières,
  - (ii) sont déposées par l'importateur ou le transporteur agréé au bureau de douane où les déchets et les matières doivent être déclarés en vertu de l'article 12 de la *Loi sur les douanes*;

- (ii) is deposited by the importer or the authorized carrier at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under section 12 of the *Customs Act*;
  - (l) the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at the authorized facility named in the import permit using the disposal or recycling operation set out in the import permit;
  - (m) after operation D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2 is completed, the hazardous waste is disposed of, or the hazardous recyclable material is recycled, at an authorized facility using an operation set out in Schedule 1 or 2, other than operation D13, D14 or D17 or R12, R13 or R16;
  - (n) in the case of operations D13, D14 or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the laws of the jurisdiction in which the authorized facility is located requires shorter time periods, in which case those time periods apply; and
  - (o) in the event that the hazardous waste or hazardous recyclable material is imported but is not accepted by the authorized facility named in the import permit, or if the authorized facility cannot, or refuses to, dispose of the waste or recycle the material in accordance with the permit, the importer
    - (i) immediately notifies the Minister, the foreign exporter and the authorities of the country of export of the non-acceptance or refusal and the reason for it,
    - (ii) if necessary, stores the hazardous waste or hazardous recyclable material at a facility authorized to store the waste or material by the authorities of the jurisdiction in which the facility is located,
    - (iii) within 90 days after the day on which the Minister is notified,
      - (A) makes arrangements to dispose of the hazardous waste or recycle the hazardous recyclable material in Canada at an authorized facility other than the one named in the import permit and advises the Minister of the name and address of the facility and the name of a contact person, or
      - (B) makes arrangements to return the hazardous waste or hazardous recyclable material to the facility from which it was exported in accordance with section 35, and
    - (iv) before shipping the hazardous waste or hazardous recyclable material to the authorized facility referred to in clause (iii)(A), receives confirmation from the Minister that the facility is an authorized facility.
- l) l'élimination ou le recyclage est effectué dans l'installation agréée indiquée dans le permis d'importation, selon l'opération qui y est indiquée;
  - m) une fois les opérations D13, D14 ou D17 figurant à l'annexe 1 ou les opérations R12, R13 ou R16 figurant à l'annexe 2 achevées, l'élimination ou le recyclage est effectué dans une installation agréée, selon une opération prévue aux annexes 1 ou 2, autre que D13, D14 ou D17 ou R12, R13 ou R16;
  - n) dans le cas de l'une ou l'autre des opérations D13, D14 ou D17 figurant à l'annexe 1 ou des opérations R12, R13 ou R16 figurant à l'annexe 2, elle est achevée dans les cent quatre-vingts jours suivant l'acceptation des déchets ou des matières par l'installation agréée ou, dans le cas d'une autre opération, elle est achevée dans l'année suivant cette acceptation, ou dans toute autre période plus courte prévue par une loi du territoire où est située l'installation agréée;
  - o) si l'installation agréée indiquée dans le permis d'importation n'accepte pas les déchets ou les matières ou est incapable ou refuse de les éliminer ou de les recycler conformément au permis :
    - (i) l'importateur en avise aussitôt le ministre, l'expéditeur étranger et les autorités du pays d'exportation, en précisant la raison du refus,
    - (ii) il les entrepose, au besoin, dans une installation autorisée à ces fins par les autorités du territoire où l'installation est située,
    - (iii) dans les quatre-vingt-dix jours suivant l'avis au ministre :
      - (A) soit il prend des arrangements en vue de leur élimination ou recyclage au Canada, dans une installation agréée autre que celle indiquée dans le permis, et communique au ministre les nom et adresse de l'installation ainsi que le nom d'une personne-ressource de celle-ci,
      - (B) soit il prend des arrangements en vue de leur renvoi à l'installation d'où ils ont été exportés, conformément à l'article 35,
    - (iv) avant de transporter les déchets ou les matières à l'installation agréée visée à la division (iii)(A), l'importateur reçoit une confirmation du ministre indiquant qu'elle est une installation agréée.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

	<i>Movement Document</i>	<i>Document de mouvement</i>	
Movement document reference number	17. The Minister shall provide a movement document reference number to an importer who requests one for the purpose of completing a movement document.	17. Le ministre attribue un numéro de référence à tout importateur qui en fait la demande pour un document de mouvement.	Numéro de référence
Importer – prior to import	18. (1) Prior to importing the hazardous waste or hazardous recyclable material, the importer shall provide the foreign exporter with a copy of the movement document indicating the movement document reference number and a copy of the import permit.	18. (1) Avant l'importation de déchets dangereux ou de matières recyclables dangereuses, l'importateur envoie à l'expéditeur étranger une copie du permis d'importation et un document de mouvement sur lequel il indique le numéro de référence attribué par le ministre.	Responsabilité de l'importateur avant l'importation
Importer – at time of import	(2) At the time of the import of the hazardous waste or hazardous recyclable material, the importer must ensure that (a) the foreign exporter has completed Part A of the movement document unless the importer is authorized to do so on the foreign exporter's behalf under the contract referred to in paragraph 16(e); (b) the foreign exporter has provided a copy of the movement document and a copy of the import permit to the first authorized carrier; and (c) the first authorized carrier has completed Part B of the movement document and has provided a copy to the foreign exporter.	(2) Au moment de l'importation de déchets dangereux ou de matières recyclables dangereuses, l'importateur s'assure que : a) l'expéditeur étranger a rempli la partie A du document de mouvement, à moins que l'importateur soit autorisé à la signer en son nom aux termes du contrat visé à l'alinéa 16e); b) l'expéditeur étranger a remis une copie du document de mouvement et du permis d'importation au premier transporteur agréé; c) le premier transporteur a rempli la partie B du document de mouvement et a remis celui-ci à l'expéditeur étranger.	Responsabilité de l'importateur au moment de l'importation
Copy of movement document	(3) Within three working days after the day on which the importer receives a copy of the movement document with Parts A and B completed in accordance with subsection (2), the importer must send a copy of it to (a) the Minister; and (b) the authorities of the province of import, if they require it.	(3) Dans les trois jours ouvrables après avoir reçu une copie du document de mouvement dont les parties A et B ont été remplies conformément au paragraphe (2), l'importateur en envoie une copie : a) au ministre; b) aux autorités de la province d'importation, si elles l'exigent.	Copie du document de mouvement
Authorized carriers	(4) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the import permit to the next authorized carrier or the importer, as the case may be, on delivery of the waste or material to that carrier or the importer.	(4) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis d'importation, au transporteur agréé suivant ou à l'importateur, selon le cas, lors de la livraison.	Transporteurs agréés
Importer	(5) The importer must ensure that every authorized carrier that transports the hazardous waste or hazardous recyclable material completes Part B of the movement document.	(5) L'importateur s'assure que tous les transporteurs agréés ayant transporté les déchets ou les matières ont rempli la partie B du document de mouvement.	Importateur
Copy of movement document	(6) Within three working days after the day on which the hazardous waste or hazardous recyclable material is delivered to the authorized facility, the importer must complete Part C of the movement document and must send a copy of the completed movement document to (a) the Minister; (b) the authorities of the province of import, if they require it; (c) the foreign exporter; and (d) every authorized carrier of the hazardous waste or hazardous recyclable material.	(6) Dans les trois jours ouvrables suivant la livraison des déchets ou des matières à l'installation agréée, l'importateur remplit la partie C du document de mouvement et envoie une copie de celui-ci : a) au ministre; b) aux autorités de la province d'importation, si elles l'exigent; c) à l'expéditeur étranger; d) à tout transporteur agréé ayant transporté les déchets ou les matières.	Copie du document de mouvement
Rail consist	19. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the	19. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu	Feuille de train

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

	movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.	qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.	
Unit of measure	20. The importer must ensure that the quantity of hazardous waste or hazardous recyclable material indicated in the movement document is in the same unit of measure as is used in the import permit.	20. L'importateur veille à ce que les quantités de déchets dangereux ou de matières recyclables dangereuses indiquées dans le document de mouvement soient exprimées au moyen de la même unité de mesure que celle utilisée dans le permis d'importation.	Unité de mesure
Retention of movement document	21. The importer and every authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the date of import.	21. L'importateur et les transporteurs agréés conservent une copie du document de mouvement à leur principal établissement au Canada pour une période de trois ans suivant la date de l'importation.	Conservation

PART 4  
TRANSIT  
Conditions

PARTIE 4  
TRANSIT  
Conditions

Conditions of transit	<p>22. A person may convey hazardous waste or hazardous recyclable material in transit if</p> <p>(a) at the time of transit, the export or import of the hazardous waste or hazardous recyclable material is not prohibited under the laws of Canada or the laws of the country of transit;</p> <p>(b) the hazardous waste or hazardous recyclable material is transported by the authorized carriers named in the transit permit;</p> <p>(c) the applicable safety mark is displayed on each shipment of hazardous waste or hazardous recyclable material in accordance with Part 4 of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(d) the hazardous waste or hazardous recyclable material is exported and imported through the port of entry and port of exit named in the transit permit;</p> <p>(e) the quantity of hazardous waste or hazardous recyclable material conveyed in transit does not exceed the quantity set out in the transit permit;</p> <p>(f) in the case of a transit through Canada, the authorized carrier if other than Her Majesty in right of Canada or of a province is insured in accordance with section 37;</p> <p>(g) in the case of a transit through a country other than Canada, the exporter and importer if other than Her Majesty in right of Canada or of a province are insured in accordance with section 37;</p> <p>(h) in the case of a transit through Canada, the country of export has provided the Minister with written confirmation that the country of import and any countries through which the hazardous waste or hazardous recyclable material will be transited after it has left Canada, has consented to the proposed import into or transit through that country; and</p> <p>(i) a copy of the transit permit and a copy of the movement document completed in accordance</p>	<p>22. Le transit de déchets dangereux ou de matières recyclables dangereuses est assujéti aux conditions suivantes :</p> <p>a) au moment du transit, les lois du Canada et celles du pays de transit n'en interdisent pas l'exportation ou l'importation;</p> <p>b) le transport des déchets ou des matières est effectué par les transporteurs agréés nommés dans le permis de transit;</p> <p>c) chaque envoi de déchets ou de matières porte une indication de danger conforme aux exigences de la partie 4 du <i>Règlement sur le transport des marchandises dangereuses</i>;</p> <p>d) l'importation et l'exportation se font via le point de sortie et le point d'entrée indiqués dans le permis de transit;</p> <p>e) la quantité de déchets ou de matières n'excède pas celle prévue dans le permis de transit;</p> <p>f) dans le cas d'un transit au Canada, le transporteur agréé, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détient l'assurance responsabilité visée à l'article 37;</p> <p>g) dans le cas d'un transit dans un pays autre que le Canada, l'exportateur et l'importateur, sauf s'il s'agit de Sa Majesté du chef du Canada ou d'une province, détiennent l'assurance responsabilité visée à l'article 37;</p> <p>h) dans le cas d'un transit au Canada, le pays d'exportation a fourni au ministre une confirmation écrite portant que le pays d'importation ainsi que tout pays de transit où les déchets ou les matières doivent aller après leur sortie du Canada ont consenti à l'importation ou au transit;</p> <p>i) une copie du permis de transit et une copie du document de mouvement rempli conformément aux articles 25 et 26 ou 30 et 31, selon le cas :</p> <p>(i) accompagnent les déchets ou les matières,</p> <p>(ii) sont déposées par l'exportateur, l'importateur ou le transporteur agréé au bureau de</p>	Conditions
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2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

with sections 25 and 26, or 30 and 31, as the case may be.

(i) accompanies the hazardous waste or hazardous recyclable material, and

(ii) is deposited by the exporter, importer or authorized carrier at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under sections 12 and 95 of the *Customs Act*.

*Movement Document – Transits Through Canada*

**Application** 23. Sections 24 to 27 apply to the transit of hazardous waste and hazardous recyclable material through Canada.

**Movement document reference number** 24. The Minister shall provide a movement document reference number to any person who requests one for the purpose of completing a movement document.

**Authorized carrier** 25. (1) At the time the hazardous waste or hazardous recyclable material enters Canada, the authorized carrier must ensure that the foreign exporter has completed Part A of a movement document and that the movement document reference number provided by the Minister is indicated on the movement document.

**Authorized carriers** (2) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the transit permit to the next authorized carrier on delivery of the waste or material to that carrier.

**Copy of movement document** (3) Within three working days after the day on which the hazardous waste or hazardous recyclable material exits Canada, the authorized carrier that transports the waste or material out of Canada must send a copy of the movement document completed in accordance with subsections (1) and (2) to the Minister.

**Rail consist** 26. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.

**Retention of movement document** 27. If the authorized carrier has a place of business in Canada, the authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the day on which the hazardous waste or hazardous recyclable material exits Canada.

*Movement Document – Transits Through a Country Other than Canada*

**Application** 28. Sections 29 to 32 apply to the transit of hazardous waste and hazardous recyclable material where Canada is the country of origin and the country of destination.

douane où les déchets et les matières doivent être déclarés en vertu des articles 12 ou 95 de la *Loi sur les douanes*.

*Document de mouvement pour les transits au Canada*

**Application** 23. Les articles 24 à 27 s'appliquent au transit de déchets dangereux et de matières recyclables dangereuses au Canada.

**Numéro de référence** 24. Le ministre attribue un numéro de référence à quiconque en fait la demande pour un document de mouvement.

**Transporteur agréé** 25. (1) Au moment de l'entrée des déchets dangereux ou des matières recyclables dangereuses au Canada, le transporteur agréé s'assure que l'expéditeur étranger a rempli la partie A d'un document de mouvement et que le numéro de référence attribué par le ministre y figure.

**Transporteur agréé** (2) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis de transit, au transporteur agréé suivant lors de la livraison.

**Copie du document de mouvement** (3) Dans les trois jours ouvrables suivant la sortie des déchets ou des matières du Canada, le transporteur agréé qui les a sortis du Canada envoie au ministre une copie du document de mouvement rempli conformément aux paragraphes (1) et (2).

**Feuille de train** 26. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.

**Conservation** 27. Si le transporteur agréé a un établissement au Canada, il y conserve une copie du document de mouvement pour une période de trois ans suivant la sortie des déchets ou des matières du Canada.

*Document de mouvement pour les transits dans un pays autre que le Canada*

**Application** 28. Les articles 29 à 32 s'appliquent au transit de déchets dangereux et de matières recyclables dangereuses dans le cas où le pays d'origine et de destination est le Canada.

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* **SOR/DORS/2005-149**

Movement document reference number	29. The Minister shall provide a movement document reference number to any exporter who requests one for the purpose of completing a movement document.	29. Le ministre attribue un numéro de référence à tout exportateur qui en fait la demande pour un document de mouvement.	Numéro de référence
Exporter	30. (1) At the time the hazardous waste or hazardous recyclable material exits Canada, the exporter must complete Part A of a movement document, indicate the movement document reference number provided by the Minister and provide a copy of the movement document and a copy of the transit permit to the first authorized carrier.	30. (1) Au moment de la sortie des déchets dangereux ou des matières recyclables dangereuses du Canada, l'exportateur remplit la partie A d'un document de mouvement, en indiquant le numéro de référence attribué par le ministre, et remet une copie du document et du permis de transit au premier transporteur agréé.	Exportateur
First authorized carrier	(2) Immediately on receipt of the movement document, the first authorized carrier must complete Part B of the movement document and provide a copy to the exporter.	(2) Sur réception du document de mouvement, le premier transporteur agréé en remplit la partie B et remet sans délai une copie du document à l'exportateur.	Premier transporteur agréé
Copy of movement document	(3) Within three working days after the day on which the hazardous waste or hazardous recyclable material exits Canada, the exporter must send a copy of the movement document completed in accordance with subsections (1) and (2) to (a) the Minister; and (b) the authorities of the province of export, if they require it.	(3) Dans les trois jours ouvrables suivant la sortie des déchets ou des matières du Canada, l'exportateur envoie une copie du document de mouvement rempli conformément aux paragraphes (1) et (2) : a) au ministre; b) aux autorités de la province d'exportation, si elles l'exigent.	Copie du document de mouvement
Other authorized carriers	(4) Every authorized carrier that transports the hazardous waste or hazardous recyclable material must complete Part B of the movement document and provide it and a copy of the transit permit on delivery of the waste or material to the next carrier or the importer, as the case may be.	(4) Tout transporteur agréé qui transporte les déchets ou les matières remplit la partie B du document de mouvement et remet celui-ci, ainsi qu'une copie du permis de transit, au transporteur agréé suivant ou à l'importateur, selon le cas, lors de la livraison.	Autres transporteurs agréés
Exporter	(5) The exporter must ensure that Part B of the movement document is completed by every authorized carrier that transports the hazardous waste or hazardous recyclable material.	(5) L'exportateur veille à ce que tous les transporteurs agréés ayant transporté les déchets ou les matières remplissent la partie B du document de mouvement.	Exportateur
Copy of movement document	(6) Within three working days after the day on which the hazardous waste or hazardous recyclable material is delivered to the authorized facility, the importer must complete Part C of the movement document and must send a copy of the completed movement document to (a) the Minister; (b) the authorities of the province of import, if they require it; (c) the exporter; and (d) every authorized carrier of the hazardous waste or hazardous recyclable material.	(6) Dans les trois jours ouvrables suivant la livraison des déchets ou des matières à l'installation agréée, l'importateur remplit la partie C du document de mouvement et envoie une copie de celui-ci : a) au ministre; b) aux autorités de la province d'importation, si elles l'exigent; c) à l'exportateur; d) à tout transporteur agréé ayant transporté les déchets ou les matières.	Copie du document de mouvement
Rail consist	31. In the case of hazardous waste or hazardous recyclable material that is transported by rail, the movement document may be replaced by a rail consist if it contains all of the information contained in the movement document.	31. En cas de transport par rail, la feuille de train peut tenir lieu de document de mouvement, pourvu qu'elle contienne les mêmes renseignements que ceux exigés pour ce document.	Feuille de train
Retention of movement document	32. The exporter, the importer and every authorized carrier must keep a copy of the movement document at their principal place of business in Canada for a period of three years after the day on which the hazardous waste or hazardous recyclable material is imported.	32. L'exportateur, l'importateur et les transporteurs agréés conservent une copie du document de mouvement à leur principal établissement au Canada pour une période de trois ans suivant la date de l'importation.	Conservation



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

PART 5  
RETURNS  
*Application*

Returns

33. This Part applies to the return of hazardous waste or hazardous recyclable material to  
(a) Canada after it has been exported from Canada; and  
(b) the country of export after it has been imported into Canada.

*Returns to Canada*

Notice

34. (1) If the hazardous waste or hazardous recyclable material is returned to Canada, the exporter that exported the waste or material from Canada must submit a notice to the Minister in writing, containing the following information:

- (a) the name, civic, mailing and electronic addresses and telephone and facsimile numbers of, and the name of the contact person for, the exporter, the foreign receiver and any authorized carriers that were not named in the original export permit;
- (b) the name of each insurance company and the policy number for each insurance policy required under these Regulations;
- (c) the reason for the return;
- (d) the quantity of hazardous waste or hazardous recyclable material that will be returned using the same unit of measure as in the original export permit;
- (e) if the quantity of hazardous waste or hazardous recyclable material to be returned is less than the quantity of waste or material exported from Canada, the reason for the difference;
- (f) the port of entry through which the return will take place and the customs office at which the hazardous waste or hazardous recyclable material will be reported;
- (g) the notice reference number contained in the original export permit; and
- (h) the line item number contained in the original export permit for the hazardous waste or hazardous recyclable material that will be returned.

Exporter

(2) After an import permit is issued, the exporter must

- (a) return the hazardous waste or hazardous recyclable material to the facility from which it was exported, using the authorized carriers and the port of entry named in the import permit;
- (b) ensure that a copy of the import permit and a copy of the movement document with Parts A and B completed, clearly indicating that the hazardous waste or hazardous recyclable material is being returned to Canada,
- (i) accompanies the hazardous waste or hazardous recyclable material, and

PARTIE 5  
RENOIS  
*Champ d'application*

Application

33. La présente partie s'applique :  
a) au renvoi au Canada de déchets dangereux ou de matières recyclables dangereuses qui ont été exportés du Canada;  
b) au renvoi au pays d'exportation de déchets dangereux ou de matières recyclables dangereuses après leur importation au Canada.

*Renvoi au Canada*

Notification

34. (1) En cas de renvoi de déchets dangereux ou de matières recyclables dangereuses au Canada, l'exportateur qui les a exportés du Canada présente au ministre une notification écrite et fournit les renseignements suivants :

- a) le nom, les adresses municipale, postale et électronique et les numéros de téléphone et de télécopieur de l'exportateur, du destinataire étranger et de tout transporteur agréé autre que ceux nommés dans le permis d'exportation original, ainsi que le nom de leur personne-ressource;
- b) le nom de l'assureur et le numéro de la police;
- c) les motifs du renvoi;
- d) la quantité de déchets ou de matières qui sera renvoyée, exprimée à l'aide de la même unité de mesure que celle utilisée dans le permis d'exportation original;
- e) si la quantité de déchets ou de matières renvoyée est inférieure à celle qui a été exportée du Canada, les raisons de cette différence;
- f) le point d'entrée prévu pour l'importation et le bureau de douane où les déchets ou les matières seront déclarés;
- g) le numéro de référence de la notification figurant au permis d'exportation original;
- h) le numéro de la ligne dans le permis d'exportation original où sont inscrits les déchets ou les matières qui seront renvoyés.

(2) Une fois le permis d'importation délivré, l'exportateur :

- a) renvoie les déchets dangereux ou les matières recyclables dangereuses à l'installation d'où ils ont été exportés, en utilisant le point d'entrée indiqué dans le permis d'importation et en ayant recours aux transporteurs agréés qui y sont nommés;
- b) veille à ce qu'une copie du permis d'importation et une copie du document de mouvement dont les parties A et B sont remplies et qui indique clairement que les déchets ou les matières sont renvoyés au Canada :

- (ii) is deposited at the customs office at which the hazardous waste or hazardous recyclable material is to be reported under section 12 of the *Customs Act*; and
- (c) submit a copy of the movement document referred to in paragraph (b) to the Minister, every authorized carrier and if they require it, to the authorities of the province of export.

#### Returns to the Country of Export

Notice –  
returns to  
country of  
export

35. (1) If the hazardous waste or hazardous recyclable material is returned to the country of export, the importer that imported the waste or material into Canada must submit a notice to the Minister in writing, containing the following information:

- (a) the name, civic, mailing and electronic addresses and telephone and facsimile numbers of, and the name of the contact person for, the importer, the foreign exporter and any authorized carriers that were not named in the original import permit;
- (b) the name of each insurance company and the policy number for each insurance policy required under these Regulations;
- (c) the reason for the return;
- (d) the quantity of hazardous waste or hazardous recyclable material that will be returned using the same unit of measure as in the original import permit;
- (e) if the quantity of hazardous waste or hazardous recyclable material to be returned is less than the quantity of waste or material imported into Canada, the reason for the difference;
- (f) the port of entry through which the return will take place and the customs office at which the hazardous waste or hazardous recyclable material will be reported;
- (g) the notice reference number contained in the original import permit for the import of the hazardous waste or hazardous recyclable material into Canada; and
- (h) the line item number contained in the original import permit for the hazardous waste or hazardous recyclable material that will be returned.

Importer's  
obligations

(2) After an export permit is issued, the importer must

- (a) return the hazardous waste or hazardous recyclable material to the facility from which it was imported, using the authorized carriers and the port of exit named in the export permit;
- (b) ensure that a copy of the export permit and a copy of the movement document with Parts B and C completed, clearly indicating that the hazardous waste or hazardous recyclable material is being returned to the country of export,
  - (i) accompanies the hazardous waste or hazardous recyclable material, and
  - (ii) is deposited at the customs office at which the hazardous waste or hazardous recyclable

- (i) accompagnent les déchets ou les matières,
- (ii) soient déposés au bureau de douane où les déchets ou les matières doivent être déclarés en vertu de l'article 12 de la *Loi sur les douanes*;
- c) envoie une copie du document de mouvement visé à l'alinéa b) au ministre, à chaque transporteur agréé et, si elles l'exigent, aux autorités de la province d'exportation.

#### Renvoi au pays d'exportation

35. (1) En cas de renvoi de déchets dangereux ou de matières recyclables dangereuses dans le pays d'exportation, l'importateur qui les a importés au Canada présente au ministre une notification écrite et fournit les renseignements suivants :

Notification

- a) le nom, les adresses municipale, postale et électronique et les numéros de téléphone et de télécopieur de l'importateur et de l'expéditeur étranger et de tout transporteur agréé, autre que ceux nommés dans le permis d'importation original, qui transporteront les déchets ou les matières, ainsi que le nom de leur personne-ressource;
- b) le nom de l'assureur et le numéro de la police;
- c) les motifs du renvoi;
- d) la quantité de déchets ou de matières renvoyée, exprimée à l'aide de la même unité de mesure que celle utilisée dans le permis d'importation original;
- e) si la quantité de déchets ou de matières renvoyée est inférieure à celle qui a été importée au Canada, les raisons de cette différence;
- f) le point de sortie prévu pour l'exportation et le bureau de douane où les déchets ou les matières seront déclarés;
- g) le numéro de référence figurant au permis d'importation original pour l'importation des déchets ou des matières au Canada;
- h) le numéro de la ligne dans le permis d'importation original où sont inscrits les déchets ou les matières qui seront renvoyés.

(2) Une fois le permis d'exportation délivré, l'importateur :

Obligations de  
l'importateur

- a) renvoie les déchets dangereux ou les matières recyclables dangereuses à l'installation d'où ils ont été importés, en utilisant le point de sortie indiqué dans le permis d'exportation et en ayant recours aux transporteurs agréés qui y sont nommés;
- b) veille à ce qu'une copie du permis d'exportation et une copie du document de mouvement dont les parties B et C sont remplies et qui indique clairement que les déchets ou les matières sont renvoyés dans le pays d'exportation :

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

material is to be reported under section 95 of the *Customs Act*; and  
(c) submit a copy of the movement document referred to in paragraph (b) to the Minister, every authorized carrier and if they require it, the authorities of the province of import.

(i) accompagnent les déchets ou les matières,  
(ii) soient déposées au bureau de douane où les déchets ou les matières doivent être déclarés en vertu de l'article 95 de la *Loi sur les douanes*;  
c) envoie une copie du document de mouvement visé à l'alinéa b) au ministre, à chaque transporteur agréé et, si elles l'exigent, aux autorités de la province d'importation.

## PART 6

### MISCELLANEOUS MATTERS

#### Confirmation of Disposal or Recycling

Confirmation 36. (1) Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled

(a) in accordance with the export or import permit;  
(b) in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and  
(c) within the period referred to in paragraph 9(o) or 16(n).

Mandatory reference (2) The exporter or importer must include the movement document reference number and line item number for the applicable hazardous waste or hazardous recyclable material referred to in subsection (1) in the confirmation.

Retention of confirmation (3) The exporter or importer must keep a copy of the confirmation at their principal place of business in Canada for a period of three years after the day on which it is submitted to the Minister.

#### Liability Insurance

Coverage 37. (1) The liability insurance required by these Regulations must be in respect of

(a) any damages to third parties for which the exporter, importer or authorized carrier is responsible; and  
(b) any costs imposed by law on the exporter, importer or authorized carrier to clean up the environment in respect of any hazardous waste or hazardous recyclable material that is released.

Amount (2) The amount of liability insurance required in respect of each export or import of hazardous waste or hazardous recyclable material is

(a) for exporters or importers, at least \$5,000,000 for hazardous waste;  
(b) for exporters or importers, at least \$1,000,000 for hazardous recyclable material; and

## PARTIE 6

### DISPOSITIONS GÉNÉRALES

#### Déclaration d'élimination ou de recyclage

Déclaration 36. (1) Dans les trente jours suivant l'élimination des déchets dangereux ou le recyclage des matières recyclables dangereuses, l'exportateur ou l'importateur présente au ministre une déclaration écrite, signée et datée attestant que l'élimination ou le recyclage a été effectué :

a) conformément au permis;  
b) d'une manière qui garantit la protection de l'environnement et de la santé humaine contre les effets nuisibles que les déchets ou les matières peuvent avoir;  
c) dans le délai visé aux alinéas 9o) ou 16n).

(2) L'exportateur ou l'importateur indique sur la déclaration le numéro de référence du document de mouvement et le numéro de la ligne dans le permis d'exportation ou d'importation où sont inscrits les déchets dangereux ou les matières recyclables dangereuses.

(3) L'exportateur ou l'importateur conserve une copie de la déclaration à son principal établissement au Canada pendant la période de trois ans suivant la date de la présentation de la déclaration au ministre.

#### Assurance responsabilité

Couverture 37. (1) L'assurance responsabilité exigée par le présent règlement couvre :

a) les dommages subis par des tiers dont l'exportateur, l'importateur ou le transporteur agréé est responsable;  
b) les frais qu'une règle de droit oblige l'exportateur, l'importateur ou le transporteur agréé à payer pour nettoyer l'environnement à la suite d'un rejet de déchets dangereux ou de matières recyclables dangereuses.

(2) Le montant de la protection pour chaque exportation ou importation est :

a) dans le cas d'un exportateur ou d'un importateur de déchets, d'au moins 5 000 000 \$;  
b) dans le cas d'un exportateur ou d'un importateur de matières, d'au moins 1 000 000 \$;

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

Coverage period	<p>(c) for authorized carriers, the amount required by the laws of the jurisdiction in which the hazardous waste or hazardous recyclable material is transported.</p> <p>(3) The insurance must cover liability arising</p> <p>(a) in the case of an export from Canada, from the time the hazardous waste or hazardous recyclable material leaves the exporter's facility to the time an authorized facility, including an authorized facility in Canada if the waste or material is returned to Canada in accordance with section 34, accepts delivery of the waste for disposal or the material for recycling;</p> <p>(b) in the case of an import into Canada, from the time the hazardous waste or hazardous recyclable material enters Canada to the time an authorized facility in Canada accepts delivery of the waste or material, or to the time the waste or material leaves Canada for return to the country of export in accordance with section 35; or</p> <p>(c) if Canada is a country of transit, at any time during the transit through Canada.</p>	<p>c) dans le cas d'un transporteur agréé, le montant exigé par les lois du territoire sur lequel les déchets ou les matières sont transportés.</p> <p>(3) L'assurance doit couvrir la responsabilité :</p> <p>a) dans le cas d'une exportation, à compter du moment où les déchets ou les matières quittent l'installation de l'exportateur jusqu'à ce qu'une installation agréée, y compris une installation au Canada s'ils y sont renvoyés conformément à l'article 34, en accepte la livraison en vue de leur élimination ou de leur recyclage;</p> <p>b) dans le cas d'une importation, à compter du moment où ils entrent au Canada jusqu'à ce qu'une installation agréée en accepte la livraison, ou jusqu'à ce qu'ils quittent le Canada en raison de leur renvoi dans le pays d'exportation conformément à l'article 35;</p> <p>c) dans le cas d'un transit au Canada, pendant la durée de celui-ci.</p>
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*Export Reduction Plans*

*Plans de réduction des exportations de déchets dangereux*

Content of plan	<p>38. (1) The plan referred to in subsection 188(1) of the Act must contain</p> <p>(a) the following information with respect to the hazardous waste to which the plan applies, namely,</p> <p>(i) the International Waste Identification Code under OECD Decision C(94)152/Final, substituting the disposal code with the disposal code set out in column 1 of Schedule 1 to these Regulations for the applicable operation set out in column 2 of that Schedule and, if the hazardous waste is a gas, substituting the letter G for the letter L, P or S in the International Waste Identification Code,</p> <p>(ii) the applicable code set out in List A of Annex VIII to the Convention,</p> <p>(iii) the identification number set out in column 1 of Schedule 3, 4 or 7, and</p> <p>(iv) the following information set out in the applicable schedules to the <i>Transportation of Dangerous Goods Regulations</i>, namely,</p> <p>(A) the applicable UN number set out in column 1 of Schedule 1 or column 5 of Schedule 3,</p> <p>(B) the applicable class set out in column 3 of Schedule 1 or the primary class set out in column 4 of Schedule 3, and</p> <p>(C) the applicable packing group and risk group set out in column 4 of Schedule 1;</p> <p>(b) the name, quantity and concentration of any persistent organic pollutant set out in column 2 of Schedule 10 that is contained in the hazardous waste referred to in the plan;</p>	<p>38. (1) Le plan visé au paragraphe 188(1) de la Loi comporte les renseignements suivants :</p> <p>a) relativement à chaque déchet dangereux qu'il vise :</p> <p>(i) le code international d'identification des déchets applicable selon la décision C(94)152/Final de l'OCDE, sauf que le code d'élimination est remplacé par celui prévu à la colonne 1 de l'annexe 1 du présent règlement pour l'opération applicable figurant à la colonne 2, et que les lettres « L », « P » ou « S » sont remplacées par la lettre « G » si le déchet est un gaz,</p> <p>(ii) le code applicable figurant à la liste A de l'annexe VIII de la Convention,</p> <p>(iii) le numéro d'identification prévu à la colonne 1 des annexes 3, 4 ou 7,</p> <p>(iv) les renseignements ci-après provenant des annexes applicables du <i>Règlement sur le transport des marchandises dangereuses</i> :</p> <p>(A) le numéro UN applicable prévu à la colonne 1 de l'annexe 1 ou à la colonne 5 de l'annexe 3,</p> <p>(B) la classe applicable prévue à la colonne 3 de l'annexe 1 ou la classe primaire applicable prévue à la colonne 4 de l'annexe 3,</p> <p>(C) le groupe d'emballage/groupe de risque applicable prévu à la colonne 4 de l'annexe 1;</p> <p>b) les nom, quantité et concentration de toute substance polluante organique persistante visée à la colonne 2 de l'annexe 10 qui se trouve dans les déchets visés par le plan;</p>
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2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SORDORS/2005-149

- (c) if the exporter generates the hazardous waste referred to in the plan, the name and a description of the process that generated the waste and the activity in which that process is used;
- (d) the origin of the hazardous waste if the exporter does not generate the waste referred to in the plan;
- (e) the quantity of hazardous waste exported at the start of the implementation of the plan and the quantity of export reduction to be achieved at each stage of the plan;
- (f) a description of the manner in which the exporter will reduce or phase out exports of the hazardous waste referred to in the plan;
- (g) the options considered for reducing or phasing out the export of the hazardous waste referred to in the plan, including options for disposing or recycling it in Canada;
- (h) the stages of the plan and a schedule for implementing the plan; and
- (i) for each stage of the plan, an estimate of the quantity of goods produced that generates the hazardous waste to which the plan applies and a description of the impact of any changes to the quantity produced on the reduction or phasing out of exports of that waste.

Retention of  
plan

(2) A person who submits a plan to the Minister must keep a copy of the plan at their principal place of business in Canada for a period of five years after the day on which the plan is submitted.

#### *Environmentally Sound Management*

Refusal to issue  
permit

39. If the Minister is of the opinion that the hazardous waste or hazardous recyclable material will not be managed in a manner that will protect the environment and human health against the adverse effects that may result from that waste or material, the Minister may, in accordance with subsection 185(2) of the Act, refuse to issue a permit taking into account the following criteria:

- (a) the implementation of an environmental management system at the authorized facility that includes
  - (i) procedures for ensuring the protection of the environment and human health against the adverse effects that may result from the disposal of the hazardous waste or the recycling of the hazardous recyclable material including measures for monitoring the efficiency of the procedures and modifying them in the event that they do not protect the environment and human health,
  - (ii) measures to monitor and ensure compliance with applicable laws with respect to the protection of the environment and human health, and
  - (iii) a certification that the system includes those procedures and measures;
- (b) the implementation of a plan at the authorized facility to prevent, prepare for and respond to an

- c) si l'exportateur produit les déchets visés par le plan, le nom et une description du procédé de production des déchets et de l'activité dans laquelle ce procédé est utilisé;
- d) si l'exportateur ne produit pas les déchets visés par le plan, la provenance des déchets;
- e) la quantité de déchets exportée à la mise en œuvre du plan et la réduction visée à chaque étape du plan;
- f) la façon dont l'exportateur réduira ou supprimera l'exportation des déchets visés par le plan;
- g) les solutions qui ont été envisagées en vue de réduire ou de supprimer les exportations de déchets visés par le plan, y compris celles concernant le recyclage des déchets au Canada;
- h) les étapes du plan et l'échéancier;
- i) pour chaque étape du plan, la quantité estimative de biens dont la production génère les déchets visés par le plan, ainsi qu'une description de l'effet des variations de quantité sur la réduction ou la suppression des exportations de déchets.

(2) La personne qui remet le plan au ministre en conserve une copie à son principal établissement au Canada pour une période de cinq ans suivant la remise du plan.

Conservation

#### *Gestion écologiquement rationnelle*

39. Si le ministre estime que les déchets dangereux ou les matières recyclables dangereuses ne seront pas gérés d'une manière qui garantisse la protection de l'environnement et de la santé humaine contre les effets nuisibles qu'ils peuvent avoir, il peut refuser, en vertu du paragraphe 185(2) de la Loi, de délivrer le permis compte tenu des facteurs suivants :

Refus de  
délivrer un  
permis

- a) la mise en application d'un système de gestion environnementale à l'installation agréée, lequel comprend notamment :
  - (i) des modalités qui garantissent la protection de l'environnement et de la santé humaine contre les effets nuisibles que l'élimination des déchets ou le recyclage des matières pourrait entraîner ainsi que des mesures pour contrôler l'efficacité de ces modalités et les modifier si elles ne protègent pas l'environnement et la santé humaine,
  - (ii) des mesures pour assurer le respect des lois applicables concernant la protection de l'environnement et de la santé humaine,
  - (iii) une attestation du fait que le système comprend les modalités et les mesures;
- b) la mise en application, à l'installation agréée, d'un plan pour prévenir tout rejet non contrôlé, non planifié ou accidentel de déchets ou de matières et pour faire face à un tel rejet;

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

uncontrolled, unplanned or accidental release of hazardous waste or hazardous recyclable material; and

(c) the existence of prohibitions or conditions relating to the disposal of hazardous waste or the recycling of hazardous recyclable material in Canada or abroad.

c) l'existence d'interdictions ou de conditions concernant l'élimination des déchets ou le recyclage des matières au Canada ou à l'étranger.

#### CONSEQUENTIAL AMENDMENT

Consequential amendment

40. Paragraph 2(2)(b) of the *Export of Substances Under the Rotterdam Convention Regulations*<sup>1</sup> is replaced by the following:

(b) is, or is contained in, a hazardous waste or hazardous recyclable material regulated by the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*;

#### MODIFICATION CORRÉLATIVE

40. L'alinéa 2(2)b) du *Règlement sur l'exportation de substances aux termes de la Convention de Rotterdam*<sup>1</sup> est remplacé par ce qui suit :

b) la substance est un déchet dangereux ou une matière recyclable dangereuse — ou est contenue dans un tel déchet ou une telle matière — qui est régi par le *Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuses*;

#### REPEAL

Repeal

41. The *Export and Import of Hazardous Wastes Regulations*<sup>2</sup> are repealed.

#### ABROGATION

41. Le *Règlement sur l'exportation et l'importation des déchets dangereux*<sup>2</sup> est abrogé.

#### COMING INTO FORCE

Coming into Force

42. These Regulations come into force on November 1, 2005.

#### ENTRÉE EN VIGUEUR

42. Le présent règlement entre en vigueur le 1<sup>er</sup> novembre 2005.

<sup>1</sup> SOR/2002-317  
<sup>2</sup> SOR/92-637

<sup>1</sup> DORS/2002-317  
<sup>2</sup> DORS/92-637

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

#### SCHEDULE 1

(Subsection 1(1), section 4, subparagraphs 8(j)(i) and (viii) and 9(f)(iv), paragraphs 9(n) and (o), subparagraph 16(e)(iv), paragraphs 16(m) and (n) and subparagraph 38(1)(a)(i))

#### DISPOSAL OPERATIONS FOR HAZARDOUS WASTE

Column 1		Column 2
Item	Disposal Code	Operation
1.	D1	Release into or onto land, other than by any of operations D3 to D5 or D12.
2.	D2	Land treatment, such as biodegradation of liquids or sludges in soil.
3.	D3	Deep injection, such as injection into wells, salt domes, mines or naturally occurring repositories.
4.	D4	Surface impoundment, such as placing liquids or sludges into pits, ponds or lagoons.
5.	D5	Specially engineered landfilling, such as placement into separate lined cells that are isolated from each other and the environment.
6.	D6	Release into water, other than a sea or ocean, other than by operation D4.
7.	D7	Release into a sea or ocean, including sea-bed insertion, other than by operation D4.
8.	D8	Biological treatment, not otherwise set out in this Schedule.
9.	D9	Physical or chemical treatment, not otherwise referred to in this Schedule, such as calcination, neutralization or precipitation.
10.	D10	Incineration or thermal treatment on land.
11.	D11	Incineration or thermal treatment at sea.
12.	D12	Permanent storage.
13.	D13	Blending or mixing, prior to any of operations D1 to D12.
14.	D14	Repackaging, prior to any of operations D1 to D13.
15.	D15	Release, including the venting of compressed or liquified gases, or treatment, other than by any of operations D1 to D12.
16.	D16	Testing of a new technology to dispose of a hazardous waste.
17.	D17	Interim storage, prior to any of operations D1 to D12.

#### SCHEDULE 2

(Subsection 2(1), subparagraph 2(2)(e)(iii), section 4, subparagraphs 8(j)(i) and (viii) and 9(f)(iv), paragraphs 9(n) and (o), subparagraph 16(e)(iv) and paragraphs 16(m) and (n))

#### RECYCLING OPERATIONS FOR HAZARDOUS RECYCLABLE MATERIAL

Column 1		Column 2
Item	Recycling Code	Operation
1.	R1	Use as a fuel in an energy recovery system, where the net heating value of the material is at least 12 780 kJ/kg.
2.	R2	Recovery or regeneration of substances that have been used as solvents.
3.	R3	Recovery of organic substances that have not been used as solvents.
4.	R4	Recovery of metals and metal compounds.
5.	R5	Recovery of inorganic materials other than metals or metal compounds.
6.	R6	Regeneration of acids or bases.
7.	R7	Recovery of components used for pollution abatement.
8.	R8	Recovery of components from catalysts.
9.	R9	Re-refining or re-use of used oil, other than by operation R1.
10.	R10	Land treatment resulting in agricultural or ecological improvement.
11.	R11	Use of residual materials obtained by any of operations R1 to R10 or R14.
12.	R12	Exchange of a recyclable material for another recyclable material prior to recycling by any of operations R1 to R11 or R14.
13.	R13	Accumulation prior to recycling by any of operations R1 to R11 or R14.
14.	R14	Recovery or regeneration of a substance or use or re-use of a recyclable material, other than by any of operations R1 to R10.
15.	R15	Testing of a new technology to recycle a hazardous recyclable material.
16.	R16	Interim storage prior to any of operations R1 to R11 or R14.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

### SCHEDULE 3

(Paragraphs 1(1)(a) and 2(1)(a), subparagraph 8(j)(v), paragraphs 9(c) and 16(b) and subparagraph 38(1)(a)(iii))

#### HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material																																		
1.	HAZ1	<p>Biomedical waste – the following wastes, other than those generated from building maintenance, office administration or food preparation and consumption, that are generated by human or animal health care establishments, medical, health care or veterinary teaching or research establishments, clinical laboratories or facilities that test or produce vaccines and needle and syringe exchange programs:</p> <p>(a) human tissues, organs or body parts, excluding teeth, hair or nails;</p> <p>(b) human blood or blood products;</p> <p>(c) human bodily fluids that are contaminated with blood;</p> <p>(d) human bodily fluids removed in the course of autopsy, treatment, or surgery for diagnosis;</p> <p>(e) animal tissues, organs, body parts or carcasses, excluding teeth, nails, hair, bristles, feathers, horns and hooves, resulting from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraph 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(f) animal blood or blood products resulting from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraph 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(g) animal bodily fluids that are visibly contaminated with animal blood and that result from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraph 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(h) animal bodily fluids removed in the course of surgery, treatment or necropsy, and that result from the treatment of an animal for contamination or suspected contamination with one or more of the agents set out in paragraphs 2.36(a) or (b) of the <i>Transportation of Dangerous Goods Regulations</i>;</p> <p>(i) live or attenuated vaccines, human or animal cell cultures, microbiology laboratory cultures, stocks or specimens of microorganisms and any items that have come into contact with them;</p> <p>(j) any items that are saturated with the blood or bodily fluids referred to in paragraphs (b) to (d) or (f) to (h), including items that were saturated but that have dried, and</p> <p>(k) cytotoxic drugs and any items, including tissues, tubing, needles or gloves, that have come into contact with a cytotoxic drug.</p> <p>Biomedical waste does not include</p> <p>(a) urine or feces;</p> <p>(b) wastes that are controlled under the <i>Health of Animals Act</i>; or</p> <p>(c) wastes that result from the breeding or raising of animals.</p>																																		
2.	HAZ2	Used lubricating oils in quantities of 500 L or more, from internal combustion engines or gear boxes, transmissions, transformers, hydraulic systems or other equipment associated with such engines.																																		
3.	HAZ3	Used oil filters containing more than 6% of oil by mass.																																		
4.	HAZ4	Cyanide, or substances containing cyanide, in a concentration equal to or greater than 100 mg/kg.																																		
5.	HAZ5	Wastes that contain more than 2 mg/kg of polychlorinated terphenyls or polybrominated biphenyls described in Schedule 1 to the Act.																																		
6.	HAZ6	<p>Wastes that contain, in a concentration of more than 100 ng/kg of 2,3,7,8-tetrachlorodibenzo-p-dioxin equivalent,</p> <p>(a) total polychlorinated dibenzofurans that have a molecular formula <math>C_{12}H_{10-n}Cl_nO</math> in which "n" is greater than 1; or</p> <p>(b) total polychlorinated dibenzo-p-dioxins that have a molecular formula <math>C_{12}H_{10-n}Cl_nO_2</math> in which "n" is greater than 1.</p> <p>The concentration is calculated in accordance with "International Toxicity Equivalency Factor (I-TEF) Method of Risk Assessment for Complex Mixtures of Dioxins and Related Compounds", <i>Pilot Study on International Information Exchange on Dioxins and Related Compounds</i>, Committee on the Challenges of Modern Society, North Atlantic Treaty Organization, Report Number 176, August 1988, as amended from time to time, using the following factors:</p> <table><tr><td>2,3,7,8-tetrachlorodibenzodioxin</td><td>1.001</td></tr><tr><td>1,2,3,7,8-pentachlorodibenzodioxin</td><td>0.5</td></tr><tr><td>1,2,3,4,7,8-hexachlorodibenzodioxin</td><td>0.1</td></tr><tr><td>1,2,3,7,8,9-hexachlorodibenzodioxin</td><td>0.1</td></tr><tr><td>1,2,3,6,7,8-hexachlorodibenzodioxin</td><td>0.1</td></tr><tr><td>1,2,3,4,6,7,8-heptachlorodibenzodioxin</td><td>0.01</td></tr><tr><td>octachlorodibenzodioxin</td><td>0.001</td></tr><tr><td>2,3,7,8-tetrachlorodibenzofuran</td><td>0.1</td></tr><tr><td>2,3,4,7,8-pentachlorodibenzofuran</td><td>0.5</td></tr><tr><td>1,2,3,7,8-pentachlorodibenzofuran</td><td>0.05</td></tr><tr><td>1,2,3,4,7,8-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>1,2,3,7,8,9-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>1,2,3,6,7,8-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>2,3,4,6,7,8-hexachlorodibenzofuran</td><td>0.1</td></tr><tr><td>1,2,3,4,6,7,8-heptachlorodibenzofuran</td><td>0.01</td></tr><tr><td>1,2,3,4,7,8,9-heptachlorodibenzofuran</td><td>0.01</td></tr><tr><td>octachlorodibenzofuran</td><td>0.001</td></tr></table>	2,3,7,8-tetrachlorodibenzodioxin	1.001	1,2,3,7,8-pentachlorodibenzodioxin	0.5	1,2,3,4,7,8-hexachlorodibenzodioxin	0.1	1,2,3,7,8,9-hexachlorodibenzodioxin	0.1	1,2,3,6,7,8-hexachlorodibenzodioxin	0.1	1,2,3,4,6,7,8-heptachlorodibenzodioxin	0.01	octachlorodibenzodioxin	0.001	2,3,7,8-tetrachlorodibenzofuran	0.1	2,3,4,7,8-pentachlorodibenzofuran	0.5	1,2,3,7,8-pentachlorodibenzofuran	0.05	1,2,3,4,7,8-hexachlorodibenzofuran	0.1	1,2,3,7,8,9-hexachlorodibenzofuran	0.1	1,2,3,6,7,8-hexachlorodibenzofuran	0.1	2,3,4,6,7,8-hexachlorodibenzofuran	0.1	1,2,3,4,6,7,8-heptachlorodibenzofuran	0.01	1,2,3,4,7,8,9-heptachlorodibenzofuran	0.01	octachlorodibenzofuran	0.001
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2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4

(Paragraphs 1(1)(c) and 2(1)(c) and subparagraphs 8(j)(v) and 38(1)(a)(iii))

PART I

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM NON-SPECIFIC SOURCES

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
1.	F001	The following spent halogenated solvents used in degreasing: tetrachloroethylene, trichloroethylene, methylene chloride, 1,1,1-trichloroethane, carbon tetrachloride and chlorinated fluorocarbons; all spent solvent mixtures and blends used in degreasing containing, before use, a total of 10% or more (by volume) of one or more of the above halogenated solvents or those solvents listed as F002, F004 or F005; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
2.	F002	The following spent halogenated solvents: tetrachloroethylene, methylene chloride, trichloroethylene, 1,1,1-trichloroethane, chlorobenzene, 1,1,2-trichloro-1,2,2-trifluoroethane, ortho-dichlorobenzene, trichlorofluoromethane and 1,1,2-trichloroethane; all spent solvent mixtures and blends containing, before use, a total of 10% or more (by volume) of one or more of the above halogenated solvents or those listed as F001, F004 or F005; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
3.	F003	The following spent non-halogenated solvents: xylene, acetone, ethyl acetate, ethyl benzene, ethyl ether, methyl isobutyl ketone, n-butyl alcohol, cyclohexanone and methanol; all spent solvent mixtures and blends containing, before use, only the above spent non-halogenated solvents; and all spent solvent mixtures and blends containing, before use, one or more of the above spent non-halogenated solvents, and a total of 10% or more (by volume) of one or more of those solvents listed as F001, F002, F004 or F005; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
4.	F004	The following spent non-halogenated solvents: cresols, cresylic acid and nitrobenzene; all spent solvent mixtures and blends containing, before use, a total of 10% or more (by volume) of one or more of the above spent non-halogenated solvents or those solvents listed as F001, F002 or F005; and still bottoms from the recovery of these spent solvents and spent solvent mixtures.
5.	F005	The following spent non-halogenated solvents: toluene, methyl ethyl ketone, carbon disulphide, isobutanol, pyridine, benzene, 2-ethoxyethanol and 2-nitropropane; all spent solvent mixtures and blends containing, before use, a total of 10% or more (by volume) of one or more of the above spent non-halogenated solvents or those solvents listed as F001, F002 or F004; and still bottoms from the recovery of those spent solvents and spent solvent mixtures.
6.	F006	Wastewater treatment sludges from electroplating operations except for the following processes: (1) sulphuric acid anodizing of aluminum; (2) tin plating on carbon steel; (3) zinc plating (on a segregated basis) on carbon steel; (4) aluminum or aluminum-zinc plating on carbon steel; (5) cleaning or stripping associated with tin, zinc or aluminum plating on carbon steel; and (6) chemical etching and milling of aluminum.
7.	F007	Spent cyanide plating bath solutions from electroplating operations.
8.	F008	Plating bath sludge from the bottom of plating baths from electroplating operations where cyanides are used in the process.
9.	F009	Spent stripping and cleaning bath solutions from electroplating operations where cyanides are used in the process.
10.	F010	Quenching bath sludge from oil baths from metal heat treating operations where cyanides are used in the process.
11.	F011	Spent cyanide solutions from salt bath pot cleaning from metal heat treating operations.
12.	F012	Quenching wastewater treatment sludge from metal heat treating operations where cyanides are used in the process.
13.	F019	Wastewater treatment sludge from the chemical conversion coating of aluminum except from zirconium phosphating in aluminum can washing if such phosphating is an exclusive conversion coating process.
14.	F020	Wastes from the production or manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tri- or tetrachlorophenol or of intermediates used to produce their pesticide derivatives, excluding wastewater and spent carbon from hydrogen chloride purification and wastes from the production of hexachlorophene from highly purified 2,4,5-trichlorophenol.
15.	F021	Wastes from the production or manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of pentachlorophenol or of intermediates used to produce its derivatives, excluding wastewater and spent carbon from hydrogen chloride purification.
16.	F022	Wastes from the manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tetra-, penta- or hexachlorobenzenes under alkaline conditions, excluding wastewater and spent carbon from hydrogen chloride purification.
17.	F023	Wastes from the production of materials on equipment previously used for the production or manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tri- and tetrachlorophenols, excluding wastewater and spent carbon from hydrogen chloride purification and wastes from equipment used only for the production or use of hexachlorophene from highly purified 2,4,5-trichlorophenol.
18.	F024	Process wastes, including, but not limited to, distillation residues, heavy ends, tars and reactor clean-out wastes from the production of certain chlorinated aliphatic hydrocarbons by free radical catalyzed processes, those chlorinated aliphatic hydrocarbons being those having carbon chain lengths ranging from 1 to and including 5, with varying amounts and positions of chlorine substitution, and excluding wastewaters, wastewater treatment sludge, spent catalysts and wastes set out in Schedule 7.
19.	F025	Condensed light ends, spent filters and filter aids, and spent desiccant wastes from the production of certain chlorinated aliphatic hydrocarbons, by free radical catalyzed processes, those chlorinated aliphatic hydrocarbons being those having carbon chain lengths ranging from 1 to and including 5, with varying amounts and positions of chlorine substitution.
20.	F026	Wastes from the production of materials on equipment previously used for the manufacturing use (as a reactant, chemical intermediate or component in a formulating process) of tetra-, penta- or hexachlorobenzene under alkaline conditions, excluding wastewater and spent carbon from hydrogen chloride purification.
21.	F027	Discarded unused formulations containing tri-, tetra- or pentachlorophenol or discarded unused formulations containing compounds derived from those chlorophenols, excluding formulations containing hexachlorophene synthesized from prepurified 2,4,5-trichlorophenol as the sole component.
22.	F028	Residues resulting from incineration or treatment of soil contaminated with wastes listed as F020, F021, F022, F023, F026 or F027.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4 — Continued

PART 1 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM NON-SPECIFIC SOURCES — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
23.	F032	Wastewaters, spent formulations from wood preserving processes generated at plants that currently use or have previously used chlorophenolic formulations, process residuals and preservative drillage, except wastewaters that have not come into contact with process contaminants, spent formulations that potentially cross-contaminated wastes from wood preserving processes at plants that do not resume or initiate use of chlorophenolic preservatives, and bottom sediment sludge listed as K001.
24.	F034	Wastewaters, process residuals, preservative drillage and spent formulations from wood preserving processes generated at plants that use creosote formulations, excluding bottom sediment sludge listed as K001 and wastewaters that have not come into contact with process contaminants.
25.	F035	Wastewaters, process residuals, preservative drillage and spent formulations from wood preserving processes generated at plants that use inorganic preservatives containing arsenic or chromium, excluding bottom sediment sludge listed as K001 and wastewaters that have not come into contact with process contaminants.
26.	F037	Petroleum refinery primary oil, water and solids separation sludge; sludge generated from the gravitational separation of oil, water and solids during the storage or treatment of process wastewaters and oil cooling wastewaters from petroleum refineries, including, but not limited to, those generated in oil, water and solids separators, tanks and impoundments, ditches and other conveyances, sumps and stormwater units receiving dry weather flow; sludge generated in stormwater units that do not receive dry weather flow; sludge generated from non-contact once-through cooling waters segregated for treatment from other processes or oily cooling waters; sludge generated in biological treatment units that employ one of the following treatment methods: activated sludge, trickling filter, rotating biological contactor for the continuous accelerated biological oxidation of wastewaters, or high-rate aeration (including sludge generated in one or more additional units after wastewaters have been treated in biological treatment units). Wastes listed as K051 are excluded.
27.	F038	Petroleum refinery secondary (emulsified) oil, water and solids separation sludge; sludge or float generated from the physical or chemical separation of oil, water and solids in process wastewaters and oily cooling wastewaters from petroleum refineries, including, but not limited to, sludge and floats generated in induced air flotation (IAF) units, tanks and impoundments, and in dissolved air flotation (DAF) units; sludge generated in stormwater units that do not receive dry weather flow; sludge generated from non-contact once-through cooling waters segregated for treatment from other processes or oily cooling water; sludge and float generated in biological treatment units that employ one of the following treatment methods: activated sludge, trickling filter, rotating biological contactor for the continuous accelerated biological oxidation of wastewaters, or high-rate aeration (including sludge and float generated in one or more additional units after wastewaters have been treated in a biological treatment unit). Wastes listed as F037, K048 and K051 are excluded.
28.	F039	Leachate (liquids that percolated through land disposed wastes) resulting from the disposal of more than one waste classified as a hazardous waste by being included in this Schedule.

PART 2

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
<b>Wood Preservation</b>		
1.	K001	Bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote or pentachlorophenol or both.
<b>Inorganic Pigments</b>		
2.	K002	Wastewater treatment sludge from the production of chrome yellow and orange pigments.
3.	K003	Wastewater treatment sludge from the production of molybdate orange pigments.
4.	K004	Wastewater treatment sludge from the production of zinc yellow pigments.
5.	K005	Wastewater treatment sludge from the production of chrome green pigments.
6.	K006	Wastewater treatment sludge from the production of chromeoxide green pigments (anhydrous and hydrated).
7.	K007	Wastewater treatment sludge from the production of iron blue pigments.
8.	K008	Oven residue from the production of chromeoxide green pigments.
<b>Organic Chemicals</b>		
9.	K009	Distillation bottoms from the production of acetaldehyde from ethylene.
10.	K010	Distillation side cuts from the production of acetaldehyde from ethylene.
11.	K011	Bottom stream from the wastewater stripper in the production of acrylonitrile.
12.	K013	Bottom stream from the acetonitrile column in the production of acrylonitrile.
13.	K014	Bottoms from the acetonitrile purification column in the production of acrylonitrile.
14.	K015	Still bottoms from the distillation of benzylchloride.
15.	K016	Heavy ends or distillation residues from the production of carbon tetrachloride.
16.	K017	Heavy ends (still bottoms) from the purification column in the production of epichlorohydrin.
17.	K018	Heavy ends from the fractionation column in ethyl chloride production.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4 — Continued

PART 2 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
18.	K019	Heavy ends from the distillation of ethylene dichloride in ethylene dichloride production.
19.	K020	Heavy ends from the distillation of vinyl chloride in vinyl chloride monomer production.
20.	K021	Aqueous spent antimony catalyst waste from fluoromethanes production.
21.	K022	Distillation bottom tars from the production of phenol and acetone from cumene.
22.	K023	Distillation light ends from the production of phthalic anhydride from naphthalene.
23.	K024	Distillation bottoms from the production of phthalic anhydride from naphthalene.
24.	K025	Distillation bottoms from the production of nitrobenzene by the nitration of benzene.
25.	K026	Stripping still tails from the production of methyl ethyl pyridines.
26.	K027	Centrifuge and distillation residues from toluene diisocyanate production.
27.	K028	Spent catalyst from the hydrochlorinator reactor in the production of 1,1,1-trichloroethane.
28.	K029	Waste from the product stream stripper in the production of 1,1,1-trichloroethane.
29.	K030	Column bottoms or heavy ends from the combined production of trichloroethylene and perchloroethylene.
30.	K083	Distillation bottoms from aniline production.
31.	K085	Distillation or fractionating column bottoms from the production of chlorobenzenes.
32.	K093	Distillation light ends from the production of phthalic anhydride from o-xylene.
33.	K094	Distillation bottoms from the production of phthalic anhydride from o-xylene.
34.	K095	Distillation bottoms from the production of 1,1,1-trichloroethane.
35.	K096	Heavy ends from the heavy ends columns from the production of 1,1,1-trichloroethane.
36.	K103	Process residues from aniline extraction from the production of aniline.
37.	K104	Combined wastewater streams from nitrobenzene and aniline production.
38.	K105	Separated aqueous stream from the reactor product washing step in the production of chlorobenzene.
39.	K107	Column bottoms from product separation from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazines.
40.	K108	Condensed column overheads from product separation and condensed reactor vent gases from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazines.
41.	K109	Spent filter cartridges from product purification from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
42.	K110	Condensed column overheads from intermediate separation from the production of 1,1-dimethylhydrazine (UDMH) from carboxylic acid hydrazides.
43.	K111	Product washwaters from the production of dinitrotoluene via nitration of toluene.
44.	K112	Reaction by-product water from the drying column in the production of toluenediamine via hydrogenation of dinitrotoluene.
45.	K113	Condensed liquid light ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.
46.	K114	Vicinals from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.
47.	K115	Heavy ends from the purification of toluenediamine in the production of toluenediamine via hydrogenation of dinitrotoluene.
48.	K116	Organic condensate from the solvent recovery column in the production of toluene diisocyanate via phosgenation of toluenediamine.
49.	K117	Wastewater from the reactor vent gas scrubber in the production of ethylene dibromide via bromination of ethene.
50.	K118	Spent adsorbent solids from the purification of ethylene dibromide in the production of ethylene dibromide via bromination of ethene.
51.	K136	Still bottoms from the purification of ethylene dibromide in the production of ethylene dibromide via bromination of ethene.
52.	K140	Floor sweepings, off-specification product and spent filter media from the production of 2,4,6-tribromophenol.
53.	K149	Distillation bottoms from the production of alpha- (or methyl-) chlorinated toluenes, ring- chlorinated toluenes, benzoyl chlorides and compounds with mixtures of those functional groups, excluding still bottoms from the distillation of benzyl chloride.
54.	K150	Organic residuals, excluding spent carbon adsorbent, from the spent chlorine gas and hydrochloric acid recovery processes associated with the production of alpha- (or methyl-) chlorinated toluenes, ring-chlorinated toluenes, benzoyl chlorides and compounds with mixtures of those functional groups.
55.	K151	Wastewater treatment sludge generated during the treatment of wastewaters from the production of alpha- (or methyl-) chlorinated toluenes, ring-chlorinated toluenes, benzoyl chlorides and compounds with mixtures of those functional groups, excluding neutralization and biological sludge.
56.	K156	Organic waste (including heavy ends, still bottoms, light ends, spent solvents, filtrates and decantates) from the production of carbamates and carbamoyl oximes, excluding waste generated from the manufacture of 3-iodo-2-propynyl n-butylcarbamate.
57.	K157	Wastewaters (including scrubber waters, condenser waters, washwaters and separation waters) from the production of carbamates and carbamoyl oximes, excluding wastes generated from the manufacture of 3-iodo-2-propynyl n-butylcarbamate.
58.	K158	Bag house dusts and filter or separation solids from the production of carbamates and carbamoyl oximes, excluding wastes generated from the manufacture of 3-iodo-2-propynyl n-butylcarbamate.
59.	K159	Organics from the treatment of thiocarbamate wastes.
60.	K161	Purification solids (including filtration, evaporation and centrifugation solids), bag house dust and floor sweepings from the production of dithiocarbamate acids and their salts, excluding substances listed as K125 or K126.

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

SCHEDULE 4 — *Continued*

PART 2 — *Continued*

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES — *Continued*

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste and Hazardous Recyclable Material
<b>Inorganic chemicals</b>		
61.	K071	Brine purification sludge from the mercury cell process in chlorine production if separately prepurified brine is not used
62.	K073	Chlorinated hydrocarbon wastes from the purification step of the diaphragm cell process using graphite anodes in chlorine production.
63.	K106	Wastewater treatment sludge from the mercury cell process in chlorine production.
<b>Pesticides</b>		
64.	K031	By-product salts generated in the production of monosodium acid methanecarboxylate (MSMA) and cacodylic acid.
65.	K032	Wastewater treatment sludge from the production of chlordane.
66.	K033	Wastewater and scrub water from the chlorination of cyclopentadiene in the production of chlordane.
67.	K034	Filter solids from the filtration of hexachlorocyclopentadiene in the production of chlordane.
68.	K035	Wastewater treatment sludge from the production of creosote.
69.	K036	Still bottoms from toluene reclamation distillation in the production of disulfoton.
70.	K037	Wastewater treatment sludge from the production of disulfoton.
71.	K038	Wastewater from the washing and stripping of phorate production.
72.	K039	Filter cake from the filtration of diethylphosphorodithioic acid in the production of phorate.
73.	K040	Wastewater treatment sludge from the production of phorate.
74.	K041	Wastewater treatment sludge from the production of toxaphene.
75.	K042	Heavy ends or distillation residues from the distillation of tetrachlorobenzene in the production of 2,4,5-T.
76.	K043	2,6-Dichlorophenol waste from the production of 2,4-D.
77.	K097	Vacuum stripper discharge from the chlordane chlorinator in the production of chlordane.
78.	K098	Untreated process wastewater from the production of toxaphene
79.	K099	Untreated wastewater from the production of 2,4-D.
80.	K123	Process wastewater, including supernates, filtrates and washwaters, from the production of ethylenedisithiocarbamic acid and its salts.
81.	K124	Reactor vent scrubber water from the production of ethylenedisithiocarbamic acid and its salts.
82.	K125	Filtration, evaporation and centrifugation solids from the production of ethylenedisithiocarbamic acid and its salts.
83.	K126	Baghouse dust and floor sweepings in milling and packaging operations from the production or formulation of ethylenedisithiocarbamic acid and its salts.
84.	K131	Wastewater from the reactor and spent sulfuric acid from the acid dryer from the production of methyl bromide.
85.	K132	Spent absorbent and wastewater separator solids from the production of methyl bromide.
<b>Explosives</b>		
86.	K044	Wastewater treatment sludge from the manufacturing and processing of explosives.
87.	K045	Spent carbon from the treatment of wastewater containing explosives.
88.	K046	Wastewater treatment sludge from the manufacturing, formulation and loading of lead-based initiating compounds.
89.	K047	Pink and red water from the production of TNT.
<b>Petroleum refining</b>		
90.	K048	Dissolved air flotation (DAF) float from the petroleum refining industry.
91.	K049	Slop oil emulsion solids from the petroleum refining industry.
92.	K050	Heat exchanger bundle cleaning sludge from the petroleum refining industry.
93.	K051	American Petroleum Institute (API) separator sludge from the petroleum refining industry.
94.	K052	Tanks bottoms (lead) from the petroleum refining industry.
95.	K169	Crude oil storage tank sediment from refining petroleum.
96.	K170	Clarified slurry oil tank sediment and in-line filter or separation solids from refining petroleum.
97.	K171	Spent hydrotreating catalyst from refining petroleum, including guard beds used to desulfurize feeds to other catalytic reactors, excluding inert support media.
98.	K172	Spent hydrorefining catalyst from refining petroleum, including guard beds used to desulfurize feeds to other catalytic reactors, excluding inert support media.
<b>Iron and steel</b>		
99.	K061	Emission control dust and sludge from the primary production of steel in electric furnaces.
100.	K062	Spent pickle liquor from steel finishing operations of facilities within the iron and steel industry at steel works, blast furnaces (including coke ovens), rolling mills, iron and steel foundries, gray and ductile iron foundries, malleable iron foundries, steel investment foundries or other miscellaneous steel foundries, or at facilities in the electrometallurgical products (except steel) industry, steel wiredrawing and steel nails and spikes industry, coldrolled steel sheet, strip and bars industry or steel pipes and tubes industry.
<b>Primary copper</b>		
101.	K064	Acid plant blowdown slurry and sludge resulting from the thickening of blowdown slurry from primary copper production.

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 4 — Continued

PART 2 — Continued

HAZARDOUS WASTES AND HAZARDOUS RECYCLABLE MATERIALS FROM SPECIFIC SOURCES — Continued

Item	Identification No.	Description of Hazardous Waste and Hazardous Recyclable Material
<b>Primary lead</b>		
102.	K065	Surface impoundment solids contained in and dredged from surface impoundments at primary lead smelting facilities.
<b>Primary zinc</b>		
103.	K066	Sludge from treatment of process wastewater and acid plant blowdown from primary zinc production.
<b>Primary aluminum</b>		
104.	K088	Spent potliners from primary aluminum reduction.
<b>Ferroalloys</b>		
105.	K090	Emission control dust or sludge from ferrochromiumsilicon production.
106.	K091	Emission control dust or sludge from ferrochromium production.
<b>Secondary lead</b>		
107.	K069	Emission control dust and sludge from secondary lead smelting.
108.	K100	Waste leaching solution from acid leaching of emission control dust and sludge from secondary lead smelting.
<b>Veterinary pharmaceuticals</b>		
109.	K084	Wastewater treatment sludge from the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.
110.	K101	Distillation tar residues from the distillation of aniline-based compounds in the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.
111.	K102	Residue from the use of activated carbon for decolourization in the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.
<b>Ink formulation</b>		
112.	K086	Solvent washes and sludge, caustic washes and sludge or water washes and sludge from cleaning tubs and equipment used in the formulation of ink from pigments, driers, soaps and stabilizers containing chromium and lead.
<b>Coking</b>		
113.	K060	Ammonia still lime sludge from coking operations.
114.	K087	Decanter tank tar sludge from coking operations.
115.	K141	Process residues from the recovery of coal tar, including, but not limited to, collecting sump residues from the production of coke from coal and the recovery of coke by-products produced from coal, excluding those wastes listed as K087.
116.	K142	Tar storage tank residues from the production of coke from coal or from the recovery of coke by-products produced from coal.
117.	K143	Process residues from the recovery of light oil, including, but not limited to, those generated in stills, decanters and wash oil recovery units from the recovery of coke by-products produced from coal.
118.	K144	Wastewater sump residues from light oil refining, including, but not limited to, intercepting or contamination sump sludge from the recovery of coke by-products produced from coal.
119.	K145	Residues from naphthalene collection and recovery operations from the recovery of coke by-products produced from coal.
120.	K147	Tar storage tank residues from coal tar refining.
121.	K148	Residues from coal tar distillation, including, but not limited to, still bottoms.

SCHEDULE 5  
(Paragraphs 1(1)(d) and 2(1)(d))

ENVIRONMENTALLY HAZARDOUS SUBSTANCES

Item	Substance	Concentration by Mass (mg/kg)
1.	Acetaldehyde	100.0
2.	Acetaldehyde ammonia	100.0
3.	Acetic acid	100.0
4.	Acetic anhydride	100.0
5.	Acetone cyanohydrin	100.0
6.	Acetyl bromide	100.0
7.	Acetyl chloride	100.0
8.	Acrolein, stabilized	100.0
9.	Acrylonitrile, stabilized	100.0
10.	Adipic acid	100.0

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 5 — Continued

ENVIRONMENTALLY HAZARDOUS SUBSTANCES — Continued

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
11.	Allethrin	100.0
12.	Allyl alcohol	100.0
13.	Allyl chloride	100.0
14.	Aluminum sulphate	100.0
15.	N-Aminopropylmorpholine	100.0
16.	Ammonia	100.0
17.	Ammonia solutions	100.0
18.	Ammonium acetate	100.0
19.	Ammonium benzoate	100.0
20.	Ammonium bicarbonate	100.0
21.	Ammonium bisulphite	100.0
22.	Ammonium carbamate	100.0
23.	Ammonium carbonate	100.0
24.	Ammonium chloride	100.0
25.	Ammonium citrate, dibasic	100.0
26.	Ammonium oxalate	100.0
27.	Ammonium sulphamate	100.0
28.	Ammonium sulphide	100.0
29.	Ammonium tartrate	100.0
30.	Ammonium thiocyanate	100.0
31.	Ammonium thiosulphate	100.0
32.	Amyl acetates	100.0
33.	Aniline	100.0
34.	Antimony pentachloride	100.0
35.	Antimony potassium tartrate	100.0
36.	Antimony tribromide	100.0
37.	Antimony trichloride	100.0
38.	Antimony trioxide	100.0
39.	Benzidine	100.0
40.	Benzoic acid	100.0
41.	Benzonitrile	100.0
42.	Benzoyl chloride	100.0
43.	Benzyl chloride	100.0
44.	Beryllium chloride	100.0
45.	Butyl acetates	100.0
46.	n-Butylamine	100.0
47.	n-Butyl phthalate	100.0
48.	Calcium hypochlorite	100.0
49.	Captan	100.0
50.	Carbon disulphide	100.0
51.	Chlordecone	100.0
52.	2-Chlorophenol	100.0
53.	Chlorosulphonic acid (with or without sulphur trioxide)	100.0
54.	Cobaltous bromide	100.0
55.	Cobaltous formate	100.0
56.	Cobaltous sulphamate	100.0
57.	Copper-based pesticides (all forms)	100.0
58.	Copper chloride	100.0
59.	Coumaphos	100.0
60.	Creosote	100.0
61.	Crotonaldehyde	100.0
62.	Cupric acetate	100.0
63.	Cupric oxalate	100.0
64.	Cupric sulphate	100.0
65.	Cupric sulphate, ammoniated	100.0
66.	Cupric tartrate	100.0
67.	Cyclohexane	100.0

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 5 — Continued  
ENVIRONMENTALLY HAZARDOUS SUBSTANCES — Continued

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
68.	Dichlobenil	100.0
69.	Dichlone	100.0
70.	1,1-Dichloro-2,2-di-(p-chlorophenyl) ethane	100.0
71.	Dichlorodiphenyltrichloroethane	100.0
72.	2,2-Dichloroethyl ether	100.0
73.	Dichloropropene	100.0
74.	2,2-Dichloropropionic acid	100.0
75.	Dichlorvos	100.0
76.	Dicofol	100.0
77.	Diethylamine	100.0
78.	Dimethylamine	100.0
79.	Dinitrobenzenes	100.0
80.	Dinitrophenol	100.0
81.	Dinitrotoluenes (excluding 2,4-dinitrotoluene)	100.0
82.	Disulfoton	100.0
83.	Endosulfan	100.0
84.	Epichlorohydrin	100.0
85.	Ethion	100.0
86.	Ethylbenzene	100.0
87.	Ethylenediamine	100.0
88.	Ethylenediaminetetraacetic acid	100.0
89.	Ethylene dibromide	100.0
90.	Ethylene dichloride	100.0
91.	Ferric ammonium citrate	100.0
92.	Ferric ammonium oxalate	100.0
93.	Ferric chloride	100.0
94.	Ferric nitrate	100.0
95.	Ferric sulphate	100.0
96.	Ferrous ammonium sulphate	100.0
97.	Ferrous chloride	100.0
98.	Ferrous sulphate	100.0
99.	Formaldehyde	100.0
100.	Formic acid	100.0
101.	Fumaric acid	100.0
102.	Furfural	100.0
103.	Hexachlorocyclopentadiene	100.0
104.	Isobutyl acetate	100.0
105.	Isobutylamine	100.0
106.	Isobutyric acid	100.0
107.	Isoprene	100.0
108.	Kelthane	100.0
109.	Mercaptodimethur	100.0
110.	Methyl bromide and ethylene dibromide mixtures	100.0
111.	Methyl methacrylate	100.0
112.	Methylamine	100.0
113.	Mevinphos	100.0
114.	Mexacarbate	100.0
115.	Naled	100.0
116.	Naphthalene	100.0
117.	Naphthoic acid	100.0
118.	Nickel ammonium sulphate	100.0
119.	Nickel chloride	100.0
120.	Nickel hydroxide	100.0
121.	Nickel sulphate	100.0
122.	Nitrophenols (o-, m-, p-)	100.0
123.	Nitrotoluenes (o-, m-, p-)	100.0
124.	Organotin compounds (all forms)	100.0

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 5 — Continued

ENVIRONMENTALLY HAZARDOUS SUBSTANCES — Continued

Column 1		Column 2
Item	Substance	Concentration by Mass (mg/kg)
125.	Organotin Pesticides (all forms)	100.0
126.	Oxalates, water soluble	100.0
127.	Paraformaldehyde	100.0
128.	Phenacpton	100.0
129.	Phenol	100.0
130.	Phosphorus	100.0
131.	Phosphorus oxychloride	100.0
132.	Phosphorus pentasulphide	100.0
133.	Phosphorus trichloride	100.0
134.	Polychlorinated biphenyls	50.0
135.	Potassium permanganate	100.0
136.	Propargite	100.0
137.	Propionic acid	100.0
138.	Propionic anhydride	100.0
139.	Propylene dichloride	100.0
140.	Propylene oxide	100.0
141.	Pyrethrins	100.0
142.	Quinoline	100.0
143.	Resorcinol	100.0
144.	Silver nitrate	100.0
145.	Sodium bisulphite	100.0
146.	Sodium dodecylbenzene sulphonate (branched chain)	100.0
147.	Sodium hydrogen sulphite	100.0
148.	Sodium hydrosulphide	100.0
149.	Sodium methylate	100.0
150.	Sodium phosphate, dibasic	100.0
151.	Sodium phosphate, tribasic	100.0
152.	Strychnine or Strychnine mixtures	100.0
153.	Strychnine salts or Strychnine salt mixtures	100.0
154.	Styrene	100.0
155.	Sulphur monochloride	100.0
156.	Tetrachloroethane	100.0
157.	Tetraethyl Pyrophosphate	100.0
158.	Thallium sulphate	100.0
159.	Thiram	100.0
160.	Titanium sulphate	100.0
161.	Toluene	100.0
162.	Triazine Pesticides	100.0
163.	Trichlorphon	100.0
164.	Triethylamine	100.0
165.	Trimethylamine	100.0
166.	Vanadium pentoxide, non-fused form	100.0
167.	Vanadyl sulphate	100.0
168.	Vinyl acetate	100.0
169.	Xylenes	100.0
170.	Xylenols	100.0
171.	Zinc acetate	100.0
172.	Zinc ammonium chloride	100.0
173.	Zinc carbonate	100.0
174.	Zinc chloride	100.0
175.	Zinc formate	100.0
176.	Zinc phenolsulphonate	100.0
177.	Zinc phosphide	100.0
178.	Zinc sulphate	100.0
179.	Zirconium sulphate	100.0



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 6  
(Paragraphs 1(1)(e) and 2(1)(e) and subparagraphs 2(2)(e)(ii) and 8(j)(v))

HAZARDOUS CONSTITUENTS CONTROLLED UNDER LEACHATE TEST AND REGULATED LIMITS

Column 1		Column 2	Column 3
Item	Hazardous Constituent Code No.	Hazardous Constituents (synonyms and descriptors)	Concentration (mg/L)
1.	L32	Aldicarb	0.900
2.	L3	Aldrin + Dieldrin	0.070
3.	L4	Arsenic	2.500
4.	L33	Atrazine + N-dealkylated metabolites	0.500
5.	L34	Azinphos-methyl	2.000
6.	L5	Barium	100.000
7.	L35	Bendiocarb	4.000
8.	L36	Benzene	0.500
9.	L37	Benzo(a)pyrene	0.001
10.	L6	Boron	500.000
11.	L38	Bromoxynil	0.500
12.	L7	Cadmium	0.500
13.	L8	Carbaryl/Sevin/1-Naphthyl-N methyl carbamate	9.000
14.	L39	Carbofuran	9.000
15.	L40	Carbon tetrachloride (Tetrachloromethane)	0.500
16.	L41	Chloramines	300.000
17.	L9	Chlordane	0.700
18.	L42	Chlorobenzene (Monochlorobenzene)	8.000
19.	L43	Chloroform	10.000
20.	L44	Chlorpyrifos	9.000
21.	L10	Chromium	5.000
22.	L45	Cresol (Mixture — total of all isomers, when isomers cannot be differentiated)	200.000
23.	L46	m-Cresol	200.000
24.	L47	o-Cresol	200.000
25.	L48	p-Cresol	200.000
26.	L49	Cyanazine	1.000
27.	L11	Cyanide	20.000
28.	L2	2,4-D / (2,4-Dichlorophenoxy)acetic acid	10.000
29.	L50	2,4-DCP / (2,4-Dichlorophenol)	90.000
30.	L12	DDT (total isomers)	3.000
31.	L13	Diazinon/Phosphorothioic acid, o,o-diethyl o-(2-isopropyl 6-methyl-4-pyrimidinyl) ester	2.000
32.	L51	Dicamba	12.000
33.	L52	1,2-Dichlorobenzene (o-Dichlorobenzene)	20.00
34.	L53	1,4-Dichlorobenzene (p-Dichlorobenzene)	0.50
35.	L54	1,2-Dichloroethane (Ethylene dichloride)	5.0
36.	L55	1,1-Dichloroethylene (Vinylidene chloride)	1.40
37.	L56	Dichloromethane (also see — methylene chloride)	5.00
38.	L57	Diclofop-methyl	0.90
39.	L58	Dimethoate	2.00
40.	L59	2,4-Dinitrotoluene	0.13
41.	L60	Diaoseb	1.00
42.	L70	Diquat	7.00
43.	L71	Diuron	15.00
44.	L14	Endrin	0.02
45.	L15	Fluoride	150.00
46.	L72	Glyphosate	28.00
47.	L16	Heptachlor + Heptachlor epoxide	0.30
48.	L73	Hexachlorobenzene	0.13
49.	L74	Hexachlorobutadiene	0.50
50.	L75	Hexachloroethane	3.00
51.	L17	Lead	5.00
52.	L18	Lindane	0.40
53.	L76	Malathion	19.00
54.	L19	Mercury	0.10
55.	L20	Methoxychlor/1,1,1-Trichloro-2,2-bis(p-methoxyphenyl) ethane	90.00

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 6 — Continued

HAZARDOUS CONSTITUENTS CONTROLLED UNDER LEACHATE TEST AND REGULATED LIMITS — Continued

Column 1		Column 2	Column 3
Item	Hazardous Constituent Code No.	Hazardous Constituents (synonyms and descriptors)	Concentration (mg/L)
56.	L77	Methyl ethyl ketone / Ethyl methyl ketone	200.00
57.	L21	Methyl Parathion	0.70
58.	L78	Methylene chloride / Dichloromethane	5.00
59.	L79	Metolachlor	5.00
60.	L80	Metribuzin	8.00
61.	L81	Nitrate	4500.00
62.	L22	Nitrate + Nitrite	1000.00
63.	L73	Nitrotetraacetic acid (NTA)	40.00
64.	L24	Nitrite	320.00
65.	L82	Nitrobenzene	2.00
66.	L83	Paraquat	1.00
67.	L26	Parathion	5.00
68.	L84	Pentachlorophenol	6.00
69.	L85	Phorate	0.20
70.	L86	Picloram	19.00
71.	L100	Polychlorinated dibenzo dioxins and furans	0.0000015 TEQ
72.	L87	Pyridine	5.00
73.	L27	Selenium	1.00
74.	L88	Simazine	1.00
75.	L89	2,4,5-T (2,4,5-Trichlorophenoxyacetic acid)	28.00
76.	L1	2,4,5-TP/ Silvex/ 2-(2,4,5-Trichlorophenoxy)propionic acid	1.00
77.	L90	Temephos	28.00
78.	L91	Terbufos	0.10
79.	L92	Tetrachloroethylene	3.00
80.	L93	2,3,4,6-Tetrachlorophenol / (2,3,4,6-TeCP)	10.00
81.	L29	Toxaphene	0.50
82.	L94	Triallate	23.00
83.	L95	Trichloroethylene	5.00
84.	L96	2,4,5-Trichlorophenol / (2,4,5-TCP)	400.00
85.	L97	2,4,6-Trichlorophenol / (2,4,6-TCP)	0.50
86.	L98	Trifluralin	4.50
87.	L30	Trihalomethanes — Total (also see — Chloroform)	10.00
88.	L31	Uranium	10.00
89.	L99	Vinyl chloride	0.20

SCHEDULE 7

(Paragraphs 1(1)(f) and 2(1)(f), subparagraphs 8(j)(v) and 38(1)(a)(iii) and Schedule 4)

PART I

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
1.	P026	1-(o-Chlorophenyl)thiourea
2.	P081	1,2,3-Propanetriol, trinitrate
3.	P042	1,2-Benzenediol, 4-[1-hydroxy-2-(methylamino)ethyl]-
4.	P067	1,2-Propylenimine
5.	P185	1,3-Dithiolane-2-carboxaldehyde, 2,4-dimethyl-, O-[(methylamino)-carbonyl]oxime
6.	P004	1,4,5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexa-chloro-1,4,4a,5,8,8a-hexahydro-, (1alpha,4alpha,4abeta,5alpha,8alpha,8abeta)-
7.	P060	1,4,5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexa-chloro-1,4,4a,5,8,8a-hexahydro-, (1alpha,4alpha,4abeta,5beta,8beta,8abeta)-
8.	P002	1-Acetyl-2-thiourea
9.	P048	2,4-Dinitrophenol

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART I — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
10.	P051	2,7:3,6-Dimethanonaphth[2,3-b]oxirene, 3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a,7,7a-octahydro-, (1aalpha,2beta,2abeta,3alpha,6alpha,6abeta,7beta,7aalpha)-, and metabolites
11.	P037	2,7:3,6-Dimethanonaphth[2,3-b]oxirene, 3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a,7,7a-octahydro-, (1aalpha,2beta,2aalpha,3beta,6beta,6aalpha,7beta,7aalpha)-[b]oxirene, 3,4,5,6,9,9-hexachloro-2-Butanone, 3,3-dimethyl-1-methylthio)-, O-(methylamino)carbonyl)oxime
12.	P045	
13.	P034	2-Cyclohexyl-4,6-dinitrophenol
14.	P001	2H-1-Benzopyran-2-one, 4-hydroxy-3-(3-oxo-1-phenylbutyl)-, and salts, when present at concentrations greater than 0.3%
15.	P069	2-Methylacetonitrile
16.	P017	2-Propanone, 1-bromo-
17.	P005	2-Propen-1-ol
18.	P003	2-Propenal
19.	P102	2-Propyn-1-ol
20.	P007	3(2H)-Isoxazolone, 5-(aminomethyl)-
21.	P027	3-Chloropropionitrile
22.	P202	3-Isopropylphenyl N-methylcarbamate
23.	P047	4,6-Dinitro-o-cresol, and salts
24.	P059	4,7-Methano-1H-indene, 1,4,5,6,7,8,8-heptachloro-3a,4,7,7a-tetrahydro-
25.	P008	4-Aminopyridine
26.	P008	4-Pyridinamine
27.	P007	5-(Aminomethyl)-3-isoxazolol
28.	P050	6,9-Methano-2,4,3-benzodioxathiepin, 6,7,8,9,10,10-hexachloro-1,5,5a,6,9,9a-hexahydro-, 3-oxide
29.	P127	7-Benzofuranol, 2,3-dihydro-2,2-dimethyl-, methylcarbamate
30.	P088	7-Oxabicyclo[2.2.1]heptane-2,3-dicarboxylic acid
31.	P023	Acetaldehyde, chloro-
32.	P057	Acetamide, 2-fluoro-
33.	P002	Acetamide, N-(aminothioxomethyl)-
34.	P058	Acetic acid, fluoro-, sodium salt
35.	P003	Acrolein
36.	P070	Aldicarb
37.	P203	Aldicarb sulfone
38.	P004	Aldrin
39.	P005	Allyl alcohol
40.	P046	alpha,a-Dimethylphenethylamine
41.	P072	alpha-Naphthylthiourea
42.	P006	Aluminum phosphide
43.	P009	Ammonium picrate
44.	P119	Ammonium vanadate
45.	P099	Argentate(1-), bis(cyano-C)-, potassium
46.	P010	Arsenic acid H <sub>3</sub> AsO <sub>4</sub>
47.	P012	Arsenic oxide As <sub>2</sub> O <sub>3</sub>
48.	P011	Arsenic oxide As <sub>2</sub> O <sub>3</sub>
49.	P011	Arsenic pentoxide
50.	P012	Arsenic trioxide
51.	P038	Arsine, diethyl-
52.	P036	Arsonous dichloride, phenyl-
53.	P054	Aziridine
54.	P067	Aziridine, 2-methyl-
55.	P013	Barium cyanide

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART I — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
56.	P024	Benzenamine, 4-chloro-
57.	P077	Benzenamine, 4-nitro-
58.	P028	Benzene, (chloromethyl)-
59.	P046	Benzeneethanamine, alpha.alpha.-dimethyl-
60.	P014	Benzenethiol
61.	P188	Benzoic acid, 2-hydroxy-, compd with (3aS-cis)-1,2,3,3a,8,8a-hexahydro-1,3a,8-trimethylpyrrolo[2,3-b]indol-5-yl methylcarbamate ester (1:1)
62.	P028	Benzyl chloride
63.	P015	Beryllium powder
64.	P017	Bromoacetone
65.	P018	Brucine
66.	P021	Calcium cyanide
67.	P021	Calcium cyanide Ca(CN) <sub>2</sub>
68.	P189	Carbamic acid, [(dibutylamino)-thio]methyl-, 2,3-dihydro-2,2-dimethyl-7-benzofuranyl ester
69.	P191	Carbamic acid, dimethyl-, 1-[(dimethyl-amino)carbonyl]-5-methyl-1H-pyrazol-3-yl ester
70.	P190	Carbamic acid, methyl-, 3-methylphenyl ester
71.	P192	Carbamic acid, dimethyl-, 3-methyl-1-(1-methylethyl)-1H-pyrazol-5-yl ester
72.	P127	Carbofuran
73.	P022	Carbon disulfide
74.	P095	Carbonic dichloride
75.	P189	Carbosulfan
76.	P023	Chloroacetaldehyde
77.	P029	Copper cyanide
78.	P029	Copper cyanide Cu(CN)
79.	P030	Cyanides (soluble cyanide salts), not otherwise specified
80.	P031	Cyanogen
81.	P033	Cyanogen chloride
82.	P033	Cyanogen chloride (CN)Cl
83.	P016	Dichloromethyl ether
84.	P036	Dichlorophenylarsine
85.	P037	Dieldrin
86.	P038	Diethylarsine
87.	P041	Diethyl-p-nitrophenyl phosphate
88.	P043	Diisopropylfluorophosphate (DFP)
89.	P044	Dimethoate
90.	P191	Dimetilan
91.	P020	Dinoseb
92.	P085	Diphosphoramidate, octamethyl-
93.	P111	Diphosphoric acid, tetraethyl ester
94.	P039	Disulfoton
95.	P049	Dithiobiuret
96.	P050	Endosulfan
97.	P088	Endosulfan
98.	P051	Endrin
99.	P051	Endrin, and metabolites
100.	P042	Epinephrine
101.	P031	Ethanedinitrile

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART I — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
102.	P194	Ethanimidothioic acid, 2-(dimethylamino)-N-[[[(methylamino)carbonyl]oxy]-2-oxo-, methyl ester
103.	P066	Ethanimidothioic acid, N-[[[(methylamino)carbonyl]oxy]-, methyl ester
104.	P101	Ethyl cyanide
105.	P054	Ethyleneimine
106.	P097	Famphur
107.	P056	Fluorine
108.	P057	Fluoroacetamide
109.	P058	Fluoroacetic acid, sodium salt
110.	P198	Formetanate hydrochloride
111.	P197	Formparanate
112.	P065	Fulminic acid, mercury(2+) salt
113.	P059	Heptachlor
114.	P062	Hexachyl tetraphosphate
115.	P068	Hydrazine, methyl-
116.	P116	Hydrazinecarbothioamide
117.	P063	Hydrocyanic acid
118.	P063	Hydrogen cyanide
119.	P096	Hydrogen phosphide
120.	P060	Isodrin
121.	P192	Isolan
122.	P196	Manganese, bis(dimethylcarbamodithioato-S,S')
123.	P196	Manganese dimethyl dithiocarbamate
124.	P202	M-Cumenyl methylcarbamate
125.	P065	Mercury fulminate
126.	P092	Mercury, (acetato-O)phenyl-
127.	P082	Methanamine, N-methyl-N-nitroso-
128.	P064	Methane, isocyanato-
129.	P016	Methane, oxybis(chloro-
130.	P112	Methane, tetranitro-
131.	P118	Methanethiol, trichloro-
132.	P197	Methanimidamide, N,N-dimethyl-N'-[2-methyl-4-[(methylamino)carbonyl]oxy]phenyl]-
133.	P198	Methanimidamide, N,N-dimethyl-N'-[3-[(methylamino)carbonyl]oxy]phenyl]-, monohydrochloride
134.	P199	Methiocarb
135.	P066	Methomyl
136.	P068	Methyl hydrazine
137.	P064	Methyl isocyanate
138.	P071	Methyl parathion
139.	P190	Metolcarb
140.	P128	Mexacarbate
141.	P073	Nickel carbonyl
142.	P073	Nickel carbonyl Ni(CO) <sub>4</sub> , (T-4)-
143.	P074	Nickel cyanide
144.	P074	Nickel cyanide Ni(CN) <sub>2</sub>
145.	P075	Nicotine, and salts
146.	P076	Nitric oxide
147.	P078	Nitrogen dioxide
148.	P076	Nitrogen oxide NO

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2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 1 — Continued

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
149.	P078	Nitrogen oxide NO <sub>2</sub>
150.	P081	Nitroglycerine
151.	P082	N-Nitrosodimethylamine
152.	P084	N-Nitrosomethylvinylamine
153.	P040	O,O-Diethyl O-pyrazinyl phosphorothioate
154.	P085	Octamethylpyrophosphoramide
155.	P087	Osmium oxide OsO <sub>4</sub> (T-4)
156.	P087	Osmium tetroxide
157.	P194	Oxamyl
158.	P089	Parathion
159.	P024	p-Chloroaniline
160.	P020	Phenol, 2-(1-methylpropyl)-4,6-dinitro-
161.	P009	Phenol, 2,4,6-trinitro-, ammonium salt
162.	P048	Phenol, 2,4-dinitro-
163.	P034	Phenol, 2-cyclohexyl-4,6-dinitro-
164.	P047	Phenol, 2-methyl-4,6-dinitro-, and salts
165.	P202	Phenol, 3-(1-methylethyl)-, methylcarbamate
166.	P201	Phenol, 3-methyl-5-(1-methylethyl)-, methylcarbamate
167.	P199	Phenol, (3,5-dimethyl-4-(methylethyl)-, methylcarbamate
168.	P128	Phenol, 4-(dimethylamino)-3,5-dimethyl-, methylcarbamate (ester)
169.	P092	Phenylmercury acetate
170.	P093	Phenylthiourea
171.	P094	Phorate
172.	P095	Phosgene
173.	P096	Phosphine
174.	P041	Phosphoric acid, diethyl 4-nitrophenyl ester
175.	P094	Phosphorodithioic acid, O,O-diethyl S-[(ethylthio)methyl] ester
176.	P039	Phosphorodithioic acid, O,O-diethyl S-[2-(ethylthio)ethyl] ester
177.	P044	Phosphorodithioic acid, O,O-dimethyl S-[2-(methylamino)-2-oxoethyl] ester
178.	P043	Phosphorofluoridic acid, bis(1-methylethyl) ester
179.	P071	Phosphorothioic acid, O,O-dimethyl O-(4-nitrophenyl) ester
180.	P089	Phosphorothioic acid, O,O-diethyl O-(4-nitrophenyl) ester
181.	P040	Phosphorothioic acid, O,O-diethyl O-pyrazinyl ester
182.	P097	Phosphorothioic acid, O-[4-[(dimethylamino)sulfonyl]phenyl] O,O-r dimethyl ester
183.	P188	Physostigmine salicylate
184.	P204	Physostigmine
185.	P110	Plumbane, tetraethyl-
186.	P077	p-Nitroaniline
187.	P098	Potassium cyanide
188.	P098	Potassium cyanide K(CN)
189.	P099	Potassium silver cyanide
190.	P201	Promecarb
191.	P203	Propanal, 2-methyl-2-(methyl-sulfonyl)-, O-[(methylamino)carbonyl]oxime
192.	P070	Propanal, 2-methyl-2-(methylethyl)-, O-[(methylamino)carbonyl]oxime
193.	P101	Propanenitrile
194.	P069	Propanenitrile, 2-hydroxy-2-methyl-
195.	P027	Propanenitrile, 3-chloro-
196.	P102	Propargyl alcohol
197.	P075	Pyridine, 3-(1-methyl-2-pyrrolidinyl)-, (S)-, and salts
198.	P204	Pyrrolo[2,3-b]indol-5-ol, 1,2,3,3a,8,8a-hexahydro-1,3a,8-trimethyl-, methylcarbamate (ester), (3aS-cis)-
199.	P114	Selenious acid, diethallium(1+) salt
200.	P103	Selenourea

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SORDORS/2005-149

SCHEDULE 7 — *Continued*

PART 1 — *Continued*

ACUTE HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — *Continued*

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
201.	P104	Silver cyanide
202.	P104	Silver cyanide Ag(CN)
203.	P105	Sodium azide
204.	P106	Sodium cyanide
205.	P106	Sodium cyanide Na(CN)
206.	P108	Strychnidin-10-one, and salts
207.	P018	Strychnidin-10-one, 2,3-dimethoxy-
208.	P108	Strychnine, and salts
209.	P115	Sulfuric acid, dithallium(1+) salt
210.	P110	Tetraethyl lead
211.	P111	Tetraethyl pyrophosphate
212.	P109	Tetraethylthiopyrophosphate
213.	P112	Tetranitromethane
214.	P062	Tetraphosphoric acid, hexaethyl ester
215.	P113	Thallic oxide
216.	P113	Thallium oxide $Tl_2O_3$
217.	P114	Thallium(I) selenide
218.	P115	Thallium(I) sulfate
219.	P109	Thiodiphosphoric acid, tetraethyl ester
220.	P045	Thiofanox
221.	P049	Thioimidodicarbonic diamide $[(H_2N)C(S)]_2NH$
222.	P014	Thiophenol
223.	P116	Thiosemicarbazide
224.	P026	Thiourea, (2-chlorophenyl)-
225.	P072	Thiourea, 1-naphthalenyl-
226.	P093	Thiourea, phenyl-
227.	P185	Tirpate
228.	P123	Toxaphene
229.	P118	Trichloromethanethiol
230.	P119	Vanadic acid, ammonium salt
231.	P120	Vanadium oxide $V_2O_5$
232.	P120	Vanadium pentoxide
233.	P084	Vinylamine, N-methyl-N-nitroso-
234.	P001	Warfarin, and salts, when present at concentrations greater than 0.3%
235.	P121	Zinc cyanide
236.	P121	Zinc cyanide $Zn(CN)_2$
237.	P122	Zinc phosphide $Zn_3P_2$ , when present at concentrations greater than 10%
238.	P205	Zinc, bis(dimethylcarbamodithioato-S,S')-
239.	P205	Ziram

PART 2

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
1.	U021	[1,1-Biphenyl]-4,4-diamine
2.	U073	[1,1'-Biphenyl]-4,4'-diamine, 3,3'-dichloro-
3.	U091	[1,1'-Biphenyl]-4,4'-diamine, 3,3'-dimethoxy-
4.	U095	[1,1'-Biphenyl]-4,4'-diamine, 3,3'-dimethyl-
5.	U208	1,1,1,2-Tetrachloroethane
6.	U209	1,1,2,2-Tetrachloroethane

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
7.	U227	1,1,2-Trichloroethane
8.	U078	1,1-Dichloroethylene
9.	U098	1,1-Dimethylhydrazine
10.	U207	1,2,4,5-Tetrachlorobenzene
11.	U085	1,2:3,4-Diepoxybutane
12.	U069	1,2-Benzenedicarboxylic acid, dibutyl ester
13.	U088	1,2-Benzenedicarboxylic acid, diethyl ester
14.	U102	1,2-Benzenedicarboxylic acid, dimethyl ester
15.	U107	1,2-Benzenedicarboxylic acid, dioctyl ester
16.	U028	1,2-Benzenedicarboxylic acid, bis(2-ethylhexyl) ester
17.	U202	1,2-Benzisothiazol-3(2H)-one, 1,1-dioxide, and salts
18.	U066	1,2-Dibromo-3-chloropropane
19.	U079	1,2-Dichloroethylene
20.	U099	1,2-Dimethylhydrazine
21.	U109	1,2-Diphenylhydrazine
22.	U155	1,2-Ethanediamine, N,N-dimethyl-N'-2-pyridinyl-N'-(2-thienylmethyl)-
23.	U193	1,2-Oxathiolane, 2,2-dioxide
24.	U142	1,3,4-Metheno-2H-cyclobuta[cd]pentalen-2-one, 1,1a,3,3a,4,5,5a,5b,6-decachlorooctahydro-
25.	U234	1,3,5-Trinitrobenzene
26.	U182	1,3,5-Trioxane, 2,4,6-trimethyl-
27.	U201	1,3-Benzenediol
28.	U364	1,3-Benzodioxol-4-ol, 2,2-dimethyl-
29.	U278	1,3-Benzodioxol-4-ol, 2,2-dimethyl-, methyl carbamate
30.	U141	1,3-Benzodioxole, 5-(1-propenyl)-
31.	U203	1,3-Benzodioxole, 5-(2-propenyl)-
32.	U090	1,3-Benzodioxole, 5-propyl-
33.	U128	1,3-Butadiene, 1,1,2,3,4,4-hexachloro-
34.	U130	1,3-Cyclopentadiene, 1,2,3,4,5,5-hexachloro-
35.	U084	1,3-Dichloropropene
36.	U190	1,3-Isobenzofurandione
37.	U186	1,3-Pentadiene
38.	U193	1,3-Propane sultone
39.	U074	1,4-Dichloro-2-butene
40.	U108	1,4-Diethylenoxide
41.	U108	1,4-Dioxane
42.	U166	1,4-Naphthalenedione
43.	U166	1,4-Naphthoquinone
44.	U172	1-Butanamine, N-butyl-N-nitroso-
45.	U031	1-Butanol
46.	U011	1H-1,2,4-Triazol-3-amine
47.	U186	1-Methylbutadiene
48.	U167	1-Naphthalenamine
49.	U279	1-Naphthalenol, methylcarbamate
50.	U194	1-Propanamine
51.	U111	1-Propanamine, N-nitroso-N-propyl-
52.	U110	1-Propanamine, N-propyl-
53.	U235	1-Propanol, 2,3-dibromo-, phosphate (3:1)
54.	U140	1-Propanol, 2-methyl-
55.	U243	1-Propene, 1,1,2,3,3,3-hexachloro-
56.	U084	1-Propene, 1,3-dichloro-
57.	U085	2,2-Bioxirane
58.	T140	2,3,4,6-Tetrachlorophenol
59.	U237	2,4-(1H,3H)-Pyrimidinedione, 5-[bis(2-chloroethyl)amino]-
60.	T140	2,4,5-T



2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Column 1		Column 2
Item	Identification No.	Description of Hazardous Waste or Hazardous Recyclable Material
61.	T140	2,4,5-Trichlorophenol
62.	U408	2,4,6-Tribromophenol
63.	T140	2,4,6-Trichlorophenol
64.	U240	2,4-D, salts and esters
65.	U081	2,4-Dichlorophenol
66.	U101	2,4-Dimethylphenol
67.	U105	2,4-Dinitrotoluene
68.	U197	2,5-Cyclohexadiene-1,4-dione
69.	U147	2,5-Furandione
70.	U082	2,6-Dichlorophenol
71.	U106	2,6-Dinitrotoluene
72.	U236	2,7-Naphthalenedisulfonic acid, 3,3'-[(3,3'-dimethyl[1,1'-biphenyl]-4,4'-diyl)bis(azo)bis[5-amino-4-hydroxy]-, tetrasodium salt
73.	U005	2-Acetylaminofluorene
74.	U159	2-Butanone
75.	U160	2-Butanone, peroxide
76.	U053	2-Butenal
77.	U074	2-Butene, 1,4-dichloro-
78.	U143	2-Butenoic acid, 2-methyl-, 7-[[2,3-dihydroxy-2-(1-methoxyethyl)-3-methyl-1-oxobutoxy)methyl]-2,3,5,7a-tetrahydro-1H-pyrrolizin-1-yl ester, [1S-[1alpha(Z), 7(2S*,3R*), 7aalpha)]-
79.	U042	2-Chloroethyl vinyl ether
80.	U125	2-Furancarboxaldehyde
81.	U058	2H-1,3,2-Oxazaphosphorin-2-amine, N,N-bis(2-chloroethyl)tetrahydro-, 2-oxide
82.	U248	2H-1-Benzopyran-2-one, 4-hydroxy-3-(3-oxo-1-phenyl-butyl)-, and salts, when present at concentrations of 0.3% or less
83.	U116	2-Imidazolidinethione
84.	U168	2-Naphthalenamine
85.	U171	2-Nitropropane
86.	U191	2-Picoline
87.	U002	2-Propanone
88.	U007	2-Propenamide
89.	U009	2-Propenenitrile
90.	U152	2-Propenenitrile, 2-methyl-
91.	U008	2-Propenoic acid
92.	U118	2-Propenoic acid, 2-methyl-, ethyl ester
93.	U162	2-Propenoic acid, 2-methyl-, methyl ester
94.	U113	2-Propenoic acid, ethyl ester
95.	U073	3,3'-Dichlorobenzidine
96.	U091	3,3'-Dimethoxybenzidine
97.	U095	3,3'-Dimethylbenzidine
98.	U148	3,6-Pyridazinedione, 1,2-dihydro-
99.	U157	3-Methylcholanthrene
100.	U164	4(1H)-Pyrimidinone, 2,3-dihydro-6-methyl-2-thioxo-
101.	U158	4,4'-Methylenebis(2-chloroaniline)
102.	U036	4,7-Methano-1H-indene, 1,2,4,5,6,7,8,8-octachloro-2,3,3a,4,7,7a-hexahydro-
103.	U030	4-Bromophenyl phenyl ether
104.	U049	4-Chloro-o-toluidine, hydrochloride
105.	U161	4-Methyl-2-pentanone
106.	U059	5,12-Naphthalenedione,8-acetyl-10-[(3-amino-2,3,6-trideoxy)-alpha-L-lyxo-hexopyranosyl)oxy]-7,8,9,10-tetrahydro-6,8,11-trihydroxy-1-methoxy-, (8S-cis)-
107.	U181	5-Nitro-o-toluidine
108.	U094	7,12-Dimethylbenz[a]anthracene
109.	U367	7-Benzofuranol, 2,3-dihydro-2,2-dimethyl-
110.	U394	A2213
111.	U001	Acetaldehyde
112.	U034	Acetaldehyde, trichloro-

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
113.	U187	Acetamide, N-(4-ethoxyphenyl)-
114.	U005	Acetamide, N-9H-fluoren-2-yl-
115.	U112	Acetic acid ethyl ester
116.	T140	Acetic acid, (2,4,5-trichlorophenoxy)-
117.	U240	Acetic acid, (2,4-dichlorophenoxy)-, salts and esters
118.	U144	Acetic acid, lead(2+) salt
119.	U214	Acetic acid, thallium(1+) salt
120.	U002	Acetone
121.	U003	Acetonitrile
122.	U004	Acetophenone
123.	U006	Acetyl chloride
124.	U007	Acrylamide
125.	U008	Acrylic acid
126.	U009	Acrylonitrile
127.	U096	alpha, alpha-Dimethylbenzylhydroperoxide
128.	U167	alpha-Naphthylamine
129.	U011	Amitrole
130.	U012	Aniline
131.	U136	Arsinic acid, dimethyl-
132.	U014	Auramine
133.	U015	Azasenne
134.	U010	Azirino[2,3,3,4]pyrrolo[1,2-a]indole-4,7-dione, 6-amino-8-[[[aminocarbonyloxy]methyl]-1,1a,2,8,8a,8b-hexahydro-8a-methoxy-5-methyl-, [1aS-(1aalpha,8beta,8alpha,8balpha)]]-
135.	U280	Barban
136.	U278	Bendiocarb
137.	U364	Bendiocarb phenol
138.	U271	Benomyl
139.	U018	Benz[a]anthracene
140.	U094	Benz[a]anthracene, 7,12-dimethyl-
141.	U016	Benz[c]acridine
142.	U157	Benz[j]aceanthrylene, 1,2-dihydro-3-methyl-
143.	U017	Benzal chloride
144.	U192	Benzamide, 3,5-dichloro-N-(1,1-dimethyl-2-propynyl)-
145.	U012	Benzenamine
146.	U328	Benzenamine, 2-methyl-
147.	U222	Benzenamine, 2-methyl-, hydrochloride
148.	U181	Benzenamine, 2-methyl-5-nitro-
149.	U014	Benzenamine, 4,4-carbonimidoylbis[N,N-dimethyl-
150.	U158	Benzenamine, 4,4-methylenebis[2-chloro-
151.	U049	Benzenamine, 4-chloro-2-methyl-, hydrochloride
152.	U353	Benzenamine, 4-methyl-
153.	U093	Benzenamine, N,N-dimethyl-4-(phenylazo)-
154.	U019	Benzene
155.	U055	Benzene, (1-methylethyl)-
156.	U017	Benzene, (dichloromethyl)-
157.	U023	Benzene, (trichloromethyl)-
158.	U247	Benzene, 1,1-(2,2,2-trichloroethylidene)bis[4-methoxy-
159.	U207	Benzene, 1,2,4,5-tetrachloro-
160.	U070	Benzene, 1,2-dichloro-
161.	U234	Benzene, 1,3,5-trinitro-
162.	U071	Benzene, 1,3-dichloro-
163.	U223	Benzene, 1,3-diisocyanatomethyl-
164.	U072	Benzene, 1,4-dichloro-
165.	U030	Benzene, 1-bromo-4-phenoxy-

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
166.	U105	Benzene, 1-methyl-2,4-dinitro-
167.	U106	Benzene, 2-methyl-1,3-dinitro-
168.	U037	Benzene, chloro-
169.	U239	Benzene, dimethyl-
170.	U127	Benzene, hexachloro-
171.	U056	Benzene, hexahydro-
172.	U220	Benzene, methyl-
173.	U169	Benzene, nitro-
174.	U183	Benzene, pentachloro-
175.	U185	Benzene, pentachloronitro-
176.	U061	Benzene, 1,1-(2,2,2-trichloroethylidene)bis[4-chloro-
177.	U060	Benzene, 1,1-(2,2-dichloroethylidene)bis[4-chloro-
178.	U038	Benzenecetic acid, 4-chloro-alpha-(4-chlorophenyl)-alpha-hydroxy-, ethyl ester
179.	U035	Benzenecarboxylic acid, 4-[bis(2-chloroethyl)amino]-
180.	U221	Benzenediamine, ar-methyl-
181.	U020	Benzenesulfonic acid chloride
182.	U020	Benzenesulfonyl chloride
183.	U021	Benzidine
184.	U022	Benzo[a]pyrene
185.	U064	Benzo[rs]pentaphene
186.	U023	Benzotrichloride
187.	U047	beta-Chloronaphthalene
188.	U168	beta-Naphthylamine
189.	U225	Bromoform
190.	U136	Cacodylic acid
191.	U032	Calcium chromate
192.	U280	Carbamic acid, (3-chlorophenyl)-, 4-chloro-2-butynyl ester
193.	U409	Carbamic acid, [1,2-phenylenebis(iminocarbonothioyl)]bis-, dimethyl ester
194.	U271	Carbamic acid, [1-[(butylamino)carbonyl]-1H-benzimidazol-2-yl]-, methyl ester
195.	U372	Carbamic acid, 1H-benzimidazol-2-yl,methyl ester
196.	U238	Carbamic acid, ethyl ester
197.	U178	Carbamic acid, methylnitroso-, ethyl ester
198.	U373	Carbamic acid, phenyl-, 1-methylethyl ester
199.	U097	Carbamic chloride, dimethyl-
200.	U114	Carbamodithioic acid, 1,2-ethanedithylbis-, salts and esters
201.	U389	Carbamothioic acid, bis(1-methylethyl)-, S-(2,3,3-trichloro-2-propenyl)ester
202.	U062	Carbamothioic acid, bis(1-methylethyl)-S-(2,3-dichloro-2-propenyl) ester
203.	U387	Carbamothioic acid, dipropyl-, S-(phenylmethyl) ester
204.	U279	Carbaryl
205.	U372	Carbendazim
206.	U367	Carbofuran phenol
207.	U033	Carbon oxyfluoride
208.	U211	Carbon tetrachloride
209.	U215	Carbonic acid, dithallium(1+) salt
210.	U033	Carbonic difluoride
211.	U156	Carbonochloridic acid, methyl ester
212.	U034	Chloral
213.	U035	Chlorambucil
214.	U036	Chlordane, alpha and gamma isomers
215.	U026	Chloromaphazin
216.	U037	Chlorobenzene
217.	U038	Chlorobenzilate
218.	U044	Chloroform
219.	U046	Chloromethyl methyl ether

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
220.	U032	Chromic acid $H_2CrO_4$ , calcium salt
221.	U050	Chrysene
222.	U051	Creosote
223.	U052	Cresol (cresylic acid)
224.	U053	Crotonaldehyde
225.	U055	Cumene
226.	U246	Cyanogen bromide (CN)Br
227.	U056	Cyclohexane
228.	U129	Cyclohexane, 1,2,3,4,5,6-hexachloro-, (1alpha,2alpha,3beta,4alpha,5alpha,6beta)-
229.	U057	Cyclohexanone
230.	U058	Cyclophosphamide
231.	U059	Daunomycin
232.	U060	DDD
233.	U061	DDT
234.	U206	D-Glucose, 2-deoxy-2-[[[(methylnitrosoamino)-carbonyl]amino]-
235.	U062	Diallate
236.	U063	Dibenz[a,h]anthracene
237.	U064	Dibenzo[a,i]pyrene
238.	U069	Dibutyl phthalate
239.	U075	Dichlorodifluoromethane
240.	U025	Dichloroethyl ether
241.	U027	Dichloroisopropyl ether
242.	U024	Dichloromethoxy ethane
243.	U088	Diethyl phthalate
244.	U395	Diethylene glycol, dicarbamate
245.	U028	Diethylhexyl phthalate
246.	U089	Diethylstilbestrol
247.	U090	Dihydrostafrole
248.	U102	Dimethyl phthalate
249.	U103	Dimethyl sulfate
250.	U092	Dimethylamine
251.	U097	Dimethylcarbamoyl chloride
252.	U107	Di-n-octyl phthalate
253.	U111	Di-n-propylnitrosamine
254.	U110	Dipropylamine
255.	U041	Epichlorohydrin
256.	U001	Ethanal
257.	U404	Ethanamine, N,N-diethyl-
258.	U174	Ethanamine, N-ethyl-N-nitroso-
259.	U208	Ethane, 1,1,1,2-tetrachloro-
260.	U226	Ethane, 1,1,1-trichloro-
261.	U209	Ethane, 1,1,2,2-tetrachloro-
262.	U227	Ethane, 1,1,2-trichloro-
263.	U024	Ethane, 1,1'-(methylenebis(oxy))bis[2-chloro-
264.	U076	Ethane, 1,1-dichloro-
265.	U117	Ethane, 1,1'-oxybis-
266.	U025	Ethane, 1,1'-oxybis[2-chloro-
267.	U067	Ethane, 1,2-dibromo-
268.	U077	Ethane, 1,2-dichloro-
269.	U131	Ethane, hexachloro-
270.	U184	Ethane, pentachloro-
271.	U218	Ethanethioamide
272.	U394	Ethanimidothioic acid, 2-(dimethylamino)-N-hydroxy-2-oxo-, methyl ester
273.	U410	Ethanimidothioic acid, N,N'-(thiobis[(methylimino)carbonyloxy])bis-, dimethyl ester

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
274.	U173	Ethanol, 2,2'-(nitrosoimino)bis-
275.	U395	Ethanol, 2,2'-oxybis-, dicarbamate
276.	U359	Ethanol, 2-ethoxy-
277.	U004	Ethanone, 1-phenyl-
278.	U042	Ethene, (2-chloroethoxy)-
279.	U078	Ethene, 1,1-dichloro-
280.	U079	Ethene, 1,2-dichloro-, (E)-
281.	U043	Ethene, chloro-
282.	U210	Ethene, tetrachloro-
283.	U228	Ethene, trichloro-
284.	U112	Ethyl acetate
285.	U113	Ethyl acrylate
286.	U238	Ethyl carbamate (urethane)
287.	U117	Ethyl ether
288.	U118	Ethyl methacrylate
289.	U119	Ethyl methanesulfonate
290.	U067	Ethylene dibromide
291.	U077	Ethylene dichloride
292.	U359	Ethylene glycol monoethyl ether
293.	U115	Ethylene oxide
294.	U114	Ethylenebisdithiocarbamic acid, salts and esters
295.	U116	Ethylenethiourea
296.	U076	Ethylidene dichloride
297.	U120	Fluoranthene
298.	U122	Formaldehyde
299.	U123	Formic acid
300.	U124	Furan
301.	U213	Furan, tetrahydro-
302.	U125	Furfural
303.	U124	Furfuran
304.	U206	Glucopyranose, 2-deoxy-2-(3-methyl-3-nitrosoureido)-, D-
305.	U126	Glycidylaldehyde
306.	U163	Guanidine, N-methyl-N'-nitro-N-nitroso-
307.	U127	Hexachlorobenzene
308.	U128	Hexachlorobutadiene
309.	U130	Hexachlorocyclopentadiene
310.	U131	Hexachloroethane
311.	U132	Hexachlorophene
312.	U243	Hexachloropropene
313.	U133	Hydrazine
314.	U098	Hydrazine, 1,1-dimethyl-
315.	U086	Hydrazine, 1,2-diethyl-
316.	U099	Hydrazine, 1,2-dimethyl-
317.	U109	Hydrazine, 1,2-diphenyl-
318.	U134	Hydrofluoric acid
319.	U134	Hydrogen fluoride
320.	U135	Hydrogen sulfide
321.	U135	Hydrogen sulfide H <sub>2</sub> S
322.	U096	Hydroperoxide, 1-methyl-1-phenylethyl-
323.	U137	Indeno[1,2,3-cd]pyrene
324.	U140	Isobutyl alcohol
325.	U141	Isosafrole
326.	U142	Xepone
327.	U143	Lasiocarpine

2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* SOR/DORS/2005-149

SCHEDULE 7 — *Continued*

PART 2 — *Continued*

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — *Continued*

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
328.	U144	Lead acetate
329.	U145	Lead phosphate
330.	U146	Lead subacetate
331.	U146	Lead, bis(acetato-O)tetrahydroxytri-
332.	U129	Lindane
333.	U150	L-Phenylalanine, 4-[bis(2-chloroethyl)amino]-
334.	U015	L-Serine, diazoacetate (ester)
335.	U147	Maleic anhydride
336.	U148	Maleic hydrazide
337.	U149	Malononitrile
338.	U071	m-Dichlorobenzene
339.	U150	Melphalan
340.	U151	Mercury
341.	U152	Methacrylonitrile
342.	U092	Methanamine, N-methyl-
343.	U029	Methane, bromo-
344.	U045	Methane, chloro-
345.	U046	Methane, chloromethoxy-
346.	U068	Methane, dibromo-
347.	U080	Methane, dichloro-
348.	U075	Methane, dichlorodifluoro-
349.	U138	Methane, iodo-
350.	U211	Methane, tetrachloro-
351.	U225	Methane, tribromo-
352.	U044	Methane, trichloro-
353.	U121	Methane, trichlorofluoro-
354.	U119	Methanesulfonic acid, ethyl ester
355.	U153	Methanethiol
356.	U154	Methanol
357.	U155	Methapyrilene
358.	U247	Methoxychlor
359.	U154	Methyl alcohol
360.	U029	Methyl bromide
361.	U045	Methyl chloride
362.	U156	Methyl chlorocarbonate
363.	U226	Methyl chloroform
364.	U159	Methyl ethyl ketone (MEK)
365.	U160	Methyl ethyl ketone peroxide
366.	U138	Methyl iodide
367.	U161	Methyl isobutyl ketone
368.	U162	Methyl methacrylate
369.	U068	Methylene bromide
370.	U080	Methylene chloride
371.	U164	Methylthiouracil
372.	U010	Mitomycin C
373.	U163	MNNG
374.	U086	N,N'-Diethylhydrazine
375.	U026	Naphthalenamine, N,N'-bis(2-chloroethyl)-
376.	U165	Naphthalene
377.	U047	Naphthalene, 2-chloro-
378.	U031	n-Butyl alcohol
379.	U217	Nitric acid, thallium(1+) salt
380.	U169	Nitrobenzene
381.	U173	N-Nitrosodiethanolamine

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
382.	U174	N-Nitrosodiethylamine
383.	U172	N-Nitrosodi-n-butylamine
384.	U176	N-Nitroso-N-ethylurea
385.	U177	N-Nitroso-N-methylurea
386.	U178	N-Nitroso-N-methylurethane
387.	U179	N-Nitrosopiperidine
388.	U180	N-Nitrosopyrrolidine
389.	U194	n-Propylamine
390.	U087	O,O-Diethyl S-methyl dithiophosphate
391.	U048	o-Chlorophenol
392.	U070	o-Dichlorobenzene
393.	U328	o-Toluidine
394.	U222	o-Toluidine hydrochloride
395.	U115	Oxirane
396.	U041	Oxirane, (chloromethyl)-
397.	U126	Oxiranecarboxaldehyde
398.	U182	Paraldehyde
399.	U197	p-Benzoquinone
400.	U039	p-Chloro-m-cresol
401.	U072	p-Dichlorobenzene
402.	U093	p-Dimethylaminoazobenzene
403.	U183	Pentachlorobenzene
404.	U184	Pentachloroethane
405.	U185	Pentachloronitrobenzene (PCNB)
406.	T140	Pentachlorophenol
407.	U161	Pentanol, 4-methyl-
408.	U187	Phenacetin
409.	U188	Phenol
410.	U411	Phenol, 2-(1-methylethoxy)-, methylcarbamate
411.	T140	Phenol, 2,3,4,6-tetrachloro-
412.	T140	Phenol, 2,4,5-trichloro-
413.	T140	Phenol, 2,4,6-trichloro-
414.	U081	Phenol, 2,4-dichloro-
415.	U101	Phenol, 2,4-dimethyl-
416.	U082	Phenol, 2,6-dichloro-
417.	U048	Phenol, 2-chloro-
418.	U089	Phenol, 4,4'-(1,2-diethyl-1,2-ethenediyl)bis-, (E)-
419.	U039	Phenol, 4-chloro-3-methyl-
420.	U170	Phenol, 4-nitro-
421.	U052	Phenol, methyl-
422.	T140	Phenol, pentachloro-
423.	U132	Phenol, 2,2'-methylenebis(3,4,6-trichloro-
424.	U145	Phosphoric acid, lead(2+) salt (2:3)
425.	U087	Phosphorodithioic acid, O,O-diethyl S-methyl ester
426.	U189	Phosphorus sulfide
427.	U190	Phthalic anhydride
428.	U179	Piperidine, 1-nitroso-
429.	U170	p-Nitrophenol
430.	U192	Pronamide
431.	U066	Propane, 1,2-dibromo-3-chloro-
432.	U083	Propane, 1,2-dichloro-
433.	U027	Propane, 2,2'-oxybis(2-chloro-
434.	U171	Propane, 2-nitro-
435.	U149	Propanedinitrile

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 7 — Continued

PART 2 — Continued

HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL CHEMICALS — Continued

Item	Column 1 Identification No.	Column 2 Description of Hazardous Waste or Hazardous Recyclable Material
436.	T140	Propanoic acid, 2-(2,4,5-trichlorophenoxy)-
437.	U373	Propham
438.	U411	Propoxur
439.	U083	Propylene dichloride
440.	U387	Prosulfocarb
441.	U353	p-Toluidine
442.	U196	Pyridine
443.	U191	Pyridine, 2-methyl-
444.	U180	Pyrrolidine, 1-nitroso-
445.	U200	Reserpine
446.	U201	Resorcinol
447.	U202	Saccharin, and salts
448.	U203	Safrole
449.	U204	Selenous acid
450.	U204	Selenium dioxide
451.	U205	Selenium sulfide
452.	U205	Selenium sulfide SeS <sub>2</sub>
453.	T140	Silvex (2,4,5-TP)
454.	U206	Streptozotocin
455.	U189	Sulfur phosphide
456.	U103	Sulfuric acid, dimethyl ester
457.	U210	Tetrachloroethylene
458.	U213	Tetrahydrofuran
459.	U216	Thallium chloride TlCl
460.	U214	Thallium(I) acetate
461.	U215	Thallium(I) carbonate
462.	U216	Thallium(I) chloride
463.	U217	Thallium(I) nitrate
464.	U218	Thioacetamide
465.	U410	Thiodicarb
466.	U153	Thiomethanol
467.	U244	Thioperoxydicarbonic diamide[(H <sub>2</sub> N)C(S)] <sub>2</sub> S <sub>2</sub> , tetramethyl-
468.	U409	Thiophanate-methyl
469.	U219	Thiourea
470.	U244	Thiram
471.	U220	Toluene
472.	U223	Toluene diisocyanate
473.	U221	Toluenediamine
474.	U389	Triallate
475.	U228	Trichloroethylene
476.	U121	Trichloromonofluoromethane
477.	U404	Triethylamine
478.	U235	Tris(2,3-dibromopropyl) phosphate
479.	U236	Trypan blue
480.	U237	Uracil mustard
481.	U176	Urea, N-ethyl-N-nitroso-
482.	U177	Urea, N-methyl-N-nitroso-
483.	U043	Vinyl chloride
484.	U248	Warfarin, and salts, when present at concentrations of 0.3% or less
485.	U239	Xylene
486.	U200	Yohimban-16-carboxylic acid, 11,17-dimethoxy-18-[(3,4,5-trimethoxybenzoyl)oxy]-, methyl ester, (3beta,16beta,17alpha,18beta,20alpha)-
487.	U249	Zinc phosphide Zn <sub>3</sub> P <sub>2</sub> , when present at concentrations of 10% or less



2005-06-01 *Canada Gazette Part II, Vol. 139, No. 11* *Gazette du Canada Partie II, Vol. 139, n° 11* **SOR/DORS/2005-149**

SCHEDULE 8  
(Subparagraph 2(2)(e)(i))

EXCLUDED MATERIALS

Item	Description
1.	Slags, skimmings and dross containing precious metals, copper or zinc for further refining
2.	Platinum group metal (PGM) automobile catalysts
3.	Electronic scrap such as circuit boards, electronic components and wires that are suitable for base or precious metal recovery
4.	Brass in the form of turnings, borings and choppings

SCHEDULE 9  
(Section 4)  
MOVEMENT DOCUMENT

MOVEMENT DOCUMENT  
DOCUMENT DE MOUVEMENT

<b>A Exporter / foreign exporter</b> <b>Exportateur / expéditeur étranger</b> Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial		<b>B Carrier</b> <b>Transporteur</b> Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial		Reference No(s) of other movement document(s) used N° de référence des autres documents de mouvement utilisés	
Company name / Nom de l'entreprise Mailing address / Adresse postale City / Ville Province Postal code / Code postal E-mail / Courriel électronique Tel No. / N° de tél. ( )		Company name / Nom de l'entreprise Mailing address / Adresse postale City / Ville Province Postal code / Code postal E-mail / Courriel électronique Tel No. / N° de tél. ( )		<b>C Importer / foreign receiver</b> <b>Importateur / destinataire étranger</b> Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial Importer / foreign receiver information same as in Part A. Les renseignements sur l'importateur / le destinataire étranger sont les mêmes qu'à la partie A. <input type="checkbox"/> Yes / Oui <input type="checkbox"/> No, complete the box below / Non, remplir la boîte ci-dessous	
Shipping site address / Adresse du lieu de l'expédition City / Ville Province Postal code / Code postal		Vehicle / Véhicule Trailer - Rail car No. 1 1 <sup>er</sup> remorqueur - wagon Trailer - Rail car No. 2 2 <sup>e</sup> remorqueur - wagon Registration No. / N° d'immatriculation Prov.			
Importer / foreign receiver Importateur / destinataire étranger Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial Mailing address / Adresse postale City / Ville Province Postal code / Code postal E-mail / Courriel électronique Tel No. / N° de tél. ( ) Receiving site address / Adresse du lieu de destination City / Ville Province Postal code / Code postal		Port of entry Port d'entrée Port of exit Port de sortie Carrier Declaration: I certify that I have received made or recyclable material from the exporter / foreign exporter for delivery to the importer / foreign receiver as set out in Part A and that the information contained in Part B is correct and complete. / Attestation du transporteur: J'atteste avoir reçu les déchets ou matières recyclables de l'exportateur / expéditeur étranger en vue de les livrer à l'importateur / au destinataire étranger, tels qu'ils figurent à la partie A et que les renseignements inscrits à la partie B sont exacts et complets. Name of authorized person (print) Nom de l'agent autorisé (impression) Tel No. / N° de tél. ( ) Year / Année Month / Mois Day / Jour Signature		Date received / Date de réception Year / Année Month / Mois Day / Jour Time / Heure <input type="checkbox"/> AM <input type="checkbox"/> PM If waste or recyclable material is to be transferred, specify intended company name / Si les déchets ou matières recyclables doivent être transférés, préciser le nom du destinataire Registration No. / Provincial ID No. N° d'immatriculation - d'id. provincial	
Prov. code Code prov.		Shipping name Appellation réglementaire		Class / Classe Sub class(es) Classe(s) sub.	
UN No. N° UN		Packing / way of Or d'emballage de l'envoi		Quantity shipped Quantité expédiée	
Units Unités		Packaging/Container Codes N° / N°		LSPG Code Code LSPG	
Notice No. N° de notification		Notice Line No. N° de ligne de la notification		Shipment Envoi	
D or R Code Code D ou R		C code Code C		Special Armes VII or Armes VII de Sûreté ou Code COSE	
H code Code H		Y code Code Y		National code in country of / Code du pays	
Customs code(s) Codes de douanes		Export Exportation		Import Importation	
Name of authorized person (print) Nom de l'agent autorisé (impression) Signature Tel No. / N° de tél. ( )		Name of authorized person (print) Nom de l'agent autorisé (impression) Signature Tel No. / N° de tél. ( )		Name of authorized person (print) Nom de l'agent autorisé (impression) Signature Tel No. / N° de tél. ( )	
Date shipped / Date d'expédition Year / Année Month / Mois Day / Jour <input type="checkbox"/> AM <input type="checkbox"/> PM		Date of arrival / Date d'arrivée prévue Year / Année Month / Mois Day / Jour		Special handling / Manipulation spéciale <input type="checkbox"/> Attached / Ci-joint <input type="checkbox"/> As follows / Ci-dessous	

2005-06-01 Canada Gazette Part II, Vol. 139, No. 11 Gazette du Canada Partie II, Vol. 139, n° 11 SOR/DORS/2005-149

SCHEDULE 10  
(Paragraphs 8(k) and 38(1)(b))

PERSISTENT ORGANIC POLLUTANTS

Item	Column 1 Identification No.	Column 2 Persistent Organic Pollutant	Column 3 Concentration
1.	POP1	Aldrin	50 mg/kg
2.	POP2	Chlordane	50 mg/kg
3.	POP3	Dieldrin	50 mg/kg
4.	POP4	Endrin	50 mg/kg
5.	POP5	Heptachlor	50 mg/kg
6.	POP6	Hexachlorobenzene	50 mg/kg
7.	POP7	Mirex	50 mg/kg
8.	POP8	Toxaphene	50 mg/kg
9.	POP9	Polychlorinated Biphenyls (PCB)	50 mg/kg
10.	POP10	DDT (1,1,1-Trichloro-2,2-bis (4-chlorophenyl)ethane)	50 mg/kg
11.	POP11	Polychlorinated dibenzo-p-dioxins (PCDD)	15 µg TEQ/kg
12.	POP12	Polychlorinated dibenzofurans (PCDF)	15 µg TEQ/kg

ANNEXE 10  
(alinéas 8(k) et 38(1)b))

SUBSTANCES POLLUANTES ORGANIQUES  
PERSISTANTES

Article	Colonne 1 Numéro d'identification	Colonne 2 Substances polluantes organiques persistantes	Colonne 3 Concentration
1.	POP1	Aldrine	50 mg/kg
2.	POP2	Chlordane	50 mg/kg
3.	POP3	Dieldrine	50 mg/kg
4.	POP4	Endrine	50 mg/kg
5.	POP5	Heptachlore	50 mg/kg
6.	POP6	Hexachlorobenzène	50 mg/kg
7.	POP7	Mirex	50 mg/kg
8.	POP8	Toxaphène	50 mg/kg
9.	POP9	Biphényles polychlorés (BPC)	50 mg/kg
10.	POP10	DDT (1,1,1-Trichloro-2,2-bis (4-chlorophényl)éthane)	50 mg/kg
11.	POP11	Polychlorodibenzo-p-dioxines (PCDD)	15 µg TEQ/kg
12.	POP12	Polychlorodibenzofuranes (PCDF)	15 µg TEQ/kg

This is Exhibit B referred to in the Affidavit  
of Anthony Bratuktsch  
sworn before me on this 24<sup>th</sup> day

of January, 2011  
[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

02/12/2010

Environment Canada - Pollution and Wa...



Environment  
Canada

Environnement  
Canada

Canada

[Home](#) > [International Agreements](#) > [Can-USA Agreement](#) > Can-USA Agreement Text

## Canada - U.S.A. Agreement

### Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste (consolidated text)

**In case of discrepancy between this webpage and the printed Agreement, the Agreement will prevail.**

The Government of Canada (Canada), and the Government of the United States of America (the United States), hereinafter called "The Parties":

**Recognizing** that severe health and environmental damage may result from the improper treatment, storage, and disposal of hazardous waste and other waste;

**Seeking** to ensure that the treatment, storage, and disposal of hazardous waste and other waste are conducted so as to reduce the risks to public health, property and environmental quality;

**Recognizing** that the close trading relationship and the long common border between the United States and Canada engender opportunities for a generator of hazardous waste and other waste to benefit from using the nearest appropriate disposal facility, which may involve the transboundary shipment of hazardous waste and other waste;

**Believing** that a bilateral agreement is needed to facilitate the control of transboundary shipments of hazardous waste and other waste between the United States and Canada;

**Reaffirming** Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm, which asserts that states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction;

**Taking** into account Organization for Economic Co-operation and Development (OECD) Council Decisions and Recommendations on transfrontier movements of hazardous wastes, the United Nations Environment Program Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Waste, and resolutions of the London Dumping Convention,

Have agreed as follows:

#### Article 1 - Definitions

For the purposes of this Agreement:

**Designated Authority**

means, in the case of the US Environmental Protection Agency (US EPA) and, in the case of Canada, the Department of the Environment.

**Hazardous Waste**

means with respect to Canada, hazardous waste, and with respect to the United States, hazardous waste subject to a manifest requirement in the United States, as defined by their respective national legislations and implementing regulations.

**Country of Export**

means the country from which the shipment of hazardous waste originated.

**Country of Import**

02/12/2010

Environment Canada - Pollution and Wa...

means the country to which hazardous waste and other waste is sent for the purpose of treatment, storage (with the exception of short-term storage incidental to transportation) or disposal.

**Country of Transit**

means the country which is neither the country of export nor the country of import, through whose land territory or internal waters hazardous waste and other waste is transported, or in whose ports such waste is unloaded for further transportation.

**Consignee**

means the treatment, storage (with the exception of short-term storage incidental to transportation) or disposal facility in the country of import and the name of the person operating the facility.

**Exporter**

means, in the case of the United States, the person defined as exporter, and in the case of Canada, the person defined as consignor, under their respective national laws and regulations governing hazardous waste and other waste.

**Other Waste**

means Municipal Solid Waste (MSW) that is sent for final disposal or for incineration with energy recovery, and residues arising from the incineration of such waste, as defined by the Parties' respective national legislation and implementing regulations, but excluding waste covered under paragraph (b) of this Article.

**Article 2 - General Obligation**

The parties shall permit the export, import, and transit of hazardous waste and other waste across their common border for treatment, storage, or disposal pursuant to the terms of their domestic laws, regulations and administrative practices, and the provisions of this Agreement.

**Article 3 - Notification to the Importing Country**

1. The designated authority of the country of export shall notify the designated authority of the country of import of proposed transboundary shipments of hazardous waste and other waste.
2. The notice referred to in paragraph (a) of this article may cover an individual shipment or a series of shipments extending over a twelve month or lesser period and shall contain the following information:
  1. The exporter's name, address and telephone number, and if required in the country of export, the identification number.
  2. for each hazardous waste and other waste type and for each consignee:
    1. A description of the hazardous waste and other waste to be exported, as identified by the waste identification number, the classification and the shipping name as required on the manifest in the country of export;
    2. The estimated frequency or rate at which such waste is to be exported and the period of time over which such waste is to be exported;
    3. The estimated total quantity of the hazardous waste and other waste in units as specified by the manifest required in the country of export;
    4. The point of entry into the country of import;
    5. The name and address of the transporter(s) and the means of transportation, such as the mode of transportation (air, highway, rail, water, etc.) and type(s) of container (drums, boxes, tanks, etc.);
    6. A description of the manner in which the waste will be treated, stored or disposed of in the importing country;
    7. The name and site address of the consignee;
    8. An approximate date of the first shipment to each consignee, if available.
3. The designated authority of the country of import shall have 30 days from the date of receipt of the notice provided pursuant to the date of receipt of the notice provided pursuant to paragraphs (a) and (b) of this article to respond to such notice, indicating its

02/12/2010

Environment Canada - Pollution and Wa...

consent (conditional or not) or its objection to the export. Such response will be transmitted to the designated authority of the country of export. The date of receipt of the notice will be identified in an acknowledgement of receipt made immediately by the designated authority of the country of import to the country of export.

4. If no response is received by the designated authority of the country of export within the 30 day period referred to in paragraph (c) of this article, the country of import shall be considered as having no objection to the export of hazardous waste and other waste described in the notice and the export may take place conditional upon the persons importing the hazardous waste and other waste complying with all the applicable laws of the country of import.
5. The country of import shall have the right to amend the terms of the proposed shipment(s) as described in the notice.
6. The consent of the country of import, whether express, tacit, or conditional, provided pursuant to paragraphs (c) and (d) of this article, may be withdrawn or modified for good cause. The Parties will withdraw or modify such consent insofar as possible at the most appropriate time for the persons concerned.
7. For the purposes of this Article and Article 5, manifest-related requirements may, with respect to other waste, be substituted by alternative tracking requirements.

#### **Article 4 - Notification to the Transit Country**

1. The designated authority of the country of export shall notify the designated authority of the country of transit of the proposed shipment of hazardous waste and other waste at least 7 days prior to the date of the shipment. The notice shall include the information specified in paragraph (b) of Article 3, with the following exceptions:
  1. The points of entry into and departure from the country of transit shall be provided in lieu of the entry point(s) into the country of import; and
  2. A description of the approximate length of time the hazardous waste and other waste will remain in the country of transit and the nature of its handling while there shall be submitted instead of a description of the treatment, storage, or disposal of the waste in the country of import.

#### **Article 5 - Cooperative Efforts**

1. The Parties will cooperate to ensure, to the extent possible, that all transboundary shipments of hazardous waste and other waste comply with the manifest requirements of both countries.
2. The Parties will cooperate in monitoring and spot-checking transboundary shipments of hazardous waste and other waste to ensure, to the extent possible, that such shipments conform to the requirements of the applicable legislation and of this Agreement.
3. To the extent any implementing laws and regulations are necessary to comply with this Agreement, the Parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the Parties will make best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The Parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such laws and regulations.

#### **Article 6 - Readmission of Exports**

The country of export shall readmit any shipment of hazardous waste and other waste that may be returned by the country of import or transit.

#### **Article 7 - Enforcement**

The Parties shall ensure, to the extent possible, that within their respective jurisdictions, their domestic laws and regulations are enforced with respect to the transportation, storage, treatment and disposal of transboundary shipments of hazardous waste and other waste.

02/12/2010

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## **Article 8 - Protection of Confidential Information**

If the provision of technical information pursuant to articles 3 and 4 would require the disclosure of information covered by agreement(s) of confidentiality between a Party and an exporter, the country of export shall make every effort to obtain the consent of the concerned person for the purpose of conveying any such information to the country of import or transit. The country of import or transit shall make every effort to protect the confidentiality of such information conveyed.

## **Article 9 - Insurance**

The Parties may require, as a condition of entry, that any transboundary movement of hazardous waste and other waste be covered by insurance or other financial guarantee in respect to damage to third parties caused during the entire movement of hazardous waste and other waste, including loading and unloading.

## **Article 10 - Effects on International Agreements**

Nothing in this Agreement shall be deemed to diminish the obligations of the Parties with respect to disposal of hazardous waste and other waste at sea contained in the 1972 London Dumping Convention.

## **Article 11 - Domestic Law**

The provisions of this Agreement shall be subject to the applicable laws and regulations of the Parties.

## **Article 12 - Amendment**

This Agreement may be amended by mutual written consent of the Parties or their authorized representatives.

## **Article 13 - Entry into Force**

This Agreement shall enter into force on November 8, 1986 and continue in force for five years. It will automatically be renewed for additional five year periods unless either Party gives written notice of termination to the other at least three months prior to the expiration of any five year period. In any five year period, this Agreement may be terminated upon one year written notice given by one Party to the other.

**In witness where of**, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

**Done** at Ottawa, in duplicate, this 28th day of October, 1986, in the English and French languages, both texts being equally authentic.

Creation date: 2010-01-12  
Last updated : 2010-07-25  
Last reviewed: 2010-07-25

**URL of this page:** <http://www.ec.gc.ca/gdd-mw/default.asp?lang=En&n=C59BCC26-1&printerversion=true>



This is Exhibit C referred to in the Affidavit  
of Anthony Butchuk  
sworn before me on this 24<sup>th</sup> day  
of January, 2011  
[Signature]  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.



ENVIRONMENTAL  
ENFORCEMENT

APPLICATION DE LA LOI  
ENVIRONNEMENTALE

## Investigation Files and Relevant Legislation

### > 3007-2007-12-19-014

#### > *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*

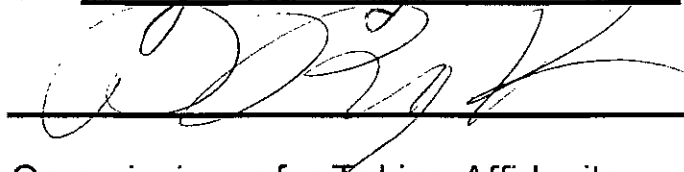
- > **Section 36(1):** Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled
  - > **(a):** in accordance with the export or import permit
  - > **(b):** in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and
  - > **(c):** within the period referred to in paragraph 9(o) and 16(n)

Environment  
Canada

Environnement  
Canada

Canada

000212

This is Exhibit D referred to in the Affidavit  
of Anthony Bratschuk  
sworn before me on this 24<sup>th</sup> day  
of January, 2011  
  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

*under - ceqa /*

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## Environmental Law and Litigation

News and analysis (not advice) by a top Ontario environmental lawyer



# ABSOLUTE DISCHARGE UNDER CEPA

by Dianne Saxe on February 7, 2009



Hello there! If you are new here, you might want to [subscribe to the RSS feed](#) for updates on this topic.

x

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On Thursday, an Ontario company received an absolute discharge for unwittingly breaching Section 36 of the *Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations*, under the *Canadian Environmental Protection Act 1999*.

This section requires those exporting hazardous waste from Canada to submit confirmation of destruction, within 30 days after the foreign receiver disposes of the waste. No specific format is prescribed. Like many others, RPR Environmental believed that Environment Canada was content to accept Copy 3 of the completed manifest as adequate proof of destruction, especially where the receiver promptly disposed of the waste.

For reasons best known to Environment Canada, they did not communicate their dissatisfaction with this interpretation to the waste industry. Environment Canada could, and should, have written to each of the (highly regulated) professional waste brokers, requesting separate confirmations of destruction. At a minimum, they could have clearly communicated this through industry associations or newsletters.

Instead, they acted like bullies. RPR's first indication of any problem was the arrival of 17 officers in flack jackets with a search warrant. Investigators ransacked their offices (twice), seized hundreds of documents, copied computer disks, terrified employees, left files in a shambles, laid three different sets of charges, and caused years of upheaval. And what the matter ultimately came down to was legitimate confusion about the interpretation of s.36. After all the drama, and much wasted expense

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(public and private), the company made a \$5,000 donation to a local charity, conducted a training course, and received an absolute discharge with no fine.

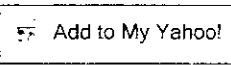
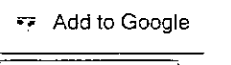
This is another sad example of cruel and inappropriate enforcement by Environment Canada. As in *Gemtec*, a small, hardworking company had an honest and reasonable understanding of a complex law. It turned out that Environment Canada disagreed with its interpretation. But instead of giving an explanation, or a warning, Environment Canada responded with a sledgehammer. This is like beating a child for breaking an unspoken rule; it's unfair, it's counterproductive, and it's bad public policy. No question, we need environmental enforcement. But we need it to be fair, and proportional to the real fault involved. Environment Canada urgently needs to re-examine its approach to compliance and enforcement. Fundamentally, serious punishment should be reserved for those who had some reason to know that what they were doing was wrong. In areas of disputed interpretation of the law, Environment Canada should explain what it means and give people an opportunity to comply, before it throws the book at them.

Tagged as: [bad public policy](#), [inappropriate enforcement](#)

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This is Exhibit E referred to in the Affidavit  
of Anthony Bratukovich  
sworn before me on this 24<sup>th</sup> day  
of January, 2011  
[Signature]  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

*lang=EN & n=CB709EF2-D63A-A133-8FBD8E5CC89F*



Environment  
Canada

Environnement  
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Canada

[Home](#) > [Enforcement Notifications](#) > Notification - 2009-05-15 > [Notification - 2009-08-04](#)

## Violation of Reporting Requirements Results in Contribution to Conservation Authority

February 5, 2009

**HAMILTON, Ont.** -- RPR Environmental Inc. of Stoney Creek, Ontario pleaded guilty in the Ontario Court of Justice to one count of violating the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*. The Regulations were made under the *Canadian Environmental Protection Act, 1999*. The court approved an agreement between Environment Canada and RPR Environmental Inc. that the company would pay a sum of \$5,000 to the Hamilton Conservation Authority and that company would then receive an absolute discharge.

In addition to the payment, the agreement requires that RPR Environmental Inc., would develop a training program and offer it to company staff, with Environment Canada officials in attendance.

**Printer-friendly version**  
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Date Modified: 2009-08-11

This is Exhibit F referred to in the Affidavit  
of Anthony Bratukovich  
sworn before me on this 24<sup>th</sup> day  
of January, 20 11  
[Signature]

Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.



00229-A0079577 p. 1 - 5

### Canadian Manifesting Mechanism Will Say

The Government of Canada is committed to protect human health and the environment and enforce environmental and conservation laws with tough standards and regulations concerning the import into and export out of Canada of hazardous wastes and hazardous recyclable materials.

Canada is a signatory to a number of international agreements which include:

1. the United Nations, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;
2. the OECD (Organization for Cooperation and Economic Development) Council Decision concerning the control of transfrontier movements of wastes destined for recovery operations; and
3. the Canada - USA Agreement on the Transboundary Movement of Hazardous Waste.

On August 28, 1992, Canada ratified the Basel Convention. The Basel Convention controls the transboundary movements of hazardous wastes and hazardous recyclable materials, and promotes their environmentally sound management. The Convention also restricts transboundary movements to take place between Basel Party countries only.

Since March 1992, the transboundary movements of hazardous wastes destined for recycling operations between Member countries of the Organization for Economic Cooperation and Development (OECD) have been supervised and controlled according to OECD Council Decision C(92)39/FINAL. The OECD Decision provides a framework to control transboundary movement of hazardous recyclable materials within the OECD area, in an environmentally sound and economically efficient manner. This Decision was subsequently revised and incorporated into the new OECD Council Decision C(2001)107/FINAL, which was adopted and came into force for OECD member countries in May 2001.

The Canada-U.S.A. Agreement, which came into effect in November 1986 and was later amended in 1992, is intended to ensure that hazardous waste and municipal solid waste destined for final disposal crossing the Canada-U.S. border comply with each country's domestic law and the provisions of the Agreement. It confirms basic principles recognized by both countries for the proper control of transboundary movements of hazardous wastes and other wastes, including a prior informed consent regime.

It should be noted that both the OECD Council Decision and the Canada-USA Agreement are recognized under Article 11 of the Basel Convention as multi-lateral and bilateral agreements which provide an equivalent level of control as required under the Convention itself. This is an important point, since the USA although signing the Convention has never ratified it and implemented the

requirements through its domestic legislation. Therefore, the USA is not a Party to the Convention. However, due to the recognition of the OECD Decision and the Canada-USA Agreement as Article 11 agreements has allowed the border to remain open to the transboundary movement of hazardous waste and hazardous recyclable materials with the United States.

In 1992, the Federal Canadian Government of Canada complied with its international obligations through the implementation of domestic legislation. The *Export and Import of Hazardous Wastes Regulations* (EIHWR)<sup>1</sup> pursuant to the Canadian Environmental Protection Act (CEPA 1988) were the means by which the conditions and articles set out in the international agreements to which Canada is a party were implemented domestically. These Regulations strictly controlled the international movement of hazardous waste and hazardous recyclable material into and out of Canada, including transits through Canadian territory.

The keystone of the EIHWR and the new *Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations* (EIHWHRMR) is the prior informed consent (PIC) mechanism which is also an essential component of all three of the international agreements to which Canada is a party.

The PIC provisions in the EIHWR require the Canadian importer to submit a notice for intended imports of hazardous waste or hazardous recyclable material destined for disposal or recycling/recovery operations respectively, before any movements can take place. The notice allows Environment Canada to determine who the parties are in the proposed transaction (generator/foreign exporter, carriers and importer/receiver), identify the hazardous waste(s)/hazardous recyclable(s) and ensure that the appropriate documentation is in place to cover the proposed shipments, such as contracts between the parties and evidence of sufficient insurance coverage in the event of an accident or mishap.

In Canada, the management of hazardous waste and hazardous recyclable materials is a shared responsibility. The Government of Canada regulates international movements of hazardous wastes and hazardous recyclable materials, while the provincial and territorial governments control generators, waste management/recycling facilities and transportation within their jurisdictions. The provinces and territories also have regulations that set out requirements for the licensing and the issuance of operating permits for waste management and recycling facilities.

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<sup>1</sup> The *Export and Import of Hazardous Wastes Regulations* (EIHWR) were in force from November 26, 1992 until November 1, 2005, at which time they were revoked and replaced by the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* (EIHWHRMR). Consequently, the text is written in the past tense with respect to the EIHWR, although the controls remain in force through the new Regulations.

In the case of imports, the PIC mechanism allows the provinces to review the import notice information and provide consent based on the strict controls that they have placed on the operational permits for the facility before the transportation of the hazardous wastes/recyclables. The provinces/territories also provide confirmation of the authorization of the carriers involved in the transaction within their jurisdictions. The entire review and consent process takes place before an import permit can be issued under CEPA 1999 and any movement can take place.

Exports of hazardous waste or hazardous recyclable materials out of Canada to a foreign country, including the United States are subject to the notification and permit conditions set out in CEPA 1999, and the Regulations.

The PIC provisions also apply to exports. Under the Act and Regulations, a Canadian export notice needs to be completed by the exporter and submitted to Environment Canada. Once the notice has been reviewed, as well as meeting the contract and insurance requirements, the notice is forwarded to the foreign competent authority for their consent. No permit will be issued until the authorities of the country of destination have authorized the movement and have confirmed that the final disposal or recycling of the hazardous waste or hazardous recyclable material is authorized.

The second keystone of the EIHWR and the EIHWRMR is the manifest movement tracking provisions. Both the Basel Convention and the OECD Council Decision require Parties to track the transboundary movements through a movement document which is signed by each person who takes charge of the hazardous waste or hazardous recyclable material upon receipt or delivery. The OECD Decision has set timelines for the distribution of the movement document. The Decision requires that the completed and signed movement document be returned by the importer to the competent authorities concerned and the exporter within three days of receipt of the hazardous recyclables by the authorized receiving facility.

In Canada, the EIHWR required the importer to ensure that a copy of the manifest, with Part A completed by the person who exported the hazardous waste from the country of export and Part B completed by the first authorized carrier, was sent, within three days after the manifest was provided to the first authorized carrier, to

- (a) the Minister; and
- (b) the authorities of the province of import.

In addition, the EIHWR required the importer, within three days after receiving the hazardous waste at the authorized facility, to complete and sign Part C of the manifest and send copies of the completed manifest to

- (a) the Minister;
- (b) the authorities of the province of import;

- (c) the person who exports the hazardous waste from the country of export; and
- (d) every carrier of the hazardous waste.

In the case of exports, the same responsibilities and timelines were placed on the Canadian exporter, in order to track the movements of hazardous waste or hazardous recyclable material out of Canada.

The notice and prior informed mechanism work in conjunction with the manifest/movement document tracking system. The notice is a means by which all affected competent authorities are provided the opportunity to review the proposed transactions and provide consent, before any movements take place. All of the review and confirmations are done up front through the notice. This affords the provinces and foreign competent authorities as proposed importing destinations to ensure that the receiving facilities are authorized to perform the disposal or recycling operations set out in the notice. The competent authorities can also ensure that the hazardous waste and hazardous recyclable materials can be disposed of, treated, or recovered and will be managed in a manner that is environmentally sound which protects human health and the environment. While the manifest/movement document is the check in the entire regime to ensure that the transaction actually has taken place as proposed and allowed in the permit.

Hazardous waste and hazardous recyclable material exhibit hazardous properties or contain hazardous constituents which can pose an immediate and acute hazard to the environment or human health. Other hazardous contaminants or constituents in the waste or recyclable may only be released into the environment or effect human health over a long period of time. In any case, if the hazardous waste or hazardous recyclable material is mismanaged or the disposal/recycling operations take place at a facility which is not authorized to perform those functions or does not have adequate environmental or emission controls in place, this could result in the release of the hazardous substances into the environment with a detrimental impact on human health and the natural environment.

The manifest tracking system does not eliminate nor remove the hazard characteristics of the waste or recyclable material. The manifest is a means of controlling the risk posed by the movement of the hazardous waste and hazardous recyclable material. In addition, the manifest/movement document is a means by which Environment Canada can take steps to ensure and verify that the hazardous waste or hazardous recyclable material was received at the authorized facility as was approved in the permit issued by the Minister.

The failure to return the manifest in the required time set out in the Regulations allows for a critical period of time to elapse during which the mismanagement of a hazardous waste or hazardous recyclable material can take place. During this


period of time, the impact to the environment or human health may occur and be acute.

Prolonged mismanagement, including improper storage, would allow for the introduction of the hazardous constituents into the environment, which may require increased clean-up costs to mitigate the damage depending on the length of time taken before the release can be halted. In the case, of chronic effects on human health, these effects may not manifest themselves for many years into the future. At that time, these chronic effects will put greater pressures on the healthcare system and will impact on the quality of life of Canadians.

In addition to the potential impacts on human health and the environment, failure to comply promptly with the manifest requirements will affect Canada's ability to comply with its international obligations.

Prepared by:  
Joachim Wittwer, BSc., CChem.  
Head, Operations Section  
Waste Management Division  
(formerly Transboundary Movement Branch)  
Environment Canada

Note: Other international companies do submit copies of the movement documents as required under the international instruments, such as the OECD Council Decision. For example, ENUSA Industrias Avandas, S.A. located in Salamanca, Spain forwarded copy 1 of OECD movement document to Environment Canada as an international shipment prepared to leave (E005965) for Canada. Although the OECD movement document is not a Canadian regulatory requirement, it is clear that companies can and do meet the submission requirements for the tracking of the hazardous waste or hazardous recyclable material movements internationally.

 18/07/07



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Email: Michael.Sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

March 25, 2011

**VIA FACSIMILE**

Registry of the Federal Court  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

Dear Sir/Madam:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

Please file the attached Notice of Motion of the Attorney General of Canada, dated March 25, 2011, and the Affidavit of Service pursuant to the *Federal Court Rules*.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Enclosures: Notice of Motion  
Affidavit of Service

Canada

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE MAR-25-2011 \*\*\*\*\* TIME 12:18 \*\*\*\*\*

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Notice of Motion and Affidavit of service attached			
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7	March 25, 2011		

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Canada

Mar 25 11 06:33a

Tony Bratschitsch

1-905-628-2532

p. 2

Court File No.: T-2112-10

## **FEDERAL COURT**

Between:

**Anthony Bratschitsch**

**Applicant**

And

**The Chief Enforcement Officer, Environmental Enforcement, Environment  
Canada and The Attorney General of Canada**

**Respondents**

---

## **MOTION RECORD**

---

### **Contents**

<b>NOTICE OF MOTION</b>	<b>2</b>
<b>WRITTEN REPRESENTATIONS</b>	<b>4</b>



Mar 25 11 06:34a

Tony Bratschitsch

1-905-628-2532

p. 3

2

**FORM 359 - Rule 359**

**Court File No.: T-2112-10**

**FEDERAL COURT**

**Between:**

**Anthony Bratschitsch**

**Applicant**

**And**

**The Chief Enforcement Officer, Environmental Enforcement, Environment  
Canada and The Attorney General of Canada**

**Respondents**

**NOTICE OF MOTION**

**TAKE NOTICE THAT the Applicant will make a motion to the Court in writing  
under Rule 369 of the Federal Courts Rules.**

**THE MOTION IS FOR an Order:**

- a) Striking out the Respondents' Notice of Motion served and filed on  
February 18, 2011, without leave to amend; or**
- b) in the alternative, this proceeding be submitted for case management; and**
- c) the costs of this motion.**

**THE GROUNDS FOR THE MOTION ARE that:**

- a) the Respondents failed to comply with Rule 364.(3) of the Federal Court  
Rules and, thereby, did not serve and file their Motion Record causing a  
Hearing scheduled for March 28, 2011 to be cancelled;**
- b) the Respondents had 33 days to comply with Rule 364.(3) which allowed  
for adequate time to serve and file the record;**
- c) the Applicant faxed a "reminder" to the Respondents' counsel in advance  
of their deadline to submit the Record;**
- d) this failure to comply with the Rules has caused unnecessary delay in  
what the Applicant submits is an urgent matter for the Court's review.;**

Mar 25 11 06:34a Tony Bratschitsch

1-905-628-2532

p. 4

3

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of  
the motion:

Written Representation of Anthony Bratschitsch

Date:



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario L9H 6L6  
Tel: (289) 260-1153  
Fax: (905) 662-3828

TO:

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario M5X 1K6  
Tel: (416) 952-7117  
Fax: (416) 973-4323

SOR/2004-283, s. 35

Mar 25 11 06:34a

Tony Bratschitsch

1-905-628-2532

p. 5

4

Court File No. T-2112-10

## FEDERAL COURT

Between:

Anthony Bratschitsch

Applicant

And

The Chief Enforcement Officer, Environmental Enforcement, Environment  
Canada and The Attorney General of Canada

Respondents

### WRITTEN REPRESENTATIONS OF THE APPLICANT

1. This motion arises in the context of the Respondents' Notice of Motion served and filed on February 18, 2011. This is recorded as Document No. 6 on the Court File's Recorded Entries for T-2112-10.
2. The Respondents' Notice of Motion was made returnable March 28, 2011.
3. On March 24, 2011, the Hearing was removed from the General Sitting because the Respondents did not file their Motion Record.
4. Counsel for the Respondents, Mr. Michael J. Sims, phoned me at 10:33 AM, March 24, 2011 to inform me that the Hearing was removed from the list.
5. In respect for Mr. Sims, I do not wish to risk mis-quoting the reasons for the delay in their filing of the Motion Record.
6. Mr. Sims requested my availability for a Hearing on April 4, 2011 subject to being placed on the Hearing List. I did acknowledge that I was available for that date.
7. However, I did ask of Mr. Sims on *'what my options where?'*. According to my notes, he replied *'None. This must go ahead.'*
8. I also stated during the same telephone conversation that I had faxed him a letter on Monday, March 21, 2011 regarding the service of his Motion Record in preparation of the Hearing. Mr. Sims acknowledged receiving this letter. For whatever the value of this document, I am submitting it as part of my Written Representation.

9. I am very concerned about the Respondents' causing the cancellation of the Hearing of March 28, 2011 for the following reasons :

- b) They had 33 days since the filing of their Notice to prepare and file their Motion Record;
- c) My letter of March 24, 2011 to Mr. Sims served as a reminder about the upcoming service of their Motion Record;
- d) The Respondents' counsels are officers of the Court who are familiar with the Rules of the Court;
- e) That this failure to abide by the Rules will cause me, and others, unnecessary further delay and grief in the process of my Application.

10. I respectfully submit that it is imperative to dismiss the Respondents' Motion for an Order to strike out my Notice of Application for the following reasons :

- a) As an "agent" described under Section 280(1) of the Canadian Environmental Protection Act, 1999 ("CEPA 1999"), I am vulnerable to being charged at any time.

Section 280(1) of CEPA 1999 states:

*"Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted."*

- b) My rights to freedom under Section 7 of the Canadian Charter of Rights and Freedoms ("Charter") is threatened due to the provisions of Section 272 of CEPA 1999, as follows:

Section 272. (2) of "CEPA 1999" states:

*"Every person who commits an offence under subsection (1) is liable*

- (a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both; and*
- (b) on summary conviction, to a fine of not more than \$300,000 or to imprisonment for a term of not more than six months, or to both."*

- c) At least one Canadian has been already charged under the conditions that I have identified in my Application, i.e. "Section 36" of the "EIHWRRM" involving an administrative issue controlled by Americans outside of Canadian jurisdiction.

Mar 25 11 06:34a Tony Bratschitsch

1-905-628-2532

p. 7

6

11. On behalf of myself and other Canadians who are similarly vulnerable, I ask the Court to dismiss the Respondents' Motion to Strike because my Application presents an urgent matter that should be reviewed by the Court without further delay caused by the Respondents and that the Respondents' have not abided by the Rules of the Court.

Respectfully submitted by the Applicant on March 25, 2011.



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel: (289) 260-1153

Mar 25 11 06:35a

Tony Bratschitsch

1-905-628-2532

p. 8

7

March 21, 2011

**Sent by Fax**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-595438  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10

Dear Mr. Sims,

In preparation for the hearing on March 28, 2011, I would be grateful if you would fax (if convenient) your Motion Record to (905) 662-3828 or, otherwise, please courier it to my below address.

If needed, I can be contacted at (289) 260-1153.

Yours truly,



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

FORM 359 – NOTICE OF MOTION  
Federal Court Rules, 1998, Rule 359

T-2112-10

**FEDERAL COURT**

**B E T W E E N :**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

Respondents

**NOTICE OF MOTION**

TAKE NOTICE THAT the Respondents will make a motion to the Court at a general sitting on Monday, April 4, 2011, at 9:30 am or as soon thereafter as the motion can be heard, at the Federal Court, 180 Queen Street West, Toronto, Ontario.

THE MOTION IS FOR an Order:

- (a) striking out the Notice of Application, without leave to amend; or
- (b) in the alternative, granting an extension of time to file responding affidavits; and
- (c) the costs of this motion.

THE GROUNDS FOR THE MOTION ARE:

- (a) the Applicant brings this application for judicial review on his own behalf;
- (b) on the application, he seeks to challenge the constitutionality of s. 36 of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulation (the "Regulation"), promulgated under the *Canadian Environmental Protection Act*;

- 2 -

- (c) the Applicant does not allege that he has been charged under s. 36 of the Regulation;
- (d) the Applicant lacks standing to bring this application;
- (e) the Applicant does not meet the criteria for public interest standing;
- (f) there is no administrative decision or action in this case to be judicially reviewed by this Court;
- (g) absent some form of administrative action, the Court cannot grant the relief the Applicant seeks;
- (h) s. 18.1 *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended;
- (i) such further and other grounds as counsel may advise and the Court may accept.

March 25, 2011



Myles J. Kirvan  
Deputy Attorney General of Canada  
Per: Michael J. Sims  
Department of Justice  
Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6  
Tel: (416) 952-7116  
Fax: (416) 973-4323

Solicitor for the Respondents



- 3 -

TO: Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel. (289) 260-1153

Applicant

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

**Respondents**

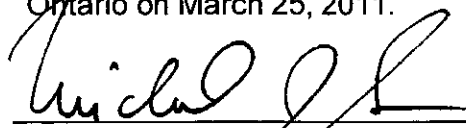
**AFFIDAVIT OF SERVICE**

I, Diane Dyke, Legal Assistant, of the City of Toronto, in the Province of Ontario

**SWEAR THAT:**

1. I served Anthony Bratschitsch with the Notice of Motion of the Attorney General of Canada, dated March 25, 2011, by sending a copy by facsimile to Anthony Bratschitsch at fax number (905) 662-3828 on Friday, March 25, 2011.
2. Annexed and marked as Exhibit "A" is a copy of the fax confirmation sheet as evidence thereof.

SWORN before me at the City of  
Toronto in the Province of  
Ontario on March 25, 2011.

  
Commissioner for Taking Affidavits

  
Diane Dyke

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE MAR-25-2011 \*\*\*\*\* TIME 10:45 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=MAR-25 10:44

END=MAR-25 10:45

FILE NO.=266

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	<p>STATION 19056623828</p> <p>referred to the affidavit of DIANE DYKE Sworn before me this 25th day of MARCH A.D. 20 11</p>	004	00:00:33

\*\*\*\*\* UF-7200 \*\*\*\*\* A Commissioner for taking affidavits

4169734323- \*\*\*\*\*



Department of Justice Canada  
Ontario Regional Office

Ministère de la Justice Canada  
Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

<b>SEND TO / ENVOYER À</b>		<b>FROM / DE</b>	
Name / Nom: Anthony Bratschitsch		Name / Nom: Michael J. Sims Counsel	
Address / Adresse:		Address / Adresse: Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur:	Tel. No. / No du Tél:	Fax # / No du télécopieur:	Tel. No. / No du Tél:
(905) 662-3828		(416) 973-4323	(416) 952-7116
Comments / Commentaires:			
Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10			
Notice of Motion (dated March 25, 2011) attached			
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice.			
Protected documents? / Documents protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
<b>TRANSMISSION</b>			
Pages (including cover sheet)	Date:	Time:	
4	March 25, 2011		

<b>NOTICE:</b>
This message is intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you have received this communication in error, please notify us immediately by telephone. Thank you.
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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
Name / Nom: Diane Dyke at / au: 416-952-7114

Canada

Court File No.: T-2112-10

## **FEDERAL COURT**

Between:

Anthony Bratschitsch

Applicant

And

The Chief Enforcement Officer, Environmental Enforcement, Environment Canada  
and The Attorney General of Canada

Respondents

---

### **APPLICANT'S "RESPONDING"\* MOTION RECORD** (Motion returnable April 4, 2011)

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\* Note: The Applicant is not the "moving" party in this motion but, according to Federal Courts Rule 36.5 (1), is the "respondent".

To avoid confusion, the word "applicant" has been used instead of "respondent".

March 30, 2011

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel: (289) 260-1153

Applicant responding to this Motion

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

AND TO: Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6  
Tel: (416) 952-7117  
Fax: (416) 973-4323

Solicitor for the Respondent to the Application

Court File No.: T-2112-10

**FEDERAL COURT**

Between:

Anthony Bratschitsch

Applicant

And

The Chief Enforcement Officer, Environmental Enforcement, Environment Canada  
and The Attorney General of Canada

Respondents

**APPLICANT'S "RESPONDING" MOTION RECORD**

(Motion returnable April 4, 2011)

**Contents**

Written Representations	4
Affidavit from Applicant's Affidavit filed January 28, 2011	9

Court File No. T-2112-10

## **FEDERAL COURT**

Between:

**Anthony Bratschitsch**

Applicant

And

**The Chief Enforcement Officer, Environmental Enforcement, Environment  
Canada and The Attorney General of Canada**

Respondents

## **WRITTEN REPRESENTATIONS OF THE APPLICANT**

### **OVERVIEW**

1. This motion arises in the context of the respondents' notice of motion served and filed on February 18, 2011. This is recorded as Document No. 6 on the Court File's Recorded Entries for T-2112-10.
2. The respondents' notice of motion was originally made returnable March 28, 2011 and re-instated to April 4, 2011.
3. Grounds for the Motion is based on that:
  - a) The applicant lacks direct standing to bring the application;
  - b) The applicant does not meet the criteria for public interest standing;
  - c) There is no decision or action that warrants the Court's review;
  - d) The Court cannot grant the relief that that the applicant seeks.
4. Applications for judicial review should not be struck out prior to a hearing on the merits of the application, unless the application is "so clearly improper as to be bereft of any possibility of success".<sup>1</sup>

---

<sup>1</sup> *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147 at para. 26 Respondents' Authorities, Tab 1. [*Amnesty International*]

## PART I – STATEMENT OF FACTS

5. The applicant is a consultant working in the waste disposal industry.<sup>2</sup>
6. The applicant makes reference in his notice of application to the prosecution of a company and its director for breaches of Section 36 in 2008.<sup>3</sup>
7. The applicant also states that he has provided services to the director and his companies in his Affidavit filed in Federal Court on January 28, 2011.<sup>4</sup>
8. The applicant challenges the validity of Section 36 on the following basis:
  - a) Section 36 breaches the liberty guarantee in s.7 of the *Charter*,<sup>5</sup>
  - b) Section 36 is invalid because it does not comply with various international agreements on the transboundary movement of hazardous waste,<sup>6</sup>
  - c) Section 36 violates Canadians' expectations of "fair justice" by unfairly placing an inference of guilt on a person in some cases.<sup>7</sup>

*Affidavit  
evidence.*

## PART II – POINTS IN ISSUE

9. The sole issue of this motion is whether the notice of application should be struck out, without leave to amend.

## PART III – SUBMISSIONS

10. Often, as per above Item #7, the applicant is placed in a position of trust with decision making authority within the previously referenced corporation.
11. The applicant would qualify as an "agent" for the corporation.

*Not even in  
Affidavit*

<sup>2</sup> Notice of Application, pg. 3, Respondents' Motion Record, Tab 3, pg. 23

<sup>3</sup> Notice of Application, pg. 3, Respondents' Motion Record, Tab 3, pg. 23

<sup>4</sup> Applicant's Affidavit, pg. 2, Item 4, Applicant's Responding Motion Record, pg. 10

<sup>5</sup> Notice of Application, pg. 7, Respondents' Motion Record, Tab 3, pg. 27

<sup>6</sup> Notice of Application, pg. 8, Respondents' Motion Record, Tab 3, pg. 28

<sup>7</sup> Notice of Application, pg. 10, Respondents' Motion Record, Tab 3, pg. 30



12. As an "agent" under the Canadian Environmental Protection Act, 1999 ("CEPA 1999"), the applicant would be included in the following :

Section 280(1) of CEPA 1999 states:

*"Where a corporation commits an offence under this Act, any officer, director or **agent** of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted."*

13. The applicant, therefore, faces the following punishment:

Section 272. (2) of "CEPA 1999" states:

*"Every person who commits an offence under subsection (1) is liable*  
*(a) on conviction on indictment, to a fine of not more than \$1,000,000 or to **imprisonment** for a term of not more than three years, or to both;*  
*and*  
*(b) on summary conviction, to a fine of not more than \$300,000 or to **imprisonment** for a term of not more than six months, or to both."*

14. The applicant's rights to freedom under Section 7 of the Canadian Charter of Rights and Freedoms ("Charter") are threatened due to the above provisions of Section 272 of CEPA 1999.

15. Therefore, the applicant submits that he qualifies for **direct standing** in this matter.

16. The applicant submits that he would also qualify for **public standing** if that consideration was necessary or relevant to this application, as per following:

- a) The Supreme Court of Canada essentially endorsed the "Standing Trilogy" test summarized in the case of *Canadian Council of Churches v. Canada* (Minister of Employment and Immigration), as per the following statement:

*'Three aspects of the claim must be considered when public interest standing is sought. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?'*<sup>8</sup>

---

<sup>8</sup> *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R., Respondents' Authorities, Tab 7, pg. 2

- b) The applicant submits in response :
- i. Serious issue raised as to the invalidity of legislation in question?  
This issue has already been addressed in this document and should be presented for judicial review
  - ii. Plaintiff directly affected by the regulation? Being an agent, the applicant is directly affected by this matter.
  - iii. Is there another reasonable and effective way to bring this issue before the court? Labouring under the threat of pending charges and possible imprisonment is not fair whereas "inviting" trial litigation is an inefficient and ineffective consumption of a court's resources. There is no other reasonable and effective way.
17. The respondents state that the application must specify a decision or some form of administrative action for judicial review, however, "actions or potential actions" were deemed acceptable for review in *Amnesty International*.<sup>9</sup>
- "Moreover, the **absence of a decision is not an absolute bar** to an application for judicial review under the Federal Courts Act..."<sup>10</sup> | Only part of the quote
18. Concerning the applicant's request for relief, the Federal Courts Act s.18. (1) provides for declaratory relief, injunction and writ of prohibition which would be as effective as rewriting or striking.
19. *Amnesty International* also itemized the following "Legal Principles Governing Motions to Strike" by citing various caselaw:
- a) "Applications for judicial review are intended to be summary proceedings, and motions to strike Notices of Application add greatly to the cost and time required to deal with such matters."<sup>11</sup>
  - b) "...the striking out process is more feasible in actions than in applications for judicial review" and "There are no comparable rules governing Notices of Application for Judicial Review."<sup>12</sup>
  - c) "...that applications for judicial review should not be struck out prior to a hearing on the merits of the application, unless the application is "so clearly improper as to be bereft of any possibility of success".<sup>13</sup>

<sup>9</sup> *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147, Respondents' Authorities, Tab 1, pg. 2

<sup>10</sup> *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147 at para. 69 Respondents' Authorities, Tab 1, pg. 10.

<sup>11</sup> *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147 at para. 22 Respondents' Authorities, Tab 1, pg. 5.

<sup>12</sup> *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147 at para. 23 Respondents' Authorities, Tab 1, pg. 5.

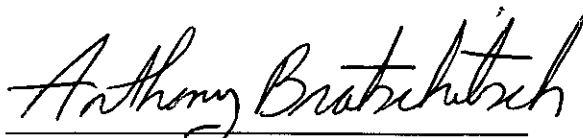
<sup>13</sup> *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147 at para. 26 Respondents' Authorities, Tab 1, pg. 6.

- d) *"Finally, in deciding whether an Application for Judicial Review should be struck as bereft of any possibility of success, the Notice of Application should be read as generously as possible, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the document."*<sup>14</sup>

## **PART IV – SUMMARY**

20. The applicant understands that the merit of his application was not to be discussed in this motion.
21. The applicant submits that he has standing, that his request for judicial review is meritorious and that it falls within the jurisdiction of the Court.
22. The applicant contends that it would be valuable to all parties, including the respondents, to proceed with this application for judicial review in an expedient manner without further delay.
23. The applicant respectfully requests that this motion be dismissed.

Respectfully submitted by the Applicant on March 30, 2011.



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel: (289) 260-1153

---

<sup>14</sup> *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147 at para. 33 Respondents' Authorities, Tab 1, pg. 6.

9  
T-2112-10

FORM 80A - Rule 80

**AFFIDAVIT**

FEDERAL COURT

BETWEEN:

ANTHONY BRATSCHITSCH

Applicant

and

THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA AND THE ATTORNEY  
GENERAL OF CANADA

Respondents

**AFFIDAVIT OF ANTHONY BRATSCHITSCH**

I, Anthony Bratschitsch, of the Town of Dundas, in the amalgamated City of Hamilton, in the Province of Ontario SWEAR THAT:

1. I am a Canadian citizen and I am employed as a consultant in the environmental waste industry affected by Section 36 of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* (EIHWHRMR). The EIHWHRMR, published in the Canada Gazette, is provided as **Exhibit A**. Section 36 is found on page 1220;
2. I am very knowledgeable of EIHWHRMR, the *Canadian Environmental Protection Act, 1999* (CEPA 1999) and the three relevant international agreements affecting the transboundary movement of hazardous wastes referred to in Item No. 8 in the Application. One of those three international agreements, *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, Amended 1992*, commonly known as "The Bilateral Agreement", is used to bridge the discrepancies of the other two international agreements to accommodate Canadian and American requirements. A copy of The Bilateral Agreement has been provided from Environment Canada's web site as **Exhibit B**;

2 10

3. I am also very knowledgeable of the typical operating procedures used by the hazardous waste industry that is utilized to achieve regulatory compliance, such as manifesting and tracking procedures;
4. I have known and provided industry-related services to Mr. Patrick Whitty and the three companies that he co-owns, including RPR Environmental Inc. (RPR), since 1998;
5. I am very knowledgeable of the facts involving the particular Environment Canada Enforcement (ECE) investigation of RPR and Mr. Whitty concerning alleged violations of Section 36 and of the subsequent prosecution. The ECE investigation file number (3007-2007-12-19-014) is shown on a copy of an ECE power point slide. This is **Exhibit C**.
6. The ECE Section 36 investigation and prosecution of RPR is a matter of public information and is of significant concern to the industry, for the reasons including fairness, predictability and consistency. **Exhibit D** is an internet publication by a reknown environmental law practioner, Dr. Dianne Saxe, detailing the Section 36 violation and her own reaction to it. Also, Environment Canada published an internet Enforcement Notification, last modified on August 11, 2009 (**Exhibit E**);
7. Dr. Saxe's internet publication refers to ECE enforcement and compliance in this manner (last paragraph) :

***We need it to be fair, and proportional to the real fault involved.***

As explained in the Application, the Canadian exporter has no control over the issuance of confirmations, commonly described as Certificates of Destruction, from the United States.

As a result, there is a perception in the industry of, at least, unfairness in the enforcement of Section 36 on Canadian exporters.

It is also my belief that there is no real fault because American legislation does not require the issuance of those Certificates, as explained in the Application.

8. Section 2.(1)(o) of CEPA 1999 states


*2. (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),*

*(o) apply and enforce this Act in a fair, predictable and consistent manner.*


- 3 //
9. The *Canadian Manifesting Mechanism Will Say* of Mr. Joachim Wittwer, Head of Operations Section, Waste Management Division of Environment Canada succinctly describes the functions and applications of various mechanisms used to ensure compliance with CEPA 1999 and The Bilateral Agreement for the transboundary movement of hazardous waste. Mr. Wittwer's document also refers to the importance of each country's domestic legislation. As stated in the Application, the Certificates of Destruction specified in Section 36 of EIHWHMR are not part of The Bilateral Agreement. Mr. Wittwer's Will Say also does not make any reference to confirmations or Certificates of Destruction. It is clear that the confirmations or Certificates of Destruction are not a requirement of the international agreements governing the transboundary movement of hazardous wastes. Mr. Wittwer's Will Say is provided as **Exhibit F**.

Sworn (or Affirmed) before me at the City of Hamilton in the Province of Ontario

on January 24, 2011 (date).

  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

  
Anthony Bratschitsch  
(Signature of Deponent)

Exhibits :

- A. Canada Gazette Part II, Volume 139, No. 11: *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*
- B. *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992*
- C. Environment Canada Enforcement power point slide identifying investigation file and Section 36 investigation
- D. Internet publication by Dr. Dianne Saxe publishing information about concerns over the fairness of the enforcement of the Section 36 regulation
- E. Internet Publication by Environment Canada
- F. *Canadian Manifesting Mechanism Will Say* of Joachim Wittwer, Head of Operations Section, Waste Management Division of Environment Canada

Michael J. Sims

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

Respondents

**RESPONDENTS' MOTION RECORD**

(Motion returnable April 4, 2011)

March 29, 2011

Myles J. Kirvan  
Deputy Attorney General of Canada  
Per: Michael J. Sims  
Department of Justice  
130 King Street West  
Toronto, Ontario

Tel: (416) 952-7116  
Fax: (416) 973-4323

Solicitor for the Respondents

TO: **The Administrator**  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

AND TO: **Anthony Bratschitsch**  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Applicant



T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

**Respondents**

**RESPONDENTS' MOTION RECORD**  
**(Motion returnable April 4, 2011)**

**TABLE OF CONTENTS**

<b>TAB</b>	<b>Page #</b>
<b>1. Notice of Motion</b>	<b>1 - 3</b>
<b>2. Memorandum of Fact and Law</b>	<b>4 – 20</b>
<b>3. Notice of Application</b>	<b>21 - 31</b>

FORM 359 – NOTICE OF MOTION  
Federal Court Rules, 1998, Rule 359

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T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

Respondents

**NOTICE OF MOTION**

TAKE NOTICE THAT the Respondents will make a motion to the Court at a general sitting on Monday, April 4, 2011, at 9:30 am or as soon thereafter as the motion can be heard, at the Federal Court, 180 Queen Street West, Toronto, Ontario.

THE MOTION IS FOR an Order:

- (a) striking out the Notice of Application, without leave to amend; or
- (b) in the alternative, granting an extension of time to file responding affidavits; and
- (c) the costs of this motion.

THE GROUNDS FOR THE MOTION ARE:

- (a) the Applicant brings this application for judicial review on his own behalf;
- (b) on the application, he seeks to challenge the constitutionality of s. 36 of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulation (the "Regulation"), promulgated under the *Canadian Environmental Protection Act*;

- (c) the Applicant does not allege that he has been charged under s. 36 of the Regulation;
- (d) the Applicant lacks standing to bring this application;
- (e) the Applicant does not meet the criteria for public interest standing;
- (f) there is no administrative decision or action in this case to be judicially reviewed by this Court;
- (g) absent some form of administrative action, the Court cannot grant the relief the Applicant seeks;
- (h) s. 18.1 *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended;
- (i) such further and other grounds as counsel may advise and the Court may accept.

March 25, 2011



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Per: Michael J. Sims  
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Solicitor for the Respondents

- 3 -

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TO: Anthony Bratschitsch  
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Tel. (289) 260-1153

- Applicant

T-2112-10

004

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

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and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

Respondents

**MEMORANDUM OF FACT AND LAW OF THE RESPONDENTS  
(Motion returnable April 4, 2011)**

**OVERVIEW**

1. The respondents move for an order striking out the notice of application for judicial review, without leave to amend, on the bases that the applicant lacks the necessary standing to bring the application.
2. Furthermore, the applicant seeks to challenge the constitutional validity of a statutory provision, but does not take issue with any action.

3. His application is, therefore, bereft of any chance of success, and should be struck out as a result.

## **PART I – STATEMENT OF FACTS**

4. The applicant is a consultant working in the waste disposal industry.<sup>1</sup>

5. The applicant does not seek judicial review of any decision or other administrative action.

6. Rather, he brings this application to challenge the validity of s.36 of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations ("Section 36"),<sup>2</sup> promulgated under the *Canadian Environmental Protection Act, 1999* (the "Act").<sup>3</sup> That section requires that an importer or exporter of hazardous waste or recyclable material provide the Minister of the Environment with written confirmation that waste has been disposed of or recycled within 30 days of its disposal.

7. A contravention of any provision of the Act or the associated regulations is a criminal offence.<sup>4</sup>

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<sup>1</sup> Notice of Application, pg. 3, Respondents' Motion Record, Tab 3, pg. 22.

<sup>2</sup> Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations, SOR/2005-149, s. 36.

<sup>3</sup> *Canadian Environmental Protection Act, 1999*, 1999, c. 33. [CEPA]

<sup>4</sup> CEPA, s. 272.

8. The applicant challenges the validity of Section 36 on the following bases:

- Section 36 breaches the liberty guarantee in s. 7 of the *Charter*,<sup>5</sup>
- Section 36 is invalid because it does not comply with various international agreements on the trans-boundary movement of hazardous waste;<sup>6</sup> and
- Section 36 violates Canadians' expectations of "fair justice" by unfairly placing an inference of guilt on a person in some cases.<sup>7</sup>

9. The applicant seeks whatever relief the Court deems necessary pursuant to s. 24 of the *Charter*, as well as an order re-writing Section 36 or simply striking out the section.<sup>8</sup>

10. The applicant does not claim that his own rights are violated. Rather, the applicant makes reference in his notice of application to the prosecution of a company and its director for breaches of Section 36 in 2008.<sup>9</sup> The applicant himself was not charged. Nor does he claim to have been a director, officer or shareholder of the company at the time of the prosecution, or to have been personally affected in any way by the prosecution.

## PART II – POINTS IN ISSUE

11. The sole issue on this motion is whether the notice of application should be struck out, without leave to amend.

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<sup>5</sup> Notice of Application, pg. 7, Respondents' Motion Record, Tab 3, pg. 26.

<sup>6</sup> Notice of Application, pg. 8, Respondents' Motion Record, Tab 3, pg. 27.

<sup>7</sup> Notice of Application, pg. 11, Respondents' Motion Record, Tab 3, pg. 30.

<sup>8</sup> Notice of Application, pg. 6, Respondents' Motion Record, Tab 3, pg. 25.

12. The respondents submit that that question should be answered in the affirmative.

### **PART III – SUBMISSIONS**

13. The Court may dismiss an application for judicial review on a preliminary motion. However, given their summary nature, applications for judicial review should only be struck out in cases where the application is "so clearly improper as to be bereft of any possibility of success."<sup>10</sup>

14. Where the court has no jurisdiction, or where an applicant has no standing to bring an application, dismissal on a preliminary motion is appropriate.<sup>11</sup>

15. On a motion to strike a notice of application, the facts alleged in the pleading must be accepted as true. No affidavit evidence is admissible.<sup>12</sup>

#### **A. THE APPLICANT LACKS DIRECT INTEREST STANDING**

16. The applicant does not have standing to bring this application.

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<sup>9</sup> Notice of Application, pg. 4, Respondents' Motion Record, Tab 3, pg. 23.

<sup>10</sup> *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147 at para. 26, Respondents' Authorities, Tab 1. [*Amnesty International*]

<sup>11</sup> *Canwest Media Networks Inc. v. Canada (Minister of Health)*, 2007 FC 752 at para. 10, aff'd. 2007 FC 752, Respondents' Authorities, Tab 2.

<sup>12</sup> *Amnesty International*, *supra* at paras. 42-43, Respondents' Authorities, Tab 1.



17. The *Federal Courts Act* provides that an application for judicial review may be brought by anyone who is "directly affected" by the matter in which relief is sought.<sup>13</sup> The applicant does not meet that test.

18. To be directly affected by a decision or other administrative action, the decision must have affected a party's legal rights, imposed legal obligations upon it, or prejudicially affected it in some way.<sup>14</sup> The satisfaction of righting a wrong or upholding a principle does not constitute a personal or direct stake in the outcome of the litigation.<sup>15</sup>

19. The applicant is not directly affected by Section 36. He does not claim that his own s. 7 *Charter* rights have been violated.<sup>16</sup> He is not an importer or exporter of hazardous waste or recyclable material. Therefore, he is not (and does not claim to be) exposed to the jeopardy which he says the impugned section imposes on those exporting hazardous waste. He has not been prosecuted for a breach of Section 36, or of any other provision of the Act or regulations.

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<sup>13</sup> *Federal Courts Act*, R.S.C. 1985, c. F-7, as am., s. 18.1(1).

<sup>14</sup> *Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.)*, [1976] 2 F.C. 500 at para. 13 (C.A.), Respondents' Authorities, Tab 3 [*Rothmans*]; *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116 at para. 28, Respondents' Authorities, Tab 4.

<sup>15</sup> *League for Human Rights of B'nai Brith Canada v. Canada*, 2008 FC 732 at para. 25, aff'd. 2009 FCA 82, Respondents' Authorities, Tab 5.

<sup>16</sup> In his notice of application, Mr. Bratschitsch says, "Since at least one Canadian and at least one entity have already faced such prospects, which occurred without precedence, the applicant is applying to the court for remedies." Notice of Application, pg. 3, Respondents' Motion Record, Tab 3, pg. 22.

- 6 -

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20. Even if the applicant did face the possibility of prosecution, that would be insufficient to give him direct interest standing to challenge the constitutionality of Section 36. As Ehrcke J. held in *R. v. Ciarniello*,<sup>17</sup> a case in which a member of the Hell's Angels sought to challenge certain provisions of the *Criminal Code*:

A theoretical possibility of imprisonment under a penal statute is not, by itself, sufficient to establish private interest standing to challenge its constitutional validity. Everyone in Canada faces a theoretical possibility of imprisonment under the various charging sections of the *Criminal Code* if they do any of the things that those sections proscribe. If such a theoretical possibility of imprisonment were sufficient, then everyone would have private interest standing.

21. The applicant is simply an independent contractor in the waste disposal business. As such, he may have a commercial interest in the industry which is regulated by the Act; however, a mere commercial interest is insufficient to make a person "directly affected" for the purposes of s. 18.1 of the *Federal Courts Act*.<sup>18</sup>

22. The applicant effectively admits his lack of direct interest standing by seeking public interest standing in his notice of application.<sup>19</sup>

## **B. THE APPLICANT LACKS PUBLIC INTEREST STANDING**

23. The test for public interest standing was articulated by the Supreme Court in *Canadian Council of Churches v. Canada*.<sup>20</sup> The Court held

<sup>17</sup> *R. v. Ciarniello*, 2006 BCSC 1671 at para. 62, Respondents' Authorities, Tab 6.

<sup>18</sup> *Rothmans*, *supra* at paras. 12-16, Respondents' Authorities, Tab 3.

<sup>19</sup> Notice of Application, pg. 3, Respondents' Motion Record, Tab 3, pg. 22.

that, in determining whether to grant standing, the courts must give consideration to three aspects: First, is there a serious issue raised? Second, has it been established that the plaintiff is directly affected or, if not, does the plaintiff have a genuine interest in the issue? Third, is there another reasonable and effective way to bring the issue before the Court?

24. The heart of the test set out in *Canadian Council of Churches* is the third question, whether there is another reasonable and effective way to bring the issue before the courts. As Cory J. held in that case,<sup>21</sup>

The whole purpose of granting status is to prevent the immunization of legislation or public act from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant.

25. The applicant in this case does not meet the test for public interest standing, for the following reasons.

26. First, the applicant has not raised a serious issue on his application. In determining whether a serious issue exists, the Court must consider the overall strength of the applicant's claim.<sup>22</sup> In this case, the applicant cannot succeed because he does not seek judicial review of any decision or administrative action of a federal board, commission or other

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<sup>20</sup> *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236 at para. 37, Respondents' Authorities, Tab 7.

<sup>21</sup> *Ibid.* at para. 36.

<sup>22</sup> *Chauvin v. Canada*, 2009 FC 1202 at paras. 62, 64 (Proth.), Respondents' Authorities, Tab 8; *Amnesty International*, *supra* at paras. 42-43, Respondents' Authorities, Tab 1.

tribunal, which is a prerequisite for the Court's jurisdiction under s. 18.1 of the *Federal Courts Act*.<sup>23</sup>

27. Furthermore, the applicant seeks remedies that the Court cannot grant him:

- Section 24 of the *Charter* provides a remedy for unconstitutional acts taken by government actors pursuant to constitutionally valid authority. It does not provide a remedy to someone challenging the validity of legislation.<sup>24</sup>
- A remedy under s. 24 is only available to someone whose own rights have been infringed. No s. 24 remedy is available to a claimant who only asserts that another's *Charter* rights have been infringed.<sup>25</sup>
- The Court's powers on an application for judicial review are limited by s. 18.1(3) of the *Federal Courts Act*. It cannot rewrite or strike out portions of a statute.

28. Second, the applicant is not directly affected by Section 36; nor does he have a genuine interest in the section. As noted above, the applicant is not an importer or exporter of hazardous waste or recyclable material. He is not subject to Section 36. He does not claim to have suffered from its operation; he simply objects to the section. This Court recently held that

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<sup>23</sup> *Amnesty International*, *supra* at para. 69, Respondents' Authorities, Tab 1.

<sup>24</sup> *R. v. Ferguson*, [2008] 1 S.C.R. 96 at para. 61, Respondents' Authorities, Tab 9.

<sup>25</sup> *R. v. Edwards*, [1996] 1 S.C.R. 128 at paras. 54-55, Respondents' Authorities, Tab 10.

disdain for a particular law is insufficient to meet the direct or genuine interest branch of the public interest test.<sup>26</sup>

29. Nor is the applicant a public interest group, such as B'Nai Brith, Amnesty International or the Canadian Council of Churches, such that he has a demonstrated real and continuing interest in the operation of the impugned legislation.

30. Finally, Section 36 is not immune from challenge. A contravention of Section 36 is a criminal offence.<sup>27</sup> Any person or corporation charged under the section may raise the issue of its constitutional validity at their trial, on the basis of a full factual record. As Cory J. held in *Canadian Council of Churches*,<sup>28</sup> where a measure will likely be subject to attack by a private litigant, granting public interest standing to a third party is not required.

### C. NO DECISION TO REVIEW IN THIS CASE

31. The applicant brings this application in order to challenge the constitutionality of Section 36. He does not take issue with any decision or other administrative action.

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<sup>26</sup> *Chauvin*, *supra* at para. 68, Respondents' Authorities, Tab 8.

<sup>27</sup> *CEPA*, s. 272(2).

<sup>28</sup> *Canadian Council of Churches*, *supra* at para. 36, Respondents' Authorities, Tab 7.

32. As the Supreme Court recently noted in *Canada v. Telezone Inc.*,<sup>29</sup> the availability of judicial review as a process depends on the existence of some form of administrative action:

Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance.

The focus of judicial review is to quash invalid government decisions — or require government to act or prohibit it from acting...

33. While the courts have interpreted the term "matter" in s. 18.1(1) of the *Federal Courts Act* broadly, some form of administrative action is necessary before the Court's jurisdiction on an application for judicial review is engaged.<sup>30</sup>

34. While an applicant may challenge the *vires* of a regulation by way of application for judicial review,<sup>31</sup> and the Court may consider the constitutionality of a statute in weighing the lawfulness of an administrative decision,<sup>32</sup> the *Federal Courts Act* does not provide for a free-standing constitutional challenge by way of judicial review.

<sup>29</sup> *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at paras. 24, 26, Respondents' Authorities, Tab 11.

<sup>30</sup> *Amnesty International*, *supra* at para. 69, Respondents' Authorities, Tab 1.

<sup>31</sup> *Canadian Council for Refugees v. Canada*, [2009] F.C.R. 136 at paras. 52-54 (C.A.), Respondents' Authorities, Tab 12.

<sup>32</sup> *Gwala v. Canada (Minister of Citizenship and Immigration)*, [1999] 3 F.C. 404 at para. 4 (C.A.), Respondents' Authorities, Tab 13; *Moktari v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 341 at para. 4, Respondents' Authorities, Tab 14.

- 11 -

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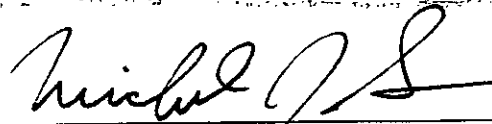
35. The applicant's application must therefore fail, as it is "so clearly improper as to be bereft of any possibility of success."

#### **PART IV – ORDER SOUGHT**

36. The respondents respectfully request an Order striking out the notice of application, and granting them their costs of this motion.

#### **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at Toronto this March 29, 2011.



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Of Counsel for the Respondents

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

AND TO: Anthony Bratschitsch  
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## PART V – LIST OF AUTHORITIES

1. *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147
2. *Canwest Media Networks Inc. v. Canada (Minister of Health)*, 2007 FC 752, aff'd. 2007 FC 752
3. *Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.)*, [1976] 2 F.C. 500 (C.A.)
4. *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116
5. *League for Human Rights of B'Nai Brith Canada v. Canada*, 2008 FC 732, aff'd. 2009 FCA 116
6. *R. v. Ciarniello*, 2006 BCSC 1671
7. *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236
8. *Chauvin v. Canada*, 2009 FC 1202
9. *R. v. Ferguson*, [2008] 1 S.C.R. 96
10. *R. v. Edwards*, [1996] 1 S.C.R. 128
11. *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62
12. *Canadian Council for Refugees v. Canada*, [2009] F.C.R. 136 (C.A.)
13. *Gwala v. Canada (Minister of Citizenship and Immigration)*, [1999] 3 F.C. 404 (C.A.)
14. *Moktari v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 341



## APPENDIX A - STATUTES AND REGULATIONS

*Canadian Environmental Protection Act, 1999, 1999, c. 33 / Loi canadienne sur la protection de l'environnement (1999), 1999, ch. 33*

272. (1) Every person commits an offence who contravenes

- (a) a provision of this Act or the regulations;
- (b) an obligation or a prohibition arising from this Act or the regulations;
- (c) an order or a direction made under this Act;
- (d) an order, direction or decision of a court made under this Act; or
- (e) an agreement respecting environmental protection alternative measures within the meaning of section 295.

(2) Every person who commits an offence under subsection (1) is liable

- (a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both; and
- (b) on summary conviction, to a fine of not more than \$300,000 or to imprisonment for a term of not more than six months, or to both.

272. (1) Commet une infraction quiconque contrevient :

- a) à la présente loi ou à ses règlements;
- b) à toute obligation ou interdiction découlant de la présente loi ou de ses règlements;
- c) à tout ordre donné — ou arrêté pris — en application de la présente loi;
- d) à une ordonnance judiciaire rendue en application de la présente loi;
- e) à l'accord visé à l'article 295.

(2) L'auteur de l'infraction encourt, sur déclaration de culpabilité :

- a) par mise en accusation, une amende maximale d'un million de dollars et un emprisonnement maximal de trois ans, ou l'une de ces peines;
- b) par procédure sommaire, une amende maximale de trois cent mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines.

**Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations, SOR/2005-149 / Règlement sur l'exportation et l'importation de déchets dangereux et de matières recyclables dangereuses, DORS/2005-149**

36. (1) Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled

(a) in accordance with the export or import permit;

(b) in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and

(c) within the period referred to in paragraph 9(o) or 16(n).

(2) The exporter or importer must include the movement document reference number and line item number for the applicable hazardous waste or hazardous recyclable material referred to in subsection (1) in the confirmation.

(3) The exporter or importer must keep a copy of the confirmation at their principal place of business in Canada for a period of three years after the day on which it is submitted to the Minister.

~~36. (1) Dans les trente jours suivant l'élimination des déchets dangereux ou le recyclage des matières recyclables dangereuses, l'exportateur ou l'importateur présente au ministre une déclaration écrite, signée et datée attestant que l'élimination ou le recyclage a été effectué :~~

a) conformément au permis;

b) d'une manière qui garantit la protection de l'environnement et de la santé humaine contre les effets nuisibles que les déchets ou les matières peuvent avoir;

c) dans le délai visé aux alinéas 9o) ou 16n).

(2) L'exportateur ou l'importateur indique sur la déclaration le numéro de référence du document de mouvement et le numéro de la ligne dans le permis d'exportation ou d'importation où sont inscrits les déchets dangereux ou les matières recyclables dangereuses.

(3) L'exportateur ou l'importateur conserve une copie de la déclaration à son principal établissement au Canada pendant la période de trois ans suivant la date de la présentation de la déclaration au ministre.

**Federal Courts Act, R.S.C., 1985, c. F-7, as am. / Loi sur les Cours  
fédérales, L.R.C., 1985, ch. F-7**

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut,

party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

avant ou après l'expiration de ces trente jours, fixer ou accorder.

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

- 17 -

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(f) acted in any other way that was  
contrary to law.

...

e) a agi ou omis d'agir en raison  
d'une fraude ou de faux  
témoignages;

f) a agi de toute autre façon  
contraire à la loi.

...

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FORM 301- Rule 301

**NOTICE OF APPLICATION**

Federal Court of Canada

Between:

Anthony Bratschitsch

Applicant

And

The Attorney General of Canada and The Chief Enforcement Officer,  
Environmental Enforcement, Environment Canada

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on page 6.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

022

Date: DEC 20 2010

Issued by: ABIGAIL GRIMUS  
REGISTRY OFFICER  
AGENT DU GREFFE  
(Registry Officer)

Address of local office: 180 Queen Street West 180, rue Queen Ouest  
Suite 200 Bureau 200  
Toronto, Ontario Toronto, Ontario  
M5V 3L6 M5V 3L6

TO:

The Chief Enforcement Officer  
Environmental Enforcement  
National Enforcement Headquarters  
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Gatineau, Quebec  
K1A 0H3

The Attorney General of Canada  
Department of Justice  
284 Wellington St.  
Ottawa, ON  
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023

3

## APPLICATION

This is an application for judicial review in respect of:

The Canadian Environmental Protection Act, 1999 and Environmental  
Enforcement, Environment Canada

The applicant, Anthony Bratschitsch, requests the judicial review of the validity of Section 36 (herein after referred to as the "Section 36") of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations (herein after referred to as the "EIHWHRMR") under the Canadian Environmental Protection Act, 1999 (herein after referred to as the "CEPA 1999").

This is a matter that consists of the prospect of persons in Canada facing the possibilities of imprisonment due to circumstances beyond their control and occurring outside Canada.

This matter also applies to Canadian entities, i.e. commercial, institutional, etc. (herein after referred to as the "entity"), facing other forms of punishment under the same circumstances.

Since at least one Canadian and at least one entity have already faced such prospects, which occurred without precedence, the applicant is applying to the court for remedies. \*

The applicant seeks public interest standing as established by the Supreme Court of Canada in cases such as *Chaouilli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 and *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147 in that:

1. The issue raises serious legal questions;
2. The applicant has a genuine interest as a citizen in the resolution of the questions; and
3. That there is no other reasonable and effective means in which the questions may be brought to court.

The applicant is a Canadian citizen employed as a consultant in the industry affected by Section 36.

The applicant makes a reference to *R v. RPR ENVIRONMENTAL INC. AND PATRICK WHITTY* (Ontario Court of Justice) in which the Enforcement Branch of Environment Canada (herein after referred to as the "ECE") laid 63 counts of charges in 2008 involving summary conviction against the Canadian exporter of hazardous wastes and a company director, Patrick Whitty.

*Deadline for summary conviction  
charges passed in 2010.*



The ECE charges were based on that the RPR ENVIRONMENTAL INC. (herein referred to as the "Company") did not obtain "confirmations", i.e. "Certificates of Destruction" (herein referred to as the "Certificates"), within the time period prescribed by provisions of Section 36.

All of the Certificates described in the charges were to be drawn from authorized disposal facilities in the United States.

However, there are circumstances in the United States, such as facility closures, inefficiencies or apathy that may restrict or prevent the issuance or release of the Certificates.

American law or regulations or any relevant international agreement between Canada and the USA does not require the Certificates.

In this case, a Canadian citizen, Patrick Whitty, residing within Canada did suffer from the threat of the loss of liberty during a twelve-month period by the actions of a Canadian government body, ECE.

As well, the Company faced punitive penalties.

The applicant does not know if this occurrence has since been repeated elsewhere in Canada because a search in Environment Canada's registry did not reveal similar cases and also because requests for information through the Access to Information Act are still in process.

The below items are relevant to this matter:

1. Section 36. (1) of "EIHWHRMR" states:

*"Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled*

*(a) in accordance with the export or import permit;*

*(b) in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and*

*(c) Within the period referred to in paragraph 9(o) or 16(n)."*

(Note: the word "confirmation" in the fifth line of above Item 1 has been described in this document as a "Certificate of Destruction" )

2. Section 9. (a) of "EIHWHRMR" states:  
*"In the case of operation D13, D14, or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the authorities of the jurisdiction in which the authorized facility is located require shorter time periods, in which case those time periods apply"*
3. Section 185(1) of "CEPA 1999" states:  
*"No person shall import, export or convey in transit a hazardous waste or hazardous recyclable material, or prescribed non-hazardous waste for final disposal, except*
  - (a) after notifying the Minister and paying the prescribed fee;*
  - (b) after receiving from the Minister which-ever one of the following permits is applicable:*
    - i. an import or export permit that, except in a case of a permit issued under subsection (4), states that the authorities of the country of destination and, if applicable, of the country of transit have authorized the movement, and that the authorities of the jurisdiction of destination have authorized the final disposal or recycling of the waste or material, or*
    - ii. a transit permit that states the Minister has authorized the movement; and*
    - iii. In accordance with the prescribed conditions."*
4. Section 272. (1) of "CEPA 1999" states:  
*"Every person commits an offence who contravenes*
  - (a) a provision of the Act or the regulations*
  - (b) an obligation or a prohibition arising from the Act or the regulations"*
5. Section 272. (2) of "CEPA 1999" states:  
*"Every person who commits an offence under subsection (1) is liable*
  - (a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both; and*
  - (b) on summary conviction, to a fine of not more than \$300,000 or to imprisonment for a term of not more than six months, or to both."*

026

6. Section 280(1) of "CEPA 1999" states:  
*"Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted."*
7. Section 280.1(1) of "CEPA 1999" states:  
*"Every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with*
  - (a) this Act and the regulations; and*
  - (b) orders and directions of, and prohibitions and requirements imposed by, the Minister and enforcement officers and review officers"*
8. Canada is a signatory to the following international agreements governing the transboundary movement of hazardous waste:
  - (a) The United Nations Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1992);
  - (b) The Organization for Cooperation and Economic Development (OECD) Council Decision concerning the control of Transfrontier movements of wastes destined for recovery operations (revised 2001);
  - (c) The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992 (herein after referred to as the "Bilateral Agreement").

### The applicant makes application for:

The applicant requests relief from the court as it deems necessary under the Canadian Charter of Rights and Freedoms (herein after referred to as the "Charter"), as per:

**24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.**

The applicant also requests a remedy that, within Section 36 of the EIHWHRM under CEPA 1999, the phrase "**exporter or importer**" be removed and that the words "**authorized facility of disposal or recycling**" be added in its place or, simply, that Section 36 be struck in its entirety from EIHWHRM.

### The grounds for the application are:

The applicant submits that the standard of review is based on correctness concerning questions of law and questions of jurisdiction (*Dunsmuir v. New Brunswick*, 2008 SCC 9, paragraph 50).

Concerning the request for a judicial review for potential matters of the same nature, the applicant cites *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147, paragraph 69:

"Moreover, the absence of a "decision" is not an absolute bar to an application for judicial review under the *Federal Courts Act*, and the role of the court has been found to extend beyond the review of formal decisions, and to include the review of a "diverse range of administrative action that does not amount to a 'decision or order' ..."

The applicant argues that:

#### A) Section 36 has the effect of violating a person's right to liberty as guaranteed under Section 7 of the "Charter"

If an American disposal facility, authorized to receive and dispose hazardous wastes from a Canadian exporter, is not able to, or chooses not to supply a Certificate of Destruction within the prescribed time period of Section 36 to the Canadian exporter, that same American facility has not violated any domestic law or international regulation that it is bound to.

Yet, in the case of the above, the provisions within Section 36 would place a Canadian exporter and any of its directors in the position of committing an offence under Sections 272(1), 272(2), 280(1) and 280.1(1) of CEPA 1999 which provide for the possibility of imprisonment.

Section 36 unfairly places the exporter and directors at fault for failing to submit the Certificates even though the exporter and directors have no provenance or Chain of Custody with those documents.

Canadian directors would then be subjected to the threat of their rights to liberty of persons as guaranteed by Section 7 of the "Charter".

B) Section 36 is not valid due to jurisdictional issues:

Extraterritorial jurisdiction is governed by international law, rather than being at the absolute discretion of individual states and that jurisdiction "*cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention*", see *R. v. Hape* SCC 26 (para. 65).

Therefore, Section 36 is invalid because it is not provided for and does not comply with the principles of the three relevant international agreements concerning the transboundary movement of hazardous waste.

The "Bilateral Agreement" which is used to bridge the other two international agreements, stipulates:

Article 2- General Obligation:

*"The parties shall permit the export, import, and transit of hazardous waste and other waste across their common border for treatment, storage, or disposal pursuant to the terms of their **domestic laws, regulations and administrative practices**, and the provisions of this agreement."*

The issuance of Certificates by an authorized American facility is not pursuant to any American domestic rules and the facility is not compelled to produce them.

Furthermore, if the American facility does not provide a Certificate to the Canadian exporter for whatever reason, that means that the Canadian exporter has never been involved in the Chain of Custody of the Certificate – a document that the Canadian exporter is not capable of authoring.

In fact, there is no standard form for Certificates under Section 36. EIHWHMR or CEPA 1999.

Yet, Section 36 creates a situation where a company and its directors can be held liable for not obtaining a foreign document, whether it exists or not, outside of its Chain of Custody.

In such cases, there is an absence of mens rea by the exporter and its directors to commit an offence while, at the same time, there is also an absence of actus reus by the only possible authors of the Certificates – the American facilities.

Therefore, Section 36 deems that a serious violation worthy of penal punishment has been committed outside of domestic laws and international agreements.

Furthermore, the requirement for Certificates from authorized American facilities is not necessary to achieve the objectives and principles of the three international agreements governing the transboundary shipment of hazardous wastes.

The reason for this is that one of the major components of the three international agreements is the "prior informed consent regime" (PIC).

For many years, the PIC has been very effective in achieving the principles of the three international agreements.

Under CEPA 1999 and EIHWHRMR, a Canadian export notice needs to be completed by the exporter and to be submitted to Environment Canada.

Once the notice has been reviewed, as well as meeting the contract and insurance requirements, the notice is forwarded to the competent American authority for their consent.

In this case, no permit will be issued until the American authority has authorized the movement and has confirmed that the final disposal of the hazardous waste is authorized.

The PIC is an effective, time-tested process that has not required Certificates of Destruction before and is not recognized and used by the Americans now.

Therefore, there would be no loss of effect to protecting human health or the environment by applying the requested remedies.

The "Bilateral Agreement" also states:

Article 5 – Cooperative Efforts:

1. *The parties will cooperate to ensure, to the extent possible, that all transboundary shipments of hazardous waste and other waste comply with the **manifest requirements** of both countries.*
2. *The parties will cooperate in monitoring and spot-checking transboundary shipments of hazardous waste and other waste to ensure, to the extent possible, that such shipments conform to the requirements of the applicable legislation and of this Agreement.*
3. *To the extent any implementing laws and regulations are necessary to comply with this Agreement, the parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the Parties will make best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The Parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such laws and regulations."*

Certificates are not a "manifest requirement" under CEPA 1999 or EIHWHRM and, therefore, are not a requirement for any of the three relevant international agreements including the "Bilateral Agreement".

Should the remedy of replacing the phrase "**exporter or importer**" within Section 36. (1) of EIHWHRM with the words "authorized facility of disposal or recycling", the Canadian party to the "Bilateral Agreement" would have to comply with Article 5, section 3 (above).

The "Bilateral Agreement" also states:

Article 7 – Enforcement:

*"The Parties shall ensure, to the extent possible, that within their respective jurisdictions, their domestic laws and regulations are enforced with respect to the transportation, storage, treatment and disposal of transboundary shipments of hazardous waste and other waste."*

The applicant contends that it is sufficient that the Americans apply their own enforcement of their local laws and their obligations under the three international agreements without the need of the intrusion of the provisions of Section 36.

C) Section 36 violates Canadians' expectations of fair justice

In *R. v. Gibbons*, 2003 ABPC 114, the court reiterated the legal concept of reasonable doubt (paragraph 20) namely,

- (i) *the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;*
- (ii) *the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;*
- (iii) *a reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense;*
- (iv) *it is logically connected to the evidence or absence of evidence,*
- (v) *it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and*
- (vi) *more is required than proof that the accused is probably guilty (emphasis added)*

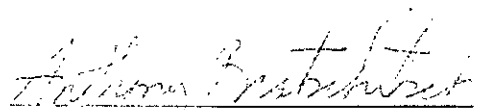
The application of Section 36 clearly places an inference of guilt onto an exporter and a person in Canada when an American facility does not provide a Certificate for whatever the reason.

This is not fair.

This application will be supported by the following material:

1. Canada Gazette Part II, Volume 139, No. 11: Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations
2. The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992

December 19, 2010

  
(Signature of applicant)

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SOR/2004-283, ss. 35 and 38



Michael J. Sims

T-2112-10

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**ANTHONY BRATSCHITSCH**

Applicant

Date MAR 30 2011  
Registrar [Signature]  
Greffier [Signature]

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

Respondents

**RESPONDENTS' MOTION RECORD**  
(Motion returnable April 4, 2011)

**BOOK OF AUTHORITIES**

March 29, 2011

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AND TO: **Anthony Bratschitsch**  
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Applicant

## TABLE OF CONTENTS

1. *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147
2. *Canwest Media Networks Inc. v. Canada (Minister of Health)*, 2007 FC 752, aff'd. 2007 FC 752
3. *Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.)*, [1976] 2 F.C. 500 (C.A.)
4. *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116
5. *League for Human Rights of B'Nai Brith Canada v. Canada*, 2008 FC 732, aff'd. 2009 FCA 116
6. *R. v. Ciarniello*, 2006 BCSC 1671
7. *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236
8. *Chauvin v. Canada*, 2009 FC 1202
9. *R. v. Ferguson*, [2008] 1 S.C.R. 96
10. *R. v. Edwards*, [1996] 1 S.C.R. 128
11. *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62
12. *Canadian Council for Refugees v. Canada*, [2009] F.C.R. 136 (C.A.)
13. *Gwala v. Canada (Minister of Citizenship and Immigration)*, [1999] 3 F.C. 404 (C.A.)
14. *Moktari v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 341

*Case Name:*

**Amnesty International Canada v. Canada (Canadian Forces)**

**Between**

**Amnesty International Canada and British Columbia Civil  
Liberties Association, Applicants, and  
Chief of the Defence Staff, for the Canadian Forces,  
Minister of National Defence and Attorney General of  
Canada, Respondents**

[2007] F.C.J. No. 1460

[2007] A.C.F. no 1460

2007 FC 1147

287 D.L.R. (4th) 35

161 A.C.W.S. (3d) 665

162 C.R.R. (2d) 308

320 F.T.R. 236

73 Admin. L.R. (4th) 206

2007 CarswellNat 3688

Docket T-324-07

Federal Court  
Ottawa, Ontario

**Mactavish J.**

Heard: October 17 and 18, 2007.

Judgment: November 5, 2007.

(149 paras.)

*Administrative law -- Judicial review and statutory appeal -- Jurisdiction of court to review -- When available -- Bodies subject to review -- Motion by Chief of Defence Staff, Minister of National Defence and the Attorney General of Canada to strike applicants' Notice of Application dismissed -- Applicants, Amnesty International and the British Columbia Civil Liberties Association, applied for judicial review with respect to "actions or potential actions" of the Canadian Forces in the Islamic Republic of Afghanistan with respect to detainees held by the Canadian Forces and the transfer of those individuals to Afghan authorities -- Applicants granted public interest standing -- Application for judicial review was not bereft of any chance of success.*

*Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Life, liberty and security of person -- Principles of fundamental justice -- Scope of application -- Entities subject to Charter -- Persons protected by Charter -- Motion by Chief of Defence Staff, Minister of National Defence and the Attorney General of Canada to strike applicants' Notice of Application dismissed -- Applicants, Amnesty International and the British Columbia Civil Liberties Association, applied for judicial review with respect to "actions or potential actions" of the Canadian Forces in the Islamic Republic of Afghanistan with respect to detainees held by the Canadian Forces and the transfer of those individuals to Afghan authorities -- Applicants granted public interest standing -- Application for judicial review was not bereft of any chance of success.*

Motion by the respondents, Chief of Defence Staff for the Canadian Forces, the Minister of National Defence and the Attorney General of Canada, for an order striking the applicants' Notice of Application. The applicants, Amnesty International and the British Columbia Civil Liberties Association, applied for judicial review with respect to "actions or potential actions" of the Canadian Forces in the Islamic Republic of Afghanistan. Specifically, the application sought to review the conduct of the Canadian Forces with respect to detainees held by the Canadian Forces in Afghanistan, and the transfer of those individuals to Afghan authorities. The Notice of Application asserted that an arrangement entitled "Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan" (the "first Arrangement") did not provide adequate safeguards to ensure that detainees transferred by Canadian Forces to Afghan Forces would not be tortured by Afghan authorities. The Notice of Application further asserted that there were substantial grounds to believe that Afghan Forces were torturing detainees, and the United States of America - "a likely third country to which detainees may be transferred" - was engaging in "cruel, degrading and inhuman treatment of detainees". Finally, the Notice of Application stated that Canadian Forces continued to capture and detain individuals in Afghanistan, and to transfer those individuals to Afghan authorities, without providing detainees with access to counsel before being transferred out of Canadian custody. The respondents asserted that the applicants did not have standing to advance the issues identified in the Notice of Application. They further argued that the application had no chance of success.

HELD: Motion dismissed. The applicants were to be granted public interest standing. While a number of the issues raised by the case were novel, it could not be said that they were clearly bereft of any chance of success. It was acknowledged by all parties that the applicants did not have any "direct" interest in the issues raised by the application for judicial review. The applicants satisfied the three criteria that had to be met in order to be granted public interest standing. The action raised a serious legal question. The respondents conceded that the applicants had a genuine interest in the resolution of the questions raised by the application. Given the state of affairs within Afghanistan,

there was no other reasonable and effective manner in which the questions raised by the application might be brought to court. It was unreasonable to expect that individuals directly affected by the actions of the Canadian Forces would be able to initiate their own legal proceedings in Canada. With respect to the merits of the application for judicial review, the court was satisfied that the application was directed not just to the First Arrangement, but also to the policy or practice of denying detainees access to counsel, and transferring them to the custody of Afghan authorities, where they face a substantial risk of torture. As the policy or practice was ongoing, the court was not persuaded that the application for judicial review was bereft of any chance of success on the basis that it was out of time. It could not be concluded that the application for judicial review was bereft of any possibility of success on the basis of the respondents' argument that the Charter did not apply in extra-territorial jurisdictions. The case involved a novel factual context that had not yet been considered by the courts.

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982,

Federal Courts Act, R.S., 1985, c. F-7, s. 18.1

**Counsel:**

Paul Champ and Amir Attaran, for the Applicants.

J. Sanderson Graham and R. Jeff Anderson, for the Respondents.

---

**REASONS FOR JUDGMENT AND JUDGMENT**

**1 MACTAVISH J.:**-- Amnesty International Canada and the British Columbia Civil Liberties Association ("the applicants") have brought an application for judicial review with respect to "actions or potential actions" of the Canadian Forces deployed in the Islamic Republic of Afghanistan. Specifically, the application seeks to review the conduct of the Canadian Forces with respect to detainees held by the Canadian Forces in Afghanistan, and the transfer of these individuals to Afghan authorities.

**2** The Chief of the Defence Staff for the Canadian Forces, the Minister of National Defence and the Attorney General of Canada ("the respondents") now seek an order striking the applicants' Notice of Application. The respondents assert that the applicants do not have standing to advance the issues identified in the Notice of Application. The respondents further contend that the application is bereft of any chance of success.

**3** For the reasons that follow, I am satisfied that the applicants should be granted public interest standing in this case. I am further satisfied that while a number of the issues raised by this case are novel, I cannot say that they are clearly bereft of any chance of success. As a consequence, the motion to strike will be dismissed.

**Background**

4 There is an issue as to the extent to which evidence may be led on a motion such as this. While I will discuss this question further on in this decision, I do not understand there to be any dispute between the parties as to the following background facts relating to this application for judicial review.

5 Canadian Forces personnel are currently deployed in Afghanistan, both as part of the multinational International Security and Assistance Force ("ISAF"), and as part of the American-led "Operation Enduring Freedom" ("OEF").

6 On December 19, 2005, the Afghan Minister of Defence and the Chief of the Defence Staff for the Canadian Forces, General Rick Hillier, signed an agreement entitled "*Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan*" (the "first Arrangement"). The first Arrangement was meant to establish procedures to be followed in the event that a detainee was transferred from the custody of the Canadian Forces to a detention facility operated by Afghan authorities.

7 On February 1, 2007, the applicants filed a Notice of Application for Judicial Review "in respect of actions or potential actions of Canadian Forces deployed in the Islamic Republic of Afghanistan." Amongst other relief requested in the Notice of Application, the applicants sought to prohibit further transfers of detainees until adequate safeguards were put in place. To this end, the applicants also sought an interim injunction restraining the transfer of detainees until the hearing of the application for judicial review.

8 On May 3, 2007, the day before the applicants' motion for an interim injunction was to be heard, Canada and Afghanistan concluded a second Arrangement governing the transfer of detainees held by the Canadian Forces (the "second Arrangement"). This Arrangement states that it supplements the first arrangement, which continues to remain in effect.

9 The second Arrangement provides that members of the Afghanistan Independent Human Rights Commission and Canadian Government personnel have access to persons transferred from Canadian to Afghan custody. The second Arrangement also requires that approval be given by Canadian officials before any detainee who had previously been transferred from Canadian to Afghan custody is transferred on to a third country.

10 As a result of the negotiation of the second Arrangement, the applicants' motion for an interim injunction was adjourned *sine die*.

11 In the meantime, the respondents had filed their motion to strike out the applicants' Notice of Application. It is this motion that forms the subject matter of this decision.

### **The Notice of Application**

12 In order to address the respondents' motion to strike, it is first necessary to understand the facts asserted in, as well as the issues raised by the applicants' Notice of Application.

13 The Notice of Application asserts that the first Arrangement does not provide adequate safeguards to ensure that detainees transferred by Canadian Forces to Afghan Forces will not be tortured by the Afghan authorities.

14 The Notice of Application further asserts that there are substantial grounds to believe that Afghan Forces are torturing detainees, and that the United States of America - "a likely third country to which detainees may be transferred" - is engaging in "cruel, degrading and inhuman treatment of

detainees", contrary to the assurances that the American government has given to other governments.

15 Finally, the Notice of Application states that the Canadian Forces continue to capture and detain individuals in Afghanistan, and to transfer these individuals into the custody of Afghan authorities, without providing the detainees with access to counsel before being transferred out of Canadian custody.

16 According to the Notice of Application, Canada's international obligations, including the *Convention Against Torture*, and the *Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment* obligate Canada to protect individuals from torture and other forms of cruel, degrading and inhuman treatment.

17 By way of relief, the applicants seek a declaration that the first Arrangement violates sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, as it provides for the transfer of detainees to the custody of other countries without adequate substantive and procedural safeguards against a substantial risk of torture.

18 The applicants further ask for a writ of prohibition preventing further transfers of detainees to the custody of other countries without the creation of adequate substantive and procedural safeguards to protect against the risk of torture. The applicants also seek a writ of *mandamus* requiring that a formal inquiry be held into the condition of all detainees transferred from Canadian custody, and that all detaining countries return the individuals in question to the custody of Canada.

19 As grounds for the Application, the applicants assert, amongst other things, that the Canadian *Charter of Rights and Freedoms* applies to the actions of the Canadian Forces in Afghanistan.

20 The applicants further state that individuals detained by the Canadian Forces have the right to counsel pursuant to subsection 10(b) of the *Charter*. In addition, the applicants say that sections 7 and 12 of the *Charter* mandate that the Canadian Forces may not take actions that place individuals at risk of torture or death.

21 Finally, the applicants seek relief under subsection 24(1) of the *Charter* and section 18.1 of the *Federal Courts Act*.

### **Legal Principles Governing Motions to Strike**

22 Applications for judicial review are intended to be summary proceedings, and motions to strike Notices of Application add greatly to the cost and time required to deal with such matters.

23 Moreover, as the Federal Court of Appeal observed in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1994] F.C.J. No. 1629, the striking out process is more feasible in actions than in applications for judicial review. This is because there are numerous rules governing actions which require precise pleadings as to the nature of the claim or the defence, and the facts upon which the claim is based. There are no comparable rules governing Notices of Application for Judicial Review.

24 As a consequence, the Federal Court of Appeal has observed that it is far more risky for a court to strike out a Notice of Application for Judicial Review than a conventional pleading. Moreover, different economic considerations come into play in relation to applications for judicial review as opposed to actions. That is, applications for judicial review do not involve examinations for dis-



covery and a trial - matters which can be avoided in actions by a decision to strike: *David Bull*, at para. 10.

25 In contrast, the full hearing of an Application for Judicial Review proceeds in much the same way that a motion to strike the Notice of Application would proceed, namely on the basis of affidavit evidence and argument before a judge of this Court.

26 As a result, the Federal Court of Appeal determined that applications for judicial review should not be struck out prior to a hearing on the merits of the application, unless the application is "so clearly improper as to be bereft of any possibility of success".

27 The Federal Court of Appeal further teaches that "Such cases must be very exceptional and cannot include cases ... where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion": *David Bull*, at para. 15.

28 Unless a moving party can meet this very stringent standard, the "direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself." (*David Bull*, at para. 10. See also *Addison & Leyen Ltd. v. Canada*, [2006] F.C.J. No. 489, 2006 FCA 107, at para. 5, rev'd on other grounds [2007] S.C.J. No. 33, 2007 SCC 33).

29 The reason why the test is so strict is that it is ordinarily more efficient for the Court to deal with a preliminary argument at the hearing of the application for judicial review itself, rather than as a preliminary motion: see the comments of the Federal Court of Appeal in *Addison & Leyen*, at para. 5.

30 By analogy to the process prescribed in the *Federal Courts Rules* with respect to the striking out of statements of claim, as a general rule, no evidence may be led on a motion to strike a Notice of Application. In addition, the facts asserted by the applicant in the Notice of Application must be presumed to be true: *Addison & Leyen Ltd. et al.*, above, at para. 6.

31 However, the Court is not obliged to accept as true allegations that are based upon assumptions and speculation. Nor is the Court obliged to accept as true allegations that are incapable of proof: see *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, at para. 27.

32 There is an exception to the general principle that no evidence may be led on a motion such as this. That is, where the jurisdiction of the Court is contested, the Court must be satisfied that there are jurisdictional facts or allegations of such facts supporting the attribution of jurisdiction: see *MIL Davie Inc. v. Hibernia Management & Development Co.* (1998), 226 N.R. 369.

33 Finally, in deciding whether an Application for Judicial Review should be struck as bereft of any possibility of success, the Notice of Application should be read as generously as possible, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the document: see *Operation Dismantle*, at para. 14.

### Standing

34 The first reason why the respondents say that the applicants' Notice of Application should be struck out is that the applicants lack the requisite standing to bring the application.

35 The applicants and the respondents agree that there is sufficient information before the Court to allow for a final determination on the issue of standing to be made, and both sides ask that such a determination be made at this time. The parties also agree that while the burden of demonstrating

that the applicants lack standing is on the respondents on a motion to strike, it is the applicants who bear the ultimate burden of demonstrating that they are entitled to standing.

36 In *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, the Supreme Court of Canada considered whether the issue of standing could be decided in the context of a motion to strike. In this regard, the Supreme Court observed that it may be preferable to have all the issues in a case, including questions of standing, decided at the same time. That said, the Court went on to note that it is a matter of judicial discretion, having regard to the particular circumstances of a case, whether the question of standing should be determined with final effect as a preliminary matter, or to reserve it for consideration on the merits: *Finlay*, at page 616.

37 In this case, I am satisfied that the record before me is sufficient to allow me to make a final determination in relation to the issue of standing, and that it is in the interests of justice that I do so.

38 Subsection 18.1(1) of the *Federal Courts Act* allows for an application for judicial review to be brought by anyone "directly affected" by the matter in respect of which relief is sought. All of the parties agree that the applicants are not directly affected by the conduct of the Canadian Forces in Afghanistan. However, the applicants submit that they satisfy the criteria to be granted public interest standing to allow them to pursue this matter.

39 There is also no dispute between the parties as to the criteria that must be satisfied in order to establish a basis for public interest standing. In cases such as *Chaouilli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, and *Finlay v. Canada (Minister of Finance)*, previously cited, the Supreme Court of Canada has recognized that courts have the discretion to grant standing to litigants who have no personal interest in an issue of constitutional or public law where the litigants in question can establish that:

1. The action raises a serious legal question;
2. The party seeking standing has a genuine interest in the resolution of the question; and
3. There is no other reasonable and effective manner in which the question may be brought to court.

40 In this case, the respondents concede that the applicants meet the second branch of the tripartite test: that is, that they have a genuine interest in the resolution of the questions raised by the application. However, the respondents submit that the application does not raise a serious issue, and that there are other reasonable and effective ways in which these issues may be brought before the Court.

41 Insofar as the serious issue component of the test is concerned, the respondents submit that the determination of the existence of whether an application raises a serious issue requires an inquiry not only into the importance of the issue, but also into the likelihood of the matter being resolved in favour of the applicants.

42 In this regard, the respondents point to the decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211, at paras. 38-39, where Justice Evans observed that in deciding whether public interest standing should be granted in a given case, the Court should not probe more

deeply into the issues other than to assess whether, on the basis of the materials before the Court, an applicant has "a fairly arguable case or, putting it the other way, has no reasonable cause of action".

43 As Justice Evans observed, having regard to the discretionary nature of public interest standing, it is necessary to determine whether an application raises a fairly arguable case in order to ensure that scarce public resources are not squandered, and other litigants are not subjected to further delay: *Sierra Club*, at para. 38.

44 I will review each of the respondents' arguments as to what they say the problems are with the applicants' case in my consideration of whether the application is bereft of any chance of success. Suffice it to say at this juncture that the applicants have satisfied me that the application raises one or more serious issues and that the applicants have a fairly arguable case.

45 As to whether there is any other reasonable and effective way in which the questions raised by this application may be brought to court, the respondents say that it is always open to the individuals in Afghanistan who are directly affected by the actions of the Canadian Forces to initiate their own legal proceedings in Canada.

46 In support of this contention, the respondents point to the fact that the family of a deceased resident of Kandahar province has evidently instituted proceedings against the government of Canada in the Ontario Superior Court. This action evidently arises out of actions of the Canadian Forces in Afghanistan.

47 I cannot agree that individuals who have been handed over to the custody of the Afghan government have any meaningful or realistic ability to mount a challenge in this country with respect to the conduct of the Canadian Forces in Afghanistan.

48 Firstly, the fact that the family of one deceased resident of Kandahar province has been able to commence an action against the Canadian Forces in Ontario is, in my view, of limited value in establishing that legal action by the individuals directly affected is a realistic alternative in this case. We have no information as to the circumstances surrounding the Ontario action. In particular, the respondents could not say whether, for example, the action was brought by individuals still in Afghanistan, or by relatives of the deceased individual who are living in Canada.

49 It is not disputed that the individuals whose situation is in issue in this case are on the other side of the world, in a desperately poor country -- a country whose infrastructure is in tatters. Quite apart from any logistical, educational, linguistic, cultural or economic considerations that might limit the ability of these individuals to assert whatever rights they may have in this country, as far as we know, the individuals in question may well still be in detention in Afghanistan.

50 Moreover, it is also not disputed that while these individuals were in the custody of the Canadian Forces, they were denied access to legal counsel.

51 In these circumstances, I am satisfied that there is no other reasonable and effective way in which the questions raised by this application may be brought before the Court.

52 Having found that the applicants satisfy all three components of the test for public interest standing established by the Supreme Court of Canada, I am therefore prepared to exercise my discretion and grant the applicants public interest standing to pursue this matter.

**Is There any Basis for Judicial Review Under the *Federal Courts Act*?**

53 Assuming that the applicants have standing to bring this application, the respondents say that the application is bereft of any chance of success as it does not raise a "matter" in respect of which a remedy is available under section 18.1 of the *Federal Courts Act*.

54 To reiterate, subsection 18.1(1) of the *Federal Courts Act* allows for an application for judicial review to be brought by anyone directly affected by "the matter" in respect of which relief is sought.

55 In this case, the respondents submit that the application does not identify any administrative or executive action that violates or is likely to violate the *Charter* rights of any specific individual or individuals. As such, it does not involve a "decision, order, act or proceeding", as contemplated by subsection 18.1(3) of the *Federal Courts Act*.

56 Rather, the respondents say that the Court is being asked whether a policy - namely the first Arrangement - is sufficient to protect the rights of unknown individuals in unknown circumstances. The Court is also being asked to address unspecified "potential actions" relating to unknown individuals, and to identify the elements of a constitutionally permissible practice.

57 The respondents contend that the first Arrangement is not an "act or proceeding". Moreover, it does not compel the Canadian Forces to transfer detainees to the custody of Afghanistan or any other country. Rather, the document merely establishes procedures to be followed, in the event of a transfer.

58 Moreover, the respondents say that the first Arrangement contains explicit terms designed to protect detainees from abuse or torture. According to the respondents, the first Arrangement does not violate the *Charter* rights of any individual, nor does it provide for the violation of such rights. As such, the respondents say, it is not reviewable.

59 While the Notice of Application asserts that existing transfer procedures are insufficient because they do not provide for adequate safeguards, the applicants have not demonstrated how the rights of specific individuals have been violated. According to the respondents, the Court should not be asked to intervene in an abstract debate, without the benefit of a live dispute on the basis of concrete facts: see *P.I.P.S.C. v. Canada (Customs & Revenue Agency)*, [2004] F.C.J. No. 649, 2004 FC 507, at para. 77 and *Canadian Bar Association v. British Columbia*, [2006] B.C.J. No. 2015, 2006 BCSC 1342.

60 Finally, the respondents say that if the decision under review is the decision of the Chief of the Defence Staff to enter into the first Arrangement on December 18, 2005, the applicants were aware of the existence of the first Arrangement by April of 2006. As such, the application for judicial review is out of time.

61 The applicants argue that what is in issue in this application is not a specific decision, but rather the ongoing policy or practice of the Canadian Forces in transferring detainees to Afghan authorities in circumstances where the individuals in question face a substantial risk of torture. As such, the time limits set out in section 18.1 of the *Federal Courts Act* do not apply: see *Krause v. Canada*, [1999] 2 F.C. 476.

62 The applicants further submit that there is a sufficient evidentiary basis upon which the application can be determined. In this regard, the applicants point to the fact that the respondents do not dispute that specific individuals have been detained by the Canadian Forces, and have subsequently been transferred to Afghan custody.

63 While the applicants may not be able to identify these individuals by name, the applicants contend that there is nothing hypothetical about the individuals or their plight.

64 Moreover, the applicants argue that the individuals in question are not part of an amorphous group, as was the case in the *Canadian Bar Association* decision relied upon by the respondents. Rather, the detainees in question are part of a finite and readily identifiable group.

65 In addition, the applicants state that the only reason they have been unable to identify specific individuals affected by the Canadian Forces' policy or practice in their Notice of Application is because the respondents have thus far refused to identify the individuals in question. Indeed, the applicants' request for this information is currently the subject of a proceeding in this Court under section 38 of the *Canada Evidence Act*, R.S., c. E-10, s. 1.

66 The essence of the applicants' allegations is contained in the following statement in the Notice of Application:

Canadian Forces continue to capture and detain individuals in Afghanistan. Canadian Forces continue to transfer these individuals into the custody of Afghan authorities, despite the substantial risk that these individuals shall be subject to torture. General Hillier has refused to allow these detainees to have access to legal counsel before being transferred to the Afghanistan authorities.

67 As was noted earlier in this decision, for the purposes of this motion, these allegations must be taken as true.

68 Moreover, read generously, as the jurisprudence dictates should be done, I am satisfied that the application for judicial review is directed not just to the first Arrangement, but also to the policy or practice of denying detainees access to counsel, and transferring them to the custody of Afghan authorities, where they face a substantial risk of torture. As the policy or practice is ongoing, I am not persuaded that the application for judicial review is bereft of any chance of success on the basis that it is out of time.

69 Moreover, the absence of a "decision" is not an absolute bar to an application for judicial review under the *Federal Courts Act*, and the role of this Court has been found to extend beyond the review of formal decisions, and to include the review of "a diverse range of administrative action that does not amount to a 'decision or order', such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a statutory agency of a public programme." see *Markevich v. Canada*, [1999] 3 F.C. 28 (T.D.), at para. 11, rev'd on other grounds, [2001] 3 F.C. 449, 2001 FCA 144, rev'd [2003] 1 S.C.R. 94, 2003 SCC 9. See also *Nunavut Tunngavik Inc. v. Canada (Attorney General)* [2004] F.C.J. No. 138, 2004 FC 85, at para. 8.

70 For the purpose of this motion, it is neither necessary nor appropriate for me to reach any conclusion with respect to the actions of the Canadian Forces in relation to detainees in Afghanistan. It is sufficient for me to find, as I do, that the applicants' argument that the policy or practice in issue in this proceeding is amenable to judicial review is not bereft of any possibility of success on the basis that it does not raise a "matter" in respect of which a remedy is available under section 18.1 of the *Federal Courts Act*.

#### **Extraterritorial Application of the Charter**

71 As this application for judicial review is framed entirely under the Canadian *Charter of Rights and Freedoms*, the respondents say that it is therefore clearly bereft of any chance of success.

72 In this regard, the respondents point to subsection 32(1) of the *Charter*, which the respondents say is determinative of the application. Subsection 32(1) provides that:

This Charter applies

- a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

73 The respondents contend that the Canadian Forces in Afghanistan are not acting as Canadian "state actors". In this regard, the respondents rely on the affidavit of Christopher Greenwood, which is tendered as an expert opinion in matters of international law.

74 The Greenwood affidavit discusses facts relating to the nature of Canada's participation in Afghanistan as part of ISAF and OEF, and includes as exhibits a number of documents relating to the nature of, and terms governing Canada's involvement in Afghanistan.

75 Professor Greenwood further considers documents such as various resolutions of the United Nations Security Council, and the "*Afghan Compact*". These documents address the nature and ambit of Canada's involvement in Afghanistan, as well as that of the international community.

76 Given their position that the Canadian Forces in Afghanistan are not acting as Canadian "state actors", the respondents submit that the activities of the Canadian Forces in Afghanistan fall outside of the ambit of subsection 32(1) of the *Charter*. Moreover, the respondents say that it would be absurd to attempt to impose a particular country's laws on a multi-national international effort.

77 Even if the Canadian Forces deployed in Afghanistan can properly be viewed as Canadian state actors, the respondents say that the *Charter* still has no application, as there is no exception to the principle of state sovereignty that would justify giving the *Charter* an extraterritorial effect in this case.

78 The respondents point to evidence in the record such as the "*Technical Arrangements between the Government of Canada and the Government of the Islamic Republic of Afghanistan*", which the respondents assert, demonstrates that Canada and Afghanistan have agreed to the application of a limited range of Canadian laws in Afghanistan. According to the respondents, this agreement does not extend to include the application of Canadian domestic law to Canadian Forces' detention and transfer activities.

79 The respondents say that the applicants are asking this Court to extend *Charter* rights to Afghan detainees on Afghan soil. This would involve an unlawful extension of Canada's enforcement jurisdiction into Afghan territory, and constitute an impermissible encroachment on Afghanistan's sovereignty.

80 According to the respondents, the Supreme Court of Canada has stated unequivocally that the *Charter* does not have such an extraterritorial effect.

81 In this regard, the respondents refer to the recent decision of the Supreme Court of Canada in *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26. According to the respondents, the majority decision in *Hape* is "crystal clear" that absent the consent of the foreign state in issue, the *Charter* has no application outside of Canada.

82 The respondents point out that the Notice of Application in this case does not allege that the sovereign Islamic Republic of Afghanistan has consented to the application of the *Charter* within its territory. In the absence of such consent, the respondents say, the *Charter* cannot apply.

83 Finally, the respondents say that none of the judgments in *Hape* contemplate the extension of *Charter* rights to non-Canadians outside of Canada. To the extent that the Supreme Court in *Hape* may have left open the potential extraterritorial application of the *Charter*, the only way that this effect could be justified or recognized would be through the exclusion of evidence improperly obtained outside of Canada in a trial taking place in this country.

84 In contrast, the applicants say that the Supreme Court's decision in *Hape* is not nearly as clear-cut as the respondents would have me believe.

85 Firstly, the applicants note that *Hape* (and its predecessors) were all decided in the law enforcement context. Indeed, *Hape* itself involved an off-shore criminal investigation. This case arises in quite a different context - namely the overseas exercise of military power. Moreover, unlike *Hape*, which involved issues related to search and seizure, this case involves the issues related to detention. The questions raised by this case are issues of first impression, say the applicants, and it remains to be seen how they will be treated by the courts in Canada.

86 The applicants also refer to the majority decision in *Hape*, where, they say, Justice Lebel specifically left open the possibility that the *Charter* may have extraterritorial application in cases where fundamental human rights are at stake. In this regard, the applicants point to the following statement in the majority decision in *Hape*:

[52] In an era characterized by transnational criminal activity and by the ease and speed with which people and goods now cross borders, the principle of comity encourages states to cooperate with one another in the investigation of transborder crimes even where no treaty legally compels them to do so. At the same time, states seeking assistance must approach such requests with comity and respect for sovereignty. Mutuality of legal assistance stands on these two pillars. Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. **That deference ends where clear violations of international law and fundamental human rights begin.** If no such violations are in issue, courts in Canada should interpret Canadian law, and approach assertions of foreign law, in a manner respectful of the spirit of international cooperation and the comity of nations. [emphasis added]

87 Given that this case involves the right to freedom from torture, the applicants say that fundamental human rights norms are at stake, giving rise to the exception to the general rule against the extraterritorial application of the *Charter* recognized by *Hape*.

88 The applicants also note that Justice Binnie's concurring decision in *Hape* cautions against sweeping pronouncements as to the lack of extraterritorial effect of the *Charter*. In this regard, Jus-

tice Binnie observed that "serious questions of the utmost importance have arisen respecting the extent to which, if at all, a constitutional bill of rights follows the flag when state security and police authorities operate outside their home territory": *Hape*, at para. 184.

89 Justice Binnie then goes on to discuss this very case, describing it as raising "the sort of issues that may eventually wind up before us and on which we can expect to hear extensive and scholarly argument in relation to the extraterritorial application of the *Charter*": *Hape*, at para. 184.

90 Justice Binnie further notes that cases such as this may not ultimately result in prosecutions in Canada, and would not therefore engage "the remedial potential of s. 24(2) of the *Charter* under which evidence may, in certain circumstances, be excluded from a Canadian trial": *Hape*, at para. 185.

91 Nevertheless, Justice Binnie was prepared to leave open the question as to whether those harmed by the extraterritorial conduct of Canadian authorities should be denied *Charter* relief in situations where they did not face trial in Canada: *Hape*, at para. 187.

92 While recognizing that Justice Binnie's comments refer to Canadian citizens harmed by the extraterritorial activities of Canadian authorities, and accepting that there is no suggestion that there are Canadian citizens amongst the Afghan detainees, the applicants nonetheless say that the implications of the decision in *Hape* for this case are by no means clear.

93 In addition, the applicants point to jurisprudence from the House of Lords and the United States Court of Appeal for the District of Columbia which has held that domestic human rights legislation applies to individuals detained by military forces in Iraq: see *Al Skeini et al. v. Secretary of State for Defence*, [2007] UKHL 26, and *Omar et al. v. Secretary of the United States Army et al.*, 479 F.3d 1 (D.C. Cir. 2007).

94 According to the applicants, this jurisprudence suggests constitutional rights guarantees do indeed "follow the flag" when state security authorities operate outside their home territory. As a consequence, Canadian human rights law should be extended to cover individuals such as the detainees held by Canadian Forces in Afghanistan.

95 Finally, the applicants say that a review of the evidence relating to the terms governing the participation of the Canadian Forces in Afghanistan demonstrates that in surrendering significant powers to Canada, including giving up the state monopoly over the use of coercive power within its territory, Afghanistan has implicitly consented to the application of Canadian law within its territory.

96 It is not appropriate on a motion such as this to enter into a detailed discussion of the relative merits of the parties' competing positions. Unless I am persuaded that the case is clearly bereft of any chance of success, that task is for the judge hearing the application for judicial review.

97 The applicants' argument that the government of Afghanistan has implicitly consented to the application of Canadian law to the actions of the Canadian Forces within its territory requires the examination and evaluation of the agreements and other evidence governing the participation of the Canadian Forces in ISAF and OEF. It is not the function of a judge, sitting on a motion to strike, to weigh and interpret the evidence before the Court. That responsibility rests with the judge dealing with the merits of the application for judicial review.

98 Insofar as the respondents' other arguments relating to the *Hape* decision and the extraterritorial application of the *Charter* are concerned, suffice it to say at this juncture that this case seeks to



have the *Charter* apply in a novel factual context - one that has not been the subject of prior judicial consideration. While the Supreme Court of Canada has recently articulated general principles limiting the extraterritorial application of the *Charter*, the majority has specifically left open the potential extraterritorial application of the *Charter* in cases where fundamental human rights are at stake.

99 In the circumstances, and without opining in any way as to whether the *Charter* does or does not apply in the circumstances of this case, I cannot conclude that this application for judicial review is so clearly improper as to be bereft of any possibility of success.

100 In this regard, I would simply echo the comments of the Supreme Court of Canada in *Hunt v. Carey*, [1990] 2 S.C.R. 959, at para. 52, where the Court stated that:

The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law [...] will continue to evolve to meet the legal challenges that arise in our modern industrial society.

101 While these comments were made in the context of a motion to strike out a statement of claim, they are, in my view, equally apposite in this case.

#### **Charter Sections not Engaged**

102 The respondents argue that even if the *Charter* has extraterritorial effect in the circumstances of this case, none of the sections of the *Charter* relied upon by the applicants are engaged on the facts alleged in the Notice of Application, with the result that the application is therefore bereft of any chance of success.

103 Moreover, the respondents say that sections 7 to 14 of the *Charter* are intended to protect the rights of individuals engaged in the criminal process. The detentions in issue in this case are not criminal in nature, with the result that the sections of the *Charter* in issue in this case can have no application.

104 With respect to section 7 of the *Charter*, the respondents say that the rights to life, liberty and security of the person are individual rights, and cannot be advanced by others on behalf of the individuals whose rights are in question.

105 Insofar as subsection 10(b) of the *Charter* is concerned, the respondents submit that this section does not apply outside of the criminal process, and more particularly, does not apply in the military context. Moreover, the respondents say that requiring that detainees be provided with access to counsel on their detention by the Canadian Forces would cripple the mission in Afghanistan.

106 Relying on extradition cases such as *United States of America v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 and *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, the respondents argue that section 12 of the *Charter* is also not engaged in this case. According to the respondents, the law is clear that section 12 does not apply where the allegedly cruel or unusual treatment or punishment is to be carried out by officials in a foreign state.

107 Finally, the respondents contend that no subsection 24 *Charter* remedy is available to the applicants, as such relief is only available to those individuals whose rights have actually been infringed.

108 The applicants argue that *Charter* rights are not limited to the criminal process. For example, deportation to torture has been found by the Supreme Court of Canada to give rise to section 7 rights: see *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 2002 SCC 1. According to the applicants, the surrender of individuals from the custody and control of the Canadian Forces to the Afghan authorities is analogous to the deportation and extradition processes.

109 The applicants submit that the fundamental question should be whether torture by another state is a foreseeable consequence of the actions of Canadian state actors.

110 In this case, the applicants say that detainees are subjected to a process which has many of the hallmarks of the administration of justice, the final result of which is a decision by the Canadian Forces Commander to release, transfer or continue the detention of the detainee. Nevertheless, detainees are denied any procedural rights -- a process that the applicants say cannot accord with principles of fundamental justice.

111 Moreover, the applicants submit that the respondents' argument that the *Charter* cannot apply in the context of armed conflict ignores the reality that a number of acts of Parliament apply in just this situation. If ordinary statutes can apply, the applicants say, surely the *Charter* must as well.

112 With respect to subsection 10(b) of the *Charter*, the applicants point out that the respondents have provided no authority to support their argument that the "detention" referred to in section 10 excludes detentions that occur within the context of an armed conflict.

113 Furthermore, the applicants say that there is no rationale for denying counsel to an individual in the context of armed conflict. In fact, the *Prisoner-of-War Status Determination Regulations*, SOR/91-134, specifically afford the right to counsel to prisoners of war. While conceding that there may be a dispute as to whether these regulations apply to detainees in the control of the Canadian Forces in Afghanistan, the applicants say that the existence of the *Regulations* demonstrates that providing detainees with access to counsel is nevertheless workable in the context of an armed conflict.

114 Insofar as section 12 of the *Charter* is concerned, the applicants argue that there are important differences between this case and cases of extradition or deportation. In cases of extradition or deportation, the Supreme Court has held that the nexus between torture on the one hand, and extradition or deportation on the other, is too remote to engage section 12.

115 In contrast, the applicants submit that there is a very close nexus between the transfer of detainees out of Canadian custody, and the exposure of the detainees to a substantial risk of torture at the hands of the Afghan authorities. According to the applicants, Afghan authorities deal with individuals at the insistence of the Canadian Forces, on the basis of evidence gathered by Canadian state actors. The context of this case is therefore distinguishable from the extradition and deportation cases relied upon by the respondents, and section 12 of the *Charter* is engaged on the facts of this case.

116 With respect to the ability of the applicants to assert *Charter* rights on behalf of others, and to seek section 24 relief on their behalf, the applicants say that it would be perverse if the Canadian Forces could immunize its conduct from scrutiny by detaining individuals, denying them due process and the right to counsel, transferring them into a situation where they face a substantial risk of torture, and then insisting that no one else could assert the rights of the detainees on their behalf.

117 In support of this contention, the applicants draw an analogy to *habeas corpus* cases. Even though *habeas corpus* applications are ordinarily to be brought by the individual whose rights are in issue, "strangers" have been allowed to bring applications where there were grounds to believe that detainees were being restrained from bringing the application personally: see *Boudreau v. Thaw* (No 2) (1913), 13 D.L.R. 712 (C.S.), *Hottentot Venus*, (1810) 13 East 195, 104 Eng. Rep. 344 (K.B.1810), and the dissenting judgment in *Ex Parte John Doe*, (1974) 46 D.L.R. (3d) 547 (B.C.C.A.).

118 Moreover, the applicants point to the decision of the Supreme Court of Canada in *R. v. Gamble*, [1988] 2 S.C.R. 595, where the Court had occasion to examine the remedy of *habeas corpus* in the *Charter* era. In this regard, the Supreme Court stated that a purposive approach should be applied to the administration of *Charter* remedies as well as to the interpretation of *Charter* rights.

119 Both sides have produced numerous cases to support their respective positions in relations to the specific sections of the *Charter* in issue in this application for judicial review. However, while some of the jurisprudence is arguably applicable by analogy to this case, none of the case law deals with a similar fact situation to that giving rise to this application for judicial review.

120 As a consequence, the respondents have not persuaded me that the application for judicial review is clearly bereft of any chance of success as it relates to the specific *Charter* sections invoked by the Notice of Application. Indeed, I am of the view that the comments of the Supreme Court of Canada in *Hunt v. Carey* are again applicable, and find that the fact that the Notice of Application may involve novel or difficult points of law does not justify striking it out.

### **The Issues are not Justiciable**

121 The respondents argue that the conduct in issue in this application for judicial review involves the exercise of prerogative powers and matters of "high policy" that are generally not justiciable.

122 In this regard, the respondents submit that this application would require the Court to express an opinion on the wisdom of the exercise of defence powers by the Executive Branch of government, which is not the role of the judiciary.

123 That said, to the extent that the applicants' Notice of Application is framed in *Charter* terms, the respondents concede that the matter is justiciable, based upon the comments of the Supreme Court of Canada in *Operation Dismantle*, previously cited, at para. 63.

124 The applicants submit that the application for judicial review does not challenge any matter of "high policy", such as Canada's decision to deploy forces into Afghanistan. Rather, the applicants say that their application involves real individuals, and decisions made by the Canadian Forces in relation to their liberty and security of the person.

125 Whether or not this case involves a matter of high policy, I do not understand the scope of the applicants' case to extend beyond their *Charter* claims. As a consequence, the matter is not bereft of any chance of success on the basis of non-justiciability.

### **The Application is Moot**

126 Before addressing the issue of mootness, I note that the parties agree that an exception to the general principle that no evidence may be led on a motion to strike a Notice of Application exists where the basis for the motion is that the issue has become moot.

**127** This makes sense, as questions of mootness will generally arise as a result of intervening developments in relation to the underlying facts giving rise to the application for judicial review. If evidence relating to these intervening developments could not be put before the Court on a motion to strike, the Court could be forced to proceed with a full hearing in relation to a case in which a live controversy no longer exists.

**128** The respondents contend that there is no longer a live controversy before the Court in this case, and that the tangible and concrete dispute between the parties has now disappeared. As a consequence, the respondents say that the issues raised by the applicants' Notice of Application have become academic.

**129** In support of this contention, the respondents submit that the issue raised by the application is the perceived inadequacies in the protections afforded to detainees by the first Arrangement. According to the respondents, all of the inadequacies in the first Arrangement that have previously been identified by representatives of the applicants have now been addressed by the second Arrangement. As a result, the respondents say that the controversy that underpins the application for judicial review no longer exists, and the application is moot.

**130** The applicants argue that the issues underlying their application for judicial review are not moot. They submit that the underlying application is not directed solely at the first Arrangement, but is also concerned with the transfers themselves. In this regard, the applicants say that they have always sought a remedy that would protect detainees from the risk of torture, and that goal has not changed.

**131** The applicants do concede that the protections offered by the second Arrangement may be an improvement over those afforded to detainees under the first Arrangement. Nevertheless, the applicants contend that the protections offered under the second Arrangement are still not sufficient in the context of a country with as serious a history of systematic human rights abuses as is the case with Afghanistan.

**132** In any event, the applicants say that the adequacy of the protections afforded to detainees, including those provided under the terms of the second Agreement, is a matter for the judge hearing this application for judicial review on its merits.

**133** The applicants' Notice of Application states that there are substantial grounds to believe that Afghan forces are torturing detainees. Not only must this assertion be taken as true for the purposes of this motion, the applicants also point to evidence which they say demonstrates that Canadian officials have received at least six first-hand reports of detainees who had been transferred by the Canadian Forces into the care of the Afghan authorities and had then been subjected to torture in Afghan prisons.

**134** Moreover, the applicants point to the fact that their Notice of Application makes specific reference to the failure of the Canadian Forces to provide detainees with access to counsel. There is no evidence before the Court that would suggest that this is now happening. As a consequence, the applicants say that their application for judicial review is clearly not moot.

**135** In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Supreme Court of Canada set out the principles to be applied in determining whether a case had become moot. In this regard, the Court said:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. According if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. [at para. 15]

**136** With these principles in mind, I find that the respondents have not met their onus of establishing that the issues raised by the applicants' application for judicial review are purely hypothetical or abstract. Nor have the respondents established that there is no longer a live controversy between the parties, such that the application for judicial review is therefore bereft of any chance of success.

#### **The Applicants' Mis-application of International Law**

**137** In their memorandum of fact and law, the respondents submit that the applicants' application for judicial review is founded on a misapprehension of the applicable principles of international law, and as such is bereft of any chance of success.

**138** According to the respondents, the individuals for whom the applicants purport to advocate are not entitled to any further safeguards at international law than those that are already being provided by the Canadian Forces. The respondents further submit that the applicants have misunderstood the legal basis for Canada's activities in Afghanistan, including the significance of United Nations' Security Council resolutions.

**139** In support of this argument, the respondents rely on the opinion of Professor Greenwood.

**140** While this argument was not developed in the course of the hearing of the motion to strike, I do not understand it to have been abandoned.

**141** In support of their argument relating to the applicable principles of international law, the applicants rely on the evidence of their own expert -- Professor Michael Byers.

**142** Suffice it to say that I have concerns as to the appropriateness of looking at evidence concerning the nature of Canada's engagement in Afghanistan on a motion such as this.

**143** I do not understand the respondents to be saying that this Court has no jurisdiction to entertain the applicants' application for judicial review, but rather that it is so fatally flawed and misconceived that it is bereft of any chance of success. This is not a true jurisdictional challenge, and the Court should not be asked to weigh and interpret the conflicting expert evidence before the Court on a motion to strike. This is a matter to be left to the judge hearing the application for judicial review on its merits.

#### **Conclusion**

144 For these reasons, I find that the applicants are entitled to public interest standing in order to pursue this application for judicial review. Moreover, the respondents have not persuaded me that the matter is bereft of any chance of success. As a consequence, the motion to strike is dismissed.

145 In the interests of certainty, I wish to make it clear that nothing in these reasons should be taken as deciding any of the issues argued on the motion to strike, apart from the issue of standing. Furthermore, the decision should not be interpreted as limiting or restricting the right of the respondents to advance any or all of its arguments, save and except arguments relating to the standing of the applicants, before the judge hearing the application for judicial review on its merits.

146 While I am satisfied that the applicants should have their costs, I am not persuaded that the circumstances are such as would warrant an award of solicitor and client costs in the applicants' favour.

#### **Next Steps**

147 The respondents have asked that they be given a further 90 days in which to file their supporting affidavits, as contemplated by Rule 307 of the *Federal Courts Rules*, in the event that their motion to strike is dismissed.

148 In light of the applicants' expressed intention to seek leave to amend their Notice of Application to deal with the second Arrangement, as well as the outstanding *Canada Evidence Act* proceedings, I am of the view that establishing a time limit for the filing of the respondents' affidavits is a matter best dealt with through the case management process.

149 Accordingly, a case management conference will be scheduled to take place as quickly as possible in order to establish a schedule for the remaining steps to be taken in relation to this application for judicial review.

### **JUDGMENT**

#### **THIS COURT ORDERS AND ADJUDGES that:**

1. The applicants are granted public interest standing to pursue this matter;  
and
2. The respondents' motion to strike is dismissed, with costs.

MACTAVISH J.

cp/e/ln/qlccl/qltxp/qlhcs/qlhcs/qlhcs

*Case Name:*

**Canwest Mediaworks Inc. v. Canada (Minister of Health)**

**Between**

**Canwest Mediaworks Inc., Applicant, and  
The Minister of Health and the Attorney General of  
Canada, Respondents**

[2007] F.C.J. No. 1008

[2007] A.C.F. no 1008

2007 FC 752

2007 CF 752

159 A.C.W.S. (3d) 193

68 Admin. L.R. (4th) 81

2007 CarswellNat 2038

Docket T-416-07

Federal Court  
Toronto, Ontario

**Snider J.**

Heard: July 4, 2007.

Judgment: July 16, 2007.

(29 paras.)

*Administrative law -- Judicial review and statutory appeal -- When available -- Bars -- Motion by respondent Attorney General and Minister of Health for order dismissing application for judicial review -- Pending action by CanWest to challenge constitutionality of provisions prohibiting direct to consumer advertising of prescription drugs -- In judicial review application, CanWest sought mandamus requiring respondents to investigate and prosecute breaches of Canadian legislation by*

*US entities -- Motion allowed -- CanWest had no standing to bring judicial review application -- CanWest unable to meet requirements for public interest standing.*

Motion by respondent Attorney General and Minister of Health for order dismissing application for judicial review or for stay of application pending outcome of applicant's action -- CanWest had interest in many forms of media -- CanWest commenced action for declaration that provisions of Foods and Drugs Act and Regulations that prohibited direct to consumer advertising of prescription drugs were unconstitutional -- Due to CanWest's concerns about US magazines imported to Canada and US television commercials accessible to Canadians that contained prescription drug advertising, CanWest filed judicial review application for mandamus requiring respondents to investigate and prosecute breaches of Canadian legislation by US entities -- HELD: Motion allowed -- CanWest had no standing to bring judicial review application -- CanWest could not establish any direct interest in outcome of application -- Parties directly affected by order of mandamus or declaration sought would be US entities in breach of legislation -- CanWest had not even established commercial impact of successful judicial review -- CanWest unable to meet requirements for public interest standing -- Even if public interest standing established, CanWest's Charter challenge in other court would weigh against granting standing -- Resolution of Charter challenge would greatly enhance court's ability to deal with issues underlying application for judicial review -- CanWest's standing and possible interest in outcome of judicial review not likely to change as a result of Charter challenge.

**Counsel:**

Andrew K. Lokan, Brydie C.M. Bethell for the Applicant.

Joseph Cheng for the Respondents.

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**REASONS FOR ORDER AND ORDER**

**1 SNIDER J.:**-- The Minister of Health and the Attorney General of Canada are the Respondents in an Application for judicial review brought by CanWest MediaWorks Inc. (CanWest). In this motion, the Respondents seek to have the Application dismissed. Alternatively, they ask the Court to stay the Application until the final outcome of an action brought by CanWest in the Ontario Superior Court of Justice (Court File Number 05-CV-303001PD2).

**Background**

**2** CanWest, through its affiliates, has an interest in many forms of media, including print, television and online publications. CanWest relies on advertising revenues from these various media. In Canada, that advertising is subject to certain limitations imposed by the provisions of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 (FDA) and the *Food and Drug Regulations*, C.R.C., c. 870 (FDR). Under these limitations, all persons are prohibited from what is known as "direct-to-consumer advertising" (DTCA) of prescription drugs. CanWest does not believe that these limitations are consistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms*. Accordingly, on December 23, 2005, it commenced an action in the Ontario Superior Court of Justice seeking to have the relevant



provisions of the FDA and FDR declared to be contrary to the Charter (the CanWest Charter challenge). That action has yet to be heard.

3 During this period while it awaits final resolution of its Charter challenge, CanWest is concerned about magazines imported to Canada from the United States, U.S. television commercials that have appeared on Canadian television and internet publications that are accessed by Canadians. These forms of U.S. media allegedly contain DTCA. On March 13, 2007, CanWest filed an Application for judicial review in this Court seeking an order of *mandamus* requiring that the Respondents investigate and prosecute breaches of the DTCA prohibitions by American entities.

### Issues

4 The motion raises the following issues:

1. Should the Application for judicial review be dismissed on the basis that:
  - a. CanWest does not have standing to bring the application?
  - b. the preconditions for *mandamus* cannot be met?
2. In the alternative, should the Application for judicial review be stayed until the disposition of the CanWest Charter challenge in the Ontario Superior Court of Justice?

5 For the reasons that follow, I have determined that CanWest has no standing to bring the Application for judicial review. The lack of standing is determinative. Therefore, I do not need to consider the other issues and will grant the Respondent's motion to dismiss.

### Statutory Framework

6 The relevant provisions which CanWest wishes to have enforced in this Application (and seeks to quash in the proceedings before the Ontario Superior Court of Justice) are s. 3(1) of the *FDA* and s. C.01.044 of the *FDR*. Section 3(1) of the *FDA* states as follows:

3. (1) No person shall advertise any food, drug, cosmetic or device to the general public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule A.

\* \* \*

3. (1) Il est interdit de faire, auprès du grand public, la publicité d'un aliment, d'une drogue, d'un cosmétique ou d'un instrument à titre de traitement ou de mesure préventive d'une maladie, d'un désordre ou d'un état physique anormal énumérés à l'annexe A ou à titre de moyen de guérison.

7 Section C.01.044 of the *FDR* provides that:

- (1) Where a person advertises to the general public a Schedule F Drug, the person shall not make any representation other than with respect to the brand name, proper name, common name, price and quantity of the drug.
- (2) Subsection (1) does not apply where

(a) the drug is listed in Part II of Schedule F; and

(b) the drug is

- (i) in a form not suitable for human use, or
- (ii) labelled in the manner prescribed by paragraph C.01.046(b).

\* \* \*

- (1) Quiconque fait la publicité auprès du grand public d'une drogue mentionnée à l'annexe F doit ne faire porter la publicité que sur la marque nominative, le nom propre, le nom usuel, le prix et la quantité de la drogue.
- (2) Le paragraphe (1) ne s'applique pas lorsque :

a) la drogue est mentionnée à la partie II de l'annexe F;

b) la drogue est :

- (i) soit présentée sous une forme impropre à l'usage humain,
- (ii) soit étiquetée de la façon prévue à l'alinéa C.01.046b).

8 Simply put, the regulatory scheme relevant to this Application prohibits certain forms of advertising of prescription drugs.

9 Under the statutory scheme, the Respondents have the overall authority to investigate and prosecute breaches of the legislation. The assertion of the Applicant is that, with respect to certain U.S. entities whose publications are imported into Canada or whose broadcasts are seen by Canadians or whose internet sites are viewed by Canadians, there is a breach of the DTCA prohibition.

## Analysis

### *General Principles*

10 It is well-established that the Federal Court may dismiss a judicial review application on a preliminary motion. However, the jurisdiction is exceptional and should only be exercised in those cases where the application is so clearly improper as to be bereft of any possibility of success (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, 176 N.R. 48 (F.C.A.)). Of relevance to this motion, two exceptions to the general rule against dismissal of judicial review applications have been: (a) where the applicant has no standing to bring the application (*Apotex Inc. v. Canada (Governor in Council)*, 2007 FC 232 at para. 33, 155 A.C.W.S. (3d) 1080, [2007] F.C.J. No. 312 (FC) (QL)); and (b) where the filed material did not establish the prerequisites for an order of *mandamus* (*Rocky Mountain Ecosystem Coalition v. Canada (National Energy Board)* (1999), 174 F.T.R. 17, [1999] F.C.J. No. 1223 at para. 42 (F.C.T.D.) (QL)).

*Issue #1(a): Does the Applicant have standing to bring this Application for judicial review?*

11 On judicial review, the jurisdiction of the Federal Court extends to review the actions or decisions of a "federal board, commission or other tribunal" (s. 18, *Federal Courts Act*, R.S.C. 1985, c. F-7). In this case, there is no dispute that the alleged action (or, more accurately, the failure to act)

of the Respondents in choosing not to enforce the provisions of the FDA is an action of a body included in s. 18 of the *Federal Courts Act*. This does not mean that any person may bring an application for judicial review against any decision of any "federal board, commission or other tribunal". An application may be made "by anyone directly affected by the matter in respect of which relief is sought" (*Federal Courts Act*, s. 18.1(1)). Thus, the person must have some link with the action or decision -- generally referred to as "standing". If an applicant cannot establish a link, he cannot bring the application.

**12** An applicant for judicial review may have standing in one of two ways. First, an applicant may have a direct interest in the matter under review. Secondly, the Courts have recognized that, in appropriate circumstances, a party should be granted "public interest standing" to challenge actions of a "federal board, commission or other tribunal" (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, [1989] 3 W.W.R. 97). I will examine each of these.

(a) Direct Interest

**13** It is generally accepted in the jurisprudence that, for an applicant to be considered "directly affected", the matter at issue must be one which adversely affects its legal rights, impose legal obligations on it, or prejudicially affect it directly (see, for example, *Rothmans of Pall Mall Canada Ltd. v. Canada (Minister of National Revenue)*, [1976] 2 F.C. 500 (F.C.A.), 67 D.L.R. (3d) 505; *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans)*, 2003 FCT 30, [2003] F.C.J. No. 98 at para. 8 (F.C.T.D.) (QL), aff'd on other grounds 2003 FCA 484, [2003] F.C.J. No. 1893 (F.C.A.) (QL), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 55); *Apotex*, above, at para. 20).

**14** In my view, CanWest cannot establish any direct interest in the outcome of the Application for judicial review. I begin with the orders sought by CanWest in the Application for judicial review. CanWest has applied for:

1. An order in the nature of *mandamus*, that the Respondents investigate and prosecute breaches of the DTCA prohibitions by U.S. media; and
2. A declaration that the Respondents are required to investigate and prosecute breaches of the DTCA.

**15** In its simplest terms, the only parties directly affected by the order of *mandamus* or declaration sought by CanWest would be those U.S. entities that have been identified by CanWest as allegedly being in breach of the DTCA prohibition and the Respondents.

**16** Indeed, on the record filed for the Application, CanWest has not even established a commercial impact of a successful judicial review. In argument before me, counsel for CanWest attempted to argue that a positive ruling from this Court on the Application would have positive financial implications for CanWest. It argues that, if U.S. entities are prevented from publishing DTCA in U.S. media that now finds its way into Canada, pharmaceutical companies who wish to advertise in Canada would then choose to advertise, in legally permissible ways, in CanWest's media enterprises. In other words, they submit, the playing field would be levelled. The problem with this assertion is that it is based on pure speculation. There is nothing before me to indicate that CanWest would be the beneficiary of additional advertising revenue if investigations and prosecutions against U.S. media were pursued.

17 Even if I were to assume that CanWest has a commercial interest in the outcome of the Application, I am still not persuaded that this would be enough to make it a party "directly affected". A commercial interest in the issues in a judicial review application, in and of itself, is not a sufficient basis for standing (*Rothmans of Pall Mall Canada Ltd. v. Canada (Minister of National Revenue)*, [1976] 2 F.C. 500, 67 D.L.R. (3d) 505 (F.C.A.); *Aventis Pharma Inc. v. Minister of Health et al*, 2005 FC 1396, 45 C.P.R. (4th) 6 at para. 19, 143 A.C.W.S. (3d) 350).

(b) Public Interest Standing

18 In cases where no direct standing can be established, the Courts have allowed, as a matter of judicial discretion, intervention by parties asserting a public interest. One of the clearest expressions of the policy reasons for when and where to allow public interest standing was that of Justice Cory in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 252 - 253, where he stated:

The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the Constitution Act, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The [page253] decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

19 Acknowledging these principles, Justice Cory in *Canadian Council of Churches* applied a tripartite test, which has been followed in other case (see, for example, *Hartling v. Nova Scotia (Attorney General)*, [2006] N.S.J. No. 316, 2006 NSSC 225 at para. 33; *Fraser v. Canada (Attorney General)*, [2005] O.J. No. 5580 at para. 51 (Ont. Sup. Ct. Jus.) (QL); *Peace Hills Trust Co. v. Sauteaux First Nation*, [2005] F.C.J. No. 1646, 2005 FC 1364 at para. 77) and requires the consideration of three aspects:

1. Is there a serious issue to be raised;
2. Does the plaintiff (or applicant in the case of a judicial review) have a genuine interest in the outcome of the litigation; and
3. Is there another reasonable and effective way to bring the issue before the Court?

**20** I will assume, without deciding, that there is a serious issue raised by the Application as to whether the Respondents are under a duty to investigate and prosecute U.S. entities as described in CanWest's application.

**21** The next aspect of "genuine interest" is more problematic for CanWest. In *Canadian Council of Churches*, Justice Cory accepted the genuine interest of the Council which, in his words, "demonstrated a real and continuing interest in the problems of the refugees and immigrants". It appears to me that an examination of this aspect of the test requires me to review the nature of CanWest's interest in this Application. In other words, does CanWest have a "real and continuing interest" in the maintenance and enforcement of the DTCA legislative scheme? In my view, the answer to this question is far from clear. The instigation of a proceeding in another Court to strike down the impugned provisions seems to be a strong statement that the continuing interest of CanWest is not to maintain the existing legislation but to remove barriers to its participation in the DTCA market.

**22** CanWest argues that the unfairness of the present situation, where it is forced to comply with the statutory scheme while U.S. entities are not, gives it a genuine interest in the outcome of the Application for judicial review. While CanWest may have a "real" interest at this time in trying to create a level playing field, I do not see this as sufficient, on these facts, to grant CanWest standing.

**23** Finally, CanWest argues that there is no reasonable and effective manner for the issue of the Respondents' failure to enforce its own laws to come to Court. If CanWest does not bring this application, it asserts, who will? CanWest contends that this is a situation, as described in *Distribution Canada Inc. v. Minister of National Revenue*, [1993] 2 F.C. 26, 99 D.L.R. (4th) 440 at 449 (F.C.A.), where the matter raised by CanWest is one of "strong public interest" and "there may be no other way such an issue could be brought to the attention of the court" and, as such, standing should be granted to CanWest. I do not agree.

**24** The fact is that a coalition of a number of interested parties has already successfully sought intervener status in CanWest's Charter challenge in opposition to CanWest. It seems evident that there are individuals and groups in Canada who are supportive of the DTCA prohibitions and who may have public interest standing to bring an application for judicial review in this Court to determine the issues (assuming that there are reviewable issues). There may be many reasons why there has been no pursuit of an order of *mandamus* in our Court by any other party. Failure, to date, by other parties (with, for example, no commercial interest or with broader health concerns) to seek *mandamus* does not elevate CanWest's interest to one of "public interest".

**25** In sum, I am not persuaded that CanWest can meet any one of the aspects for public interest standing.

**26** However, even assuming that there are some arguments that CanWest meets the three criteria, the granting of public interest standing is a matter of judicial discretion. As stated by Justice Cory in *Canadian Council of Churches*, above at 252-253. "The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused." In this case, there are strong reasons why I should not exercise my discretion. This is particularly so where the very party bringing the Application for judicial review is the same party that commenced

the Charter challenge in a different Court. It is also difficult to understand how an interest in leveling the playing field is anything more than a private concern.

27 Further, resolution of the CanWest Charter challenge would greatly enhance the ability of this Court to deal with the issues underlying the Application for judicial review. That is, knowing that the impugned provisions are not in violation of the Charter (if that is the outcome of the Charter challenge) would provide the Court with a proper legal foundation to assess submissions in an Application for judicial review. Such a conclusion could also provide other stakeholders (such as concerned individuals or public interest groups), who do not hold a possible commercial interest in the outcome, with an informed opportunity to seek *mandamus* through an Application for judicial review in the Federal Court. On the other hand, a finding by the Ontario Superior Court of Justice that the impugned provisions are contrary to the Charter could obviate the need for any judicial review. Although this argument could support an application for a stay of this Application, it also, in my view, goes to the question of standing and whether judicial discretion should be exercised. On the record before me, CanWest's standing and possible interest in the outcome of the judicial review is not likely to change as a result of its Charter challenge. Accordingly, rather than stay the Application for judicial review, the better option is to dismiss this Application for judicial review.

### **Conclusion**

28 In conclusion, I am not persuaded that CanWest has the requisite standing to bring this Application for judicial review. I make this finding on the basis that:

- CanWest is not directly affected by the matter that is the subject of the judicial review; and
- This is not an appropriate case in which to exercise judicial discretion to grant CanWest public interest standing.

29 As noted, the issue of standing is determinative and there is no need to consider the other issues raised and argued before me. On the basis that CanWest lacks standing, it follows that the Application for judicial review is bereft of any possibility of success. The motion to dismiss the Application for judicial review will be allowed and the Application for judicial review will be dismissed, with costs to the Respondents.

### **ORDER**

**THIS COURT ORDERS** that:

1. The motion of the Respondents to dismiss the Application for judicial review is granted;
2. The Application for judicial review is dismissed; and
3. Costs are awarded to the Respondents.

SNIDER J.

cp/e/qlklc/qllkb/qltxp/qlbrl

*Case Name:*

**CanWest MediaWorks Inc. v. Canada (Minister of Health)**

**Between**

**CanWest MediaWorks Inc., Appellant, and  
The Minister of Health and the Attorney General of  
Canada, Respondents**

[2008] F.C.J. No. 944

[2008] A.C.F. no 944

2008 FCA 207

78 Admin. L.R. (4th) 1

382 N.R. 365

2008 CarswellNat 1934

Docket A-366-07

Federal Court of Appeal  
Toronto, Ontario

**Sexton, Blais and Evans JJ.A.**

Heard: June 9, 2008.

Judgment: June 11, 2008.

(19 paras.)

*Civil litigation -- Civil procedure -- Parties -- Standing -- Public interest -- Appeal by media company from a Federal Court decision which granted a motion to dismiss for lack of standing an application for judicial review brought by the appellant for an order of mandamus to require the respondents to investigate and prosecute American media corporations which distributed advertisements in Canada for prescription drugs which contravened the Food and Drugs Act -- Appeal dismissed -- The appellant clearly lacked standing on the only basis it had advanced, namely as a public interest applicant.*

Appeal by CanWest from a Federal Court decision which granted a motion by the Crown to dismiss for lack of standing an application for judicial review brought by CanWest for an order of mandamus to require the respondents to investigate and prosecute American media corporations which, it alleged, distribute in Canada, in magazines, cable television, and the internet, advertisements for prescription drugs which contravened the Food and Drugs Act. The legislation prevented "Direct to Customer Advertising" ("DTCA") in Canada of prescribed drugs by prohibiting advertisements which claimed that a drug treated, prevented, or cured listed medical conditions and diseases, and restricted representations about listed drugs to a very few facts. On appeal, CanWest argued that the application judge failed to consider whether there was a sufficiently full evidentiary record to enable her to decide the standing question as a preliminary matter on a motion to dismiss.

HELD: Appeal dismissed. CanWest clearly lacked standing on the only basis it had advanced, namely as a public interest applicant. The fact that CanWest's interest in the enforcement of the DTCA prohibition was commercial indicated that it did not have a real and continuing interest for the purpose of being afforded public interest standing. Accordingly, the application judge did not err when he dismissed the application for judicial review.

#### **Appeal From:**

Appeal from the Order of the Honourable Madam Justice Snider of the Federal Court, dated July 16, 2007 in Federal Court File Docket No. T-416-07, [2007] F.C.J. No. 1008.

#### **Counsel:**

Martin Teplitsky, Q.C. and Andrew K. Lokan, for the Appellant.

Joseph Cheng, for the Respondents.

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The judgment of the Court was delivered by

**EVANS J.A.:**--

#### **A. INTRODUCTION**

1 This is an appeal from a decision of the Federal Court in which Justice Snider granted a motion by the Attorney General of Canada and the Minister of Health ("the respondents") to dismiss for lack of standing an application for judicial review brought by CanWest Media Works Inc. ("CanWest"): *CanWest Media Works Inc. v. Canada (Minister of Health)*, [2007] F.C.J. No. 1008, 2007 FC 752.

2 CanWest is a Canadian corporation which derives income from advertising placed in media in which it has an interest, including newspapers and magazines, television, and publications available online. In its application for judicial review CanWest requests an order of *mandamus* to require the respondents to investigate and prosecute American media corporations which, it alleges, distribute in Canada, in magazines, cable television, and the internet, advertisements for prescription drugs which contravene the *Food and Drugs Act*, R.S.C. 1985, c. F-27, ("FDA") and the *Food and Drug Regulations*, C.R.C., c. 870 ("FDR").



3 This legislation prevents "Direct to Customer Advertising" ("DTCA") in Canada of prescribed drugs by prohibiting advertisements which claim that a drug treats, prevents, or cures listed medical conditions and diseases (FDA, subsection 3(1)), and restricts representations about listed drugs to a very few facts: their names, price and quantity (FDR, section C.01.044). United States' law is more permissive on DTCA.

4 CanWest argues in this appeal that Justice Snider erred in the exercise of her discretion to grant the respondents' motion to dismiss the application for judicial review for lack of standing in two respects. First, she failed to consider whether there was a sufficiently full evidentiary record to enable her to decide the standing question as a preliminary matter on a motion to dismiss. Second, she denied CanWest public interest standing by finding that CanWest had no genuine interest in the subject matter of the application for judicial review, and by concluding that CanWest should not be afforded public interest standing because there were more appropriate litigants to challenge the respondents' failure to enforce the law.

5 In oral argument, counsel abandoned the argument that Justice Snider had also erred in concluding that CanWest was not "directly affected" within the meaning of the *Federal Courts Act*, R.S.C. 1985, c. F-7, subsection 18.1(1) by the respondents' alleged breach of their duty to enforce the statutory prohibition of DTCA against United States' media corporations whose publications are available in Canada.

## **B. ISSUES AND ANALYSIS**

### **(i) Was the motion to dismiss premature?**

6 Counsel for CanWest submitted that only in the clearest of cases should a court dismiss an application for judicial review on a motion to strike. Where, as here, it is not obvious that the applicant lacks standing, the application should be permitted to proceed so that standing can be determined on the basis of a full evidentiary record. He argued that, in this case, some aspects of the standing issue require further exploration in the context of the application itself, and that it is premature to decide standing as a preliminary question on a motion to strike.

7 Counsel relied on *Apotex Inc. v. Canada (Governor in Council)*, [2007] F.C.J. No. 1585, 2007 FCA 374, where, writing for the Court, Sexton J.A. said (at para. 14) that a judge should not decide a motion to strike an application for judicial review without first explicitly exercising her or his discretion as to whether the standing question could properly be decided on the motion. In the present case, counsel said, Justice Snider did not address this issue, but seemed simply to assume (at para. 10) that it was appropriate to decide the motion on its merits because standing is one of the two exceptions to the general rule that a court should only exercise its jurisdiction to strike when the application is so clearly improper as to be bereft of any possibility of success.

8 I agree that Justice Snider did not explicitly acknowledge that, even when a motion to strike is based on the applicant's lack of standing, the court must still consider whether the standing issue is appropriately decided on the motion to strike and meets the stringent test for striking out. I should point out that this Court rendered its decision in the *Apotex* case cited above after Justice Snider rendered hers; she relied on the decision of the Federal Court ([2007] F.C.J. No. 312, 2007 FC 232), which this Court reversed.

9 If the Motions Judge erred in this respect, this Court on an appeal may decide for itself whether, on the basis of the motion record and counsel's oral submissions, CanWest's alleged lack of standing can properly be determined on the motion. In my view, it can.

10 At the time of the motion to strike, CanWest had filed its affidavits in the application for judicial review and has not indicated that it wishes to adduce more evidence on the main application or on the standing issue. The Court has all the material it needs to determine if CanWest has standing. For the reasons given below, CanWest clearly lacks standing on the only basis now advanced, that is, as a public interest applicant, and the application must therefore fail. ✕

**(ii) Public interest standing**

11 CanWest argues that Justice Snider erred in two respects in applying the test in *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575. First, it is said, she committed an error of law in finding that CanWest had no "genuine interest" in the non-discriminatory enforcement of the statutory prohibition of DTCA because it was already pursuing an action in the Superior Court of Justice for a declaration that the legislation was invalid as an unconstitutional abridgement of the right to freedom of expression guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*.

12 Counsel submitted that the Motions Judge's conclusion was illogical. It was, he said, perfectly coherent for CanWest to claim that the legislation is invalid, but also to insist that it must be enforced meanwhile in an even handed manner against Canadian and American corporations alike. If CanWest had carried DTCA in its publications, the respondents were likely to have instituted proceedings against it, in which it would have had standing to raise the invalidity of the legislation as a defence. Having decided, as a good corporate citizen, to obey the law, counsel argued that it should not now be precluded for lack of standing from challenging the legality of the respondents' failure to enforce the law, a failure which goes to the heart of the rule of law.

13 Despite the attractive argument ably made by counsel, I cannot agree. In considering whether the appellants in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, ("*Canadian Council*") should be given public interest standing, Cory J. stated (at p. 254) that they had "demonstrated a real and continuing interest" in the general subject matter of the litigation, namely, the problems faced by immigrants and refugees. In contrast, CanWest's interest in the enforcement of the law is merely temporary and contingent on the outcome of its action in the Superior Court of Justice for a declaration that the statutory prohibition of DTCA is invalid. This action is scheduled to be tried approximately four months from now. CanWest's principal objective is to have the legislation struck down; in the ten years that DTCA has proliferated, it has brought no proceedings, before this, to challenge the alleged failure by the respondents to enforce the law.

14 The fact that CanWest's interest in the enforcement of the DTCA prohibition is commercial also indicates that it does not have "a real and continuing interest" for the purpose of being afforded public interest standing. Private interests are primarily relevant to determining whether persons are "directly affected" by the impugned administrative action and therefore have standing as of right.

15 In this case, the Motions Judge concluded that CanWest was not "directly affected" because the harm that it alleged that the respondents' failure to enforce the law has caused to its commercial interests was too speculative and indirect. CanWest surely cannot rely on the same interest that did

not qualify it for "private interest standing" to establish that it has a "genuine interest" for the purpose of public interest standing.

**16** The grant of public interest standing to the appellant in *Harris v. Canada (Minister of National Revenue)*, [2000] 4 F.C. 37 (C.A.) does not assist CanWest because, in that case, unlike this, the Attorney General virtually conceded that the appellant had a genuine interest in the issue.

**17** Having concluded that CanWest has no "genuine interest" in the subject matter of its application I need not deal with the submission that Justice Snider also erred in concluding that there was another reasonable and effective way to bring the issue before the Court. CanWest says that she did not consider whether "on a balance of probabilities" (*Canadian Council* at p. 252) any of the interveners opposing CanWest's action in the Superior Court of Justice would challenge the respondents' alleged failure to enforce the DTCA prohibition against American corporations.

**18** In my opinion, these interveners (members of a coalition of organizations representing, among others, the interests of consumers of pharmaceuticals products, patients, a trade union, and those who rely on employer-provided health benefit plans) are more appropriate representatives of the public interest in the due enforcement of the law than CanWest. Their intervention in the Superior Court of Justice demonstrates a willingness and an ability to resort to the law when, in their view, the public interest in upholding the statutory ban in Canada on DTCA is in jeopardy. If CanWest's action fails and the legislation prohibiting DTCA is upheld, it is not unreasonable to think that those who were willing to intervene in the action may also be willing to challenge the under enforcement of the law, even though they have not done so previously.

### **C. CONCLUSIONS**

**19** For these reasons, I would dismiss the appeal with costs.

EVANS J.A.

SEXTON J.A.:-- I agree

BLAIS J.A.:-- I agree

cp/e/qlaim/qlpxm/qltxp/qlrxg

*Indexed as:*

**Rothmans of Pall Mall Canada Ltd. v. Canada (Minister of  
National Revenue - M.N.R.)**

**Rothmans of Pall Mall Canada Limited and Imperial Tobacco  
Limited (Appellants)**

**v.**

**Minister of National Revenue and Deputy Minister of National  
Revenue for Customs and Excise; Benson & Hedges (Canada)  
Limited, and The Macdonald Tobacco Inc. (Respondents)**

[1976] 2 F.C. 500

Court File No. A-485-75

Federal Court of Canada  
COURT OF APPEAL

**PRATTE, URIE AND LE DAIN JJ.**

OTTAWA, MARCH 1, 2 AND APRIL 12, 1976.

*Jurisdiction -- Customs and excise -- Extraordinary remedies -- Whether appellants aggrieved parties -- Duty on cigarettes -- Whether cigarettes measuring less than four inches when filter not included and over four inches when filter included to be treated as two cigarettes -- Excise Act, R.S.C. 1970, c. E-12, ss. 6, (as am. R.S.C. 1970 (1st Supp.) c. 15, s. 3), 202 -- Customs Tariff R.S.C. 1970, c. C-41, s. 21(1)(d).*

Revenue Canada reviewed the question as to whether the filter should be included in measuring cigarette length, having regard to the definitions of "cigarette" and "manufacture tobacco" in section 6 of the Excise Act. The conclusion was that a unit in which the portion containing tobacco was less than four inches would be considered as one cigarette, notwithstanding that its total length, including filter, would exceed four inches. Appellants sought relief against this conclusion, while respondents objected to the Court's jurisdiction. The Trial Judge dismissed the motion, holding that the Court lacked jurisdiction. It was decided that appellants had not established that they were aggrieved parties, and that the Minister's interpretation was not a decision. Appellants appealed.

Held, dismissing the appeal, the Trial Judge was correct. Appellants have no genuine grievance entitling them to challenge the interpretation. It did not adversely affect their legal rights, impose any additional legal obligation on them or prejudicially affect them directly. Nor do they derive any

rights from what may have been their own assumption as to the application of section 6. In so far as the interpretation of the section is to be considered a "change" in policy by the Department, there is no supporting authority for a general duty, when considering such a change to be applied in individual cases, to notify anyone who may be interested, and offer an opportunity to be heard. Appellants had made no previous representations as to how section 6 should be applied to cigarettes such as respondent companies were introducing. There had been no undertaking to appellants with respect to the question, nor did such practice as there was with respect to industry representation give any reasonable expectation that representations of the kind made by respondent companies involving a matter of a competitive nature were such as would come from the industry as a whole, or be promptly communicated to it. In any event, appellant companies learned of the proposed policy change soon after its adoption and had opportunity to make representations. While the Courts have increasingly taken a broader view of locus standi requirements, nowhere has it been suggested that persons in the position of appellants in relation to the official action complained of would be persons considered aggrieved (even for purposes of certiorari and prohibition, where the locus standi requirement may not be quite as strict). A person should not have the right to interfere with an official action affecting an existing competitor solely to prevent the competitor from obtaining some advantage, particularly where the complainer is free to seize the same advantage. The public interest in competition is an important factor in the exercise of discretion as to whether to recognize standing in a Competitive relationship.

The case is not one that raises any questions of the limits of statutory authority. The most it raises is a question of administrative interpretation of the governing statute. The action is not subject to certiorari, prohibition, mandamus or injunction. There was no determination of any rights, no duty to act judicially, nor any enforceable public duty at all (but rather, one owing to the Crown). Nor was there interference with appellants' rights such as would entitle them to an injunction against public authorities.

## **CASES JUDICIALLY CONSIDERED**

Distinguished:

Regina v. Liverpool Corporation [1972] 2 Q.B. 299.

Considered:

The King v. Richmond Confirming Authority [1921] 1 K.B. 248

and Regina v. Commissioners of Customs and Excise [1970] 1 W.L.R. 450

Discussed:

Thorson v. Attorney General of Canada [1975] 1 S.C.R. 138 and

McNeil v. Nova Scotia Board of Censors (1975) 5 N.R. 43.

Applied:

Landreville v. The Queen [1973] F.C. 1223.

**APPEAL.**

**COUNSEL:**

R. T. Hughes for appellants.

W.B. Williston, Q. C., and R. W. Cosman for respondent The Macdonald Tobacco Inc.  
G.W. Ainslie, Q.C., and W. Lefebvre for respondents the Minister of National Revenue and the Deputy Minister of National Revenue for Customs and Excise.  
J. B. Claxton, Q. C., for respondent Benson & Hedges (Canada) Ltd.

**SOLICITORS:**

Donald F. Sim, Q.C., Toronto, for appellants.  
Faskin & Calvin, Toronto, for respondent The Macdonald Tobacco Inc.  
Deputy Attorney General of Canada for respondents the Minister of National Revenue and the Deputy Minister of National Revenue for Customs and Excise.  
Lafleur & Brown, Montreal, for respondent Benson & Hedges (Canada) Ltd.

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The following are the reasons for judgment rendered in English by

**1 LE DAIN J.:** This is an appeal from a judgment of the Trial Division<sup>1</sup> dismissing an application for relief in the nature of prohibition, mandamus, injunction and certiorari on the ground, among others, that the applicants lack status or locus standi.

**2** The application is directed against action taken by the Minister of National Revenue and the Deputy Minister of National Revenue for Customs and Excise in respect of the interpretation and application of the definition of "cigarette" in section 6 of the Excise Act, R.S.C. 1970, c. E-12, for purposes of the imposition, levying and collection of excise duty under the said Act. The Deputy Minister is impleaded because of his authority under the Act to exercise the powers of the Minister. The respondent companies, upon whose representations such action was taken, were, at their request, added as parties by order of the Court.

**3** Section 202 of the Excise Act provides:

202. There shall be imposed, levied and collected on tobacco and cigars manufactured in Canada and on Canadian raw leaf tobacco the duties of excise set out in the schedule, by means of stamps to be affixed to the packages in which tobacco, cigars and Canadian raw leaf tobacco are entered for consumption under departmental regulations.

"Manufactured tobacco" is defined in section 6 of the Act as follows:

"manufactured tobacco" means every article made by a tobacco manufacturer from raw leaf tobacco by any process whatever, except cigars; and includes cigarettes and snuff;

**4** The definition of "cigarette" in section 6, as replaced by R.S.C. 1970 (1st Supp. 1, c. 15, s. 3, is 6, as follows:

"cigarette" means every description of cigarette and any roll or tubular construction intended for smoking that is not a cigar; and where any cigarette exceeds four inches in length, each three inches or fraction thereof shall be deemed to be separate cigarette;

5 The Schedule to the Act, as amended, provides that excise duties are to be imposed, levied and collected on cigarettes at the rate of five dollars per thousand, where the weight is not more than three pounds per thousand, and at the rate of six dollars per thousand, where the weight is more than three pounds per thousand.

6 The definition of "cigarette" in the Excise Act has a bearing on the duties collected under the Customs Tariff R.S.C. 1970, c. C-41, as indicated by section 21(1) of the latter Act, which reads in part as follows:

21. (1) There shall be levied, collected and paid as customs duty on all goods hereinafter enumerated in this section when imported into Canada or taken out of warehouse for consumption therein, in addition to the duties otherwise established, an amount equal to the amount that would have been imposed, levied and collected thereon under the Excise Act as excise duties if

...

- (d) in the case of cigars, cigarettes and tobacco enumerated in tariff items 14305-1, 14315-1, 14400-I, 14450-I and 14500-I, the goods were "tobacco, cigars and cigarettes manufactured in Canada" within the meaning of the Excise Act.

7 The issue of statutory construction raised in these proceedings is whether the filter tip portion of a cigarette should be included in determining its length for purposes of the definition in section 6 of the Excise Act. The Department of National Revenue, Customs and Excise, has adopted the position that it should not be included. The appellants contend that it should, and that the position adopted by the Department gives the respondent companies a competitive advantage which causes the appellants prejudice. The appellants seek by these proceedings to require the Minister to include the filter tip portion of a cigarette in determining its length for purposes of the definition in section 6. The issues on this appeal are whether the appellants have the required status or locus standi to bring these proceedings, and whether, in any event, the specific forms of relief sought would be appropriate to challenge the action of the Minister.

8 The affidavit evidence and cross-examination thereon disclose the following background to the appellants' contention. The appellant and respondent companies are competitors in the manufacture and sale of tobacco products. Together they share about 99 per cent of the Canadian market, with their estimated individual shares running approximately as follows: Rothmans -- 27 per cent; Imperial (or its parent, Imasco) -- 38 per cent; Macdonald -- 20 per cent; and Benson & Hedges 14 per cent. Prior to 1975 there were no cigarettes on the Canadian market having an overall length of more than four inches. Sometime early in 1975 the respondent companies, acting separately, decided to introduce cigarettes with a tobacco portion of less than four inches but an overall length, including the filter tip, of more than four inches. Macdonald proposed to introduce a cigarette called "More" and Benson & Hedges cigarette called "Plus". Before doing so they sought clarification from the Department of National Revenue, Customs and Excise, as to how the definition in section

6 of the Excise Act would be applied to such cigarettes, and, specifically, whether the filter tip would be included in determining the length of the cigarettes for purposes of that definition. The practical question, for purposes of excise duty, is whether a cigarette of this length, and composition is to be deemed to be one cigarette or two.

9 Both Macdonald and Benson & Hedges approached the Department separately, without notice to each other or the other members of the industry. Nor did the Department notify anyone else in the industry that this question was being raised. The question appears to have been raised with departmental officials by Macdonald in May 1975. A memorandum dated June 3, 1975 was sent by W. M. Horner, Chief Excise Duty, Department of National Revenue, to Regional Directors, Excise, but without notification to the industry, in the following terms:

There is evidence that a market is developing in other countries for long cigarettes (over 4 inches).

The manufacturer of cigarettes in Canada in excess of 4 inches would require consideration of length as well as weight when assessing duty.

The definition of a cigarette in the Excise Act stipulates that where a cigarette exceeds 4 inches in length, each 3 inches or fraction thereof shall be deemed to be a separate cigarette.

The weight of the cigarettes is determined as the weight of the tobacco paper and tip. The length of the cigarette should be determined by including these same materials.

Would you kindly adjust your tobacco audit program to make provisions for reviewing the length of cigarette products produced.

10 There were discussions by representatives of Macdonald and Benson & Hedges with departmental officials in the course of June 1975, and the Department agreed to consider its interpretation of the definition of "cigarette" in section 6 of the Excise Act. Some time around the end of June or the beginning of July, officials in the Department agreed to adopt the view urged by Macdonald and Benson & Hedges, and these companies were so advised. It was conceded on cross-examination by Howard Perrigo, Assistant Deputy Minister Excise of the Department of National Revenue, Customs and Excise, that this represented a "change" of administrative policy or interpretation. Some time in late June or early July the appellant companies learned of the proposed change of policy through their own inquiries and made strong representations against it, but departmental officials indicated that they would adhere to their position. On the strength of the assurances received from departmental officials as to the manner in which the definition of "cigarette" would be applied to "Plus" cigarettes, Benson & Hedges imported these cigarettes for a short period from an affiliated company in the United States and began manufacture of them in Canada in July, 1975. Since being introduced into Canada "Plus" and "More" cigarettes have been treated for purposes of excise duty as being cigarettes under four inches in length.

11 The appellants applied in July, 1975, by originating notice of motion for writs of prohibition, mandamus, injunction and certiorari, to have the effect of requiring the Minister of National Revenue and the Deputy Minister of National Revenue for Customs and Excise to include the filter tip



portion in determining the length of cigarettes for purposes of calculating the number of cigarettes upon which duties are to be imposed, levied and collected under the Excise Act. On the hearing of the motion the respondents made what the Trial Judge described as "a preliminary objection to the Court's jurisdiction to grant the relief asked for." After hearing argument on this issue and reserving judgment, he dismissed the motion on the ground that the applicants lacked status or locus standi for any of the relief claimed, and on the further grounds that, apart from the question of status, the powers and duties of the respondent officials and the nature of the action taken by them were not such as to give rise to the specific forms of relief sought. The applicants appealed from this judgment.

12 The complaint of the appellants is that the change in departmental policy was adopted without first giving them an opportunity to be heard and that it had the effect of conferring a competitive advantage on the respondent companies by permitting them to market a longer cigarette for the same amount of excise duty as is paid by the appellants. The appellants do not contend, nor is there any evidence to suggest, that they themselves have had any interest in marketing a cigarette with a tobacco portion of less than four inches but an overall length, including the filter tip, of more than four inches. They do not seek the interpretation which they contend to be the correct one in order to permit them to do anything in particular that they are not able to do now, but rather to prevent the respondent companies from doing something which is thought to give the latter a commercial advantage.

13 I am in agreement with the learned Trial Judge that such an interest is not sufficient to give the appellants the required status or locus standi to obtain any of the relief sought in their application. The appellants do not have a genuine grievance entitling them to challenge by legal proceedings the interpretation which the respondent officials have given to the definition of "cigarette" in section 6 of the Excise Act for purposes of their administrative application of the Act. Such interpretation does not adversely affect the legal rights of the appellants nor impose any additional legal obligation upon them. Nor can it really be said to affect their interests prejudicially in any direct sense. If it permits the respondent companies to do something which the appellants are not doing, it is because the appellants choose not to do it.

14 The appellants do not derive any rights, procedural or otherwise, from what may have been their own assumption as to how section 6 of the Excise Act would be applied to a cigarette in which the tobacco portion is less than four inches long but the overall length, including the filter tip, is more than four inches. Before May or June, 1975, officials of the Department had not been called on to consider this question so there was no basis in their action for such an assumption. In so far as the interpretation is to be considered a "change" of administrative policy it can only be considered as such in relation to the internal memorandum circulated by Horner at the beginning of June. When the question was raised by the respondent companies in May and June the departmental officials were under no duty to advise the appellant companies and offer them an opportunity to make representations. I know of no authority which supports a general duty, when considering a change of administrative policy to be applied in individual cases, to notify and offer anyone who may be interested an opportunity to make representations.

15 The circumstances of the present case are distinguishable, for example, from those in *Regina v. Liverpool Corporation* [1972] 2 Q.B. 299, in which the Court of Appeal granted an application for prohibition to prevent the Corporation from giving effect to a change of policy respecting the number of taxicab licences to be issued before hearing representations from taxicab owners and other interested persons. When the corporation had originally considered a change in the existing

policy it had invited representations from the owners and following such representations the corporation had given an undertaking to the owners that there would be no increase in the number of licences issued before certain legislation to regulate private cars for hire had been adopted and put into force. Contrary to this undertaking, which the corporation had been advised was not binding on it, and without notice to the owners and a further opportunity to them to make representations, the corporation adopted resolutions providing for an increase in the number of licences. On learning of this the owners asked for an opportunity to make representations and were in effect denied an adequate opportunity. The Court held that the Corporation had dealt unfairly with the owners. Lord Denning M.R. held that, given the nature of the power to grant taxi licences, there was a duty to act fairly by giving persons interested an opportunity to make representations before adopting a change of policy with respect to the issue of licences. The Court as a whole held that the corporation was bound by the undertaking that it had given, at least to the extent that it should not be permitted to set it aside before hearing all those who were interested. In my opinion the decision in this case cannot be taken as authority for the proposition that whenever an administrative authority, regardless of the nature of its function, contemplates a change in the policy to be applied in individual cases, it has a duty to notify persons who may conceivably be interested and offer them an opportunity to make representations. The conclusion that the corporation had not acted fairly in the Liverpool Taxi case must be viewed in the light of the particular circumstances of that case: the general nature of the power to grant licences; the early assurances given to the taxi owners that they would be heard before there was any change of policy, and the fact that they were heard in the first instance; and, finally and most importantly, the undertaking given by the corporation to the owners that there would be no increase in the number of licences before certain legislation had come into force, which carried with it the necessary implication that there would be no departure from this undertaking without a further opportunity to the owners to make representations. The importance to be attached to these circumstances, in considering the general significance of this case, is reflected, I think in the judgments of the other members of the Court, which, as I read them, rested essentially on the undertaking that the Corporation had given. Roskill L.J. said [at page 311]: "It has been said that the council and its relevant committee and sub-committee were never under any duty to hear any representations from the applicants. That may or may not be correct. In the light of what has happened, I do not think it necessary to express any opinion upon that question." Sir Gordon Willmer said [at page 313]: "It seems to me that in these very special circumstances, having regard to the history of how this matter had been dealt with in the past, and having regard especially to the giving of the undertaking, the applicants are justified in regarding themselves as aggrieved by what I can only describe as unfair treatment on the part of the Liverpool Corporation."

**16** The circumstances in the present case are quite different and afford no basis for a conclusion that the respondent officials acted unfairly toward the appellants. There had been no previous representations by the appellants as to how the definition in section 6 in the Excise Act should be applied to cigarettes of the kind introduced by the respondent companies. There had been no undertaking to the appellants with respect to this question. Nor did such practice as there was with respect to industry representation give any reasonable expectation that representations of the kind made by the respondent companies, involving a matter of a competitive nature, were such as would come from the industry as a whole or be promptly communicated to the industry as a whole. In any event, the appellant companies learned of the proposed policy soon after it was adopted and had an opportunity to make representations.

17 It is unnecessary to review the many cases that were cited to us as purporting to show that the courts are increasingly disposed to take a broad view of the requirement of locus standi. The expression that is given to the requirement of locus standi may vary somewhat from one recourse to another, and it may be that the requirement is not as strict with respect to certiorari and prohibition, where in certain circumstances a stranger may be recognized as having standing, as it is with respect to other recourses. Cf. de Smith, *Judicial Review of Administrative Action*, 3rd ed., 366-369. But in none of the cases on certiorari and prohibition, however broad a view is taken of the requirement of locus standi, do I find anything to suggest that persons in the position of the appellants in relation to the official action complained of would be considered to be persons aggrieved for purposes of these remedies. It may be conceded that in certain contexts a competitive interest may be regarded as conferring status to challenge administrative action, as for example, on certiorari to quash the grant of a licence allegedly in excess of jurisdiction: *The King v. Richmond Confirming Authority* [1921] 1 K.B. 248. A person should not, however, in my view, have the right to interfere with or meddle in official action affecting an existing competitor for the sole purpose of preventing that competitor from obtaining some advantage, particularly where the action complained of is something that the person complaining is free to take advantage of himself. That kind of interest appears to have been clearly rejected in the case of *Regina v. Commissioners of Customs and Excise* [1970] 1 W.L.R. 450 (albeit one of mandamus), where Lord Parker C.J. said [at page 456]: "Secondly, as it seems to me, in any event the interest, or the motive, which is moving this application is what I would term an ulterior motive, a motive of putting people out of business and nothing more." The public interest in competition must be borne in mind in exercising the judicial discretion as to whether to recognize standing in a competitive relationship.

18 The decisions of the Supreme Court of Canada in *Thorson v. Attorney General of Canada* [1975] 1 S.C.R. 138, and *McNeil v. Nova Scotia Board of Censors* (1975) 5 N.R. 43, were urged upon us as indicating a relaxation of the requirement of locus standi. A careful reading of these decisions shows, in my respectful opinion, that the principal consideration governing them is the importance in a federal state of opportunity to challenge the constitutional validity of statutes. No such consideration is applicable here. It was suggested that there is a comparable consideration of public policy in broad access to challenge the validity of administrative action, and this view finds some support in the recognition of a judicial discretion to permit a stranger to bring certiorari or prohibition in certain cases. The present case is not one that raises any question of the limits of statutory authority. The most that is raised is a question of administrative interpretation that the authorities are obliged to make in their application of the governing statute. Indeed, the action in this case is not of the kind that is subject to challenge by certiorari or prohibition. There is no decision here determining rights or obligations in an individual case, much less a determination of those of the appellants. See *Landreville v. The Queen* [1973] F.C. 1223. There is no duty to act judicially or fairly in a procedural sense. In so far as mandamus is concerned, there is no public duty of any kind that the appellants have a right to enforce. The duty of the respondent officials under section 202 of the Excise Act is one owing to the Crown rather than the appellants. Cf. *The Queen v. Lord Commissioners of the Treasury* (1871-72) 7 L.R.Q.B. 387. In so far as injunction is concerned, apart from the question of whether it may lie in certain cases against servants of the Crown, there is no interference with the rights of the appellants such as would entitle them to bring it against public authorities. *Cowan v. C.B.C.* [1966] 2 O.R. 309.

19 For all of the above reasons the appeal should be dismissed with costs.

\* \* \*

20 PRATTE J.: I concur.

\* \* \*

21 URIE J.: I concur.

qp/s/dcm

1 [1976] 1 F.C. 314.

*Indexed as:*

**Irving Shipbuilding Inc. v. Canada (Attorney General) (F.C.A.)**

**Irving Shipbuilding Inc. and Fleetway Inc. (Appellants)**

**v.**

**The Attorney General of Canada and CSMG Inc. (Respondents)**

[2010] 2 F.C.R. 488

[2010] 2 R.C.F. 488

[2009] F.C.J. No. 449

[2009] A.C.F. no 449

2009 FCA 116

No. A-547-08

Federal Court of Appeal

**Richard C.J., Evans and Ryer JJ.A.**

Heard: Ottawa, February 24, 25, 2009;

Judgment: Ottawa, April 16, 2009.

(63 paras.)

*Catchwords:*

*Crown -- Contracts -- Appeal from Federal Court decision dismissing judicial review by subcontractors of unsuccessful bidder BAE Systems (Canada) Inc. (BAE) to set aside contract awarded by Minister of Public Works and Government Services Canada (PWGSC) to respondent CSMG Inc. (CSMG) -- Applications Judge holding appellants not "directly affected" by award of contract, lacking standing under Federal Courts Act, s. 18.1(1) -- Whether subcontractor of unsuccessful bidder for government procurement contract may apply for judicial review to challenge fairness of process when unsuccessful bidder deciding not to litigate -- Appellants' losses not making them "directly affected" by PWGSC's decision, as standing not determined by quantum of applicant's loss -- Whether PWGSC owing duty of fairness to appellants -- Duty of fairness arising either from contract, legislation, common law -- Appellants having no contractual relationship with PWGSC, could*

*not rely on contract between BAE, PWGSC -- Financial Administration Act, s. 40.1 not sufficiently precise to impose immediate legal duty of procedural fairness enforceable by bidder, subcontractor -- Common law duty of fairness not free-standing -- Normally inappropriate to import into pre-dominantly commercial relationship governed by contract public law duty developed in context of performance of governmental functions pursuant to powers derived solely from statute -- When Crown entering into contract, rights, duties, available remedies generally determined by law of contract -- Subcontractors permitted to bring judicial review proceedings to challenge fairness of process only in extraordinary situations: fraud, bribery, corruption, grave misconduct undermining public confidence in essential integrity of process -- Here, appellants not establishing breach of duty of fairness in conduct of procurement process -- Appeal dismissed.*

[page489]

*Practice -- Parties -- Standing -- Public Works and Government Services Canada (PWGSC) awarding contract to respondent CSMG Inc. -- Appellants, subcontractors of unsuccessful bidder, seeking judicial review of that decision -- Applications Judge holding appellants not "directly affected" by award of contract, lacking standing under Federal Courts Act, s. 18.1(1) -- Appellants' losses not making them directly affected by PWGSC decision -- PWGSC not owing duty of fairness to appellants -- Even if such duty owed, duty not breached herein -- Appellants thus not having standing to challenge PWGSC decision.*

### **Summary:**

This was an appeal from a decision of the Federal Court dismissing an application for judicial review by the appellants to set aside a contract to provide in-service support to submarines awarded by the Minister of Public Works and Government Services Canada (PWGSC) to CSMG Inc. (CSMG). The appellants were subcontractors to BAE Systems (Canada) Inc. (BAE), the unsuccessful bidder. In response to PWGSC's request for proposals (RFP), the appellants and other subcontractors entered into "teaming agreements" with BAE. The agreement explicitly stated that the "team" was not a joint venture between the appellants and BAE, which remained the sole primary bidder on the submarine contract. The appellants' contract with BAE would have entitled them to 50% of the revenue and 50% of the work from the submarine contract. The applications Judge held that the appellants were not "directly affected" by the award of the contract to CSMG and hence lacked standing under subsection 18.1(1) of the *Federal Courts Act* to make an application for judicial review. He rejected the argument that the award of the contract was vitiated by conflict of interest and a reasonable apprehension of bias due to the involvement of Weir, a shareholder of CSMG, in the development of the RFP. The principal issue was whether the appellants had a right to procedural fairness in the process by which PWGSC awarded the submarine contract to CSMG.

[page490]

*Held*, the appeal should be dismissed.

The award of the submarine contract by the Minister of PWGSC was reviewable under section 18.1 of the *Federal Courts Act* (Act) as a decision of a "federal board, commission or other tribunal" made in the exercise of "powers conferred by or under an Act of Parliament". The argument focused on whether the appellants' losses made them "directly affected" by PWGSC's decision so as to enable them to make this application for judicial review. If PWGSC owed the appellants a duty of fairness and awarded the contract to CSMG in breach of that duty, they would be directly affected by the impugned decision. Most judicial review statutes are drafted against the background of the common law of judicial review (*Canada (Citizenship and Immigration) v. Khosa*). To respect the context and purpose of the statutory language of subsection 18.1(1) of the Act, significance must be attached to the common law standing requirements ("person aggrieved" or "specially affected"). Standing is not determined by the quantum of an applicant's loss. The relationship of the loss to the administrative action impugned and whether it falls within the range of interests protected by the enabling legislation is at least as important.

The fact that this case involved the award of a contract provided the essential context in which to determine if a duty of fairness was owed to the appellants. On the facts of this case, such a duty could arise from contract, legislation or common law. A tender in response to an RFP creates a contract (contract A) governing the conduct of the party calling for tenders. In the present case, BAE elected not to initiate judicial review proceedings in order to establish that the submarine contract was awarded to CSMG in breach of the duty of fairness implicit in contract A. As subcontractors of BAE who have no contractual relationship with PWGSC, the appellants could not rely on contract A between BAE and PWGSC as the source of any legal duty owed to them. Having elected not to enter in a joint venture with BAE to bid for the submarine contract, the appellants could not now claim the benefit of contract A.

Legislation may impose a duty of procedural fairness on PWGSC in its conduct of the procurement process. However, [page491] section 40.1 of the *Financial Administration Act* relied on by the appellants, in providing that the Government of Canada is committed to taking appropriate measures to promote fairness in the bidding process, is not sufficiently precise to impose an immediate legal duty of procedural fairness enforceable by a bidder, let alone by a subcontractor.

The common law duty of fairness is not free-standing, but is imposed in connection with the particular scheme in which the impugned administrative decision has been taken. It will normally be inappropriate to import into a predominantly commercial relationship governed by contract (such as in the present case) a public law duty developed in the context of the performance of governmental functions pursuant to powers derived solely from statute. First, judicially imposed procedural duties in favour of subcontractors would undermine the right of a bidder for a procurement contract to determine what, if any, steps it should take in the event of an apparent breach of contract A. Second, procedural rights are personal to those whose substantive rights or interests they protect. Third, the appellants' logic that they were entitled to procedural fairness opened the alarming possibility of a cascading array of potential procedural rights holders. Fourth, since those who bid in response to an RFP have contractual rights to ensure that their tenders are evaluated accurately and fairly, the protection of the public interest in the integrity of the process does not require a judicial extension of procedural rights to subcontractors. Fifth, the public interest in the efficiency of the tendering process may be compromised by an extension of the right to procedural fairness. Such an extension to subcontractors could only complicate the procurement process and introduce new levels of uncertainty into essentially commercial relationships. To supplement the contractual safeguards with the common law duty of fairness would thus frustrate the parties' expectations. Sixth, once a contract

has been awarded, the public has an interest in the avoidance of undue delays (such as those caused by setting aside a contract and starting the tendering process again) in its performance and in ensuring that government is able promptly to acquire the goods and services that it needs for the discharge of its responsibilities. When the Crown enters into a contract, its rights, duties, and available remedies are generally to be determined by the law of contract.

[page492]

Finally, it will only be in the most extraordinary situations that subcontractors should be permitted to bring judicial review proceedings to challenge the fairness of the process. The facts of this case fell short of the kind of extraordinary circumstances in which the Court might intervene at the instance of a subcontractor. These would be, for example, fraud, bribery, corruption or other kinds of grave misconduct which, if proved, would undermine the public confidence in the essential integrity of the process. Here, even if the appellants did have standing, they did not establish a breach of the duty of fairness, including a reasonable apprehension of bias, on the part of PWGSC in its conduct of the procurement process.

#### **Statutes and Regulations Cited**

*Defence Production Act*, R.S.C., 1985, c. D-1, s. 16(a) (as am. by S.C. 2004, c. 25, s. 125(F)).

*Department of Public Works and Government Services Act*, S.C. 1996, c. 16, s. 6 (as am. by S.C. 2001, c. 4, s. 157; 2005, c. 30, s. 121).

*Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, ss. 28(1)(b),(c).

*Federal Court Act*, R.S.C., 1985, c. F-7, ss. 18(1)(a) (as am. by S.C. 1990, c. 8, s. 4), 28.

*Federal Courts Act*, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 2 "federal board, commission or other tribunal" (as am. *idem*, s. 15), 18.1 (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27).

*Financial Administration Act*, R.S.C., 1985, c. F-11, s. 40.1 (as enacted by S.C. 2006, c. 9, s. 310).

#### **Cases Cited**

Applied:

*Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, 293 D.L.R. (4th) 434, 64 C.C.L.I. (4th) 159.

*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577.

*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, 304 D.L.R. (4th) 1, 82 Admin. L.R. (4th) 1.

#### **Considered:**

*Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694, (1995), 125 D.L.R. (4th) 559, 184 N.R. 260 (C.A.).



*Sunshine Village Corp. v. Superintendent of Banff National Park* (1996), 44 Admin. L.R. (2d) 201, 20 C.E.L.R. (N.S.) 171, 202 N.R. 132 (F.C.A.).

[page493]

Referred to:

*Cardinal et al. v. Director of Kent Institution*, [1985] 2 S.C.R. 643, (1985), 24 D.L.R. (4th) 44, [1986] 1 W.W.R. 577.

*Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, (1981), 119 D.L.R. (3d) 267, 13 B.L.R. 72.

*Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, 193 D.L.R. (4th) 1, 3 C.C.L.T. (3d) 1.

*Ratepayers of the School District of the New Ross Consolidated School et al. and Chester and District Municipal School Board, Re* (1979), 102 D.L.R. (3d) 586 (N.S.S.C. (T.D.)).

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Woolf, Lord *et al.* *De Smith's Judicial Review*, 6th ed. London: Sweet & Maxwell, 2007.

#### History and Disposition:

APPEAL from the Federal Court decision (2008 FC 1102, 89 Admin. L.R. (4th) 200, 336 F.T.R. 208) dismissing an application for judicial review by subcontractors of the unsuccessful bidder to set aside a contract awarded by the Minister of Public Works and Government Services Canada. Appeal dismissed.

#### Appearances:

*J. Bruce Carr-Harris, David Sherriff-Scott and Vincent DeRose* for appellants.

*Michael F. Ciavaglia* for respondent Attorney General of Canada.

*Lawrence E. Thacker* for respondent CSMG Inc.

[page494]

**Solicitors of record:**

*Borden Ladner Gervais LLP, Ottawa, for appellants.*

*Deputy Attorney General of Canada for respondent Attorney General of Canada.*

*Lenczner Slaght Royce Smith Griffin LLP, Toronto, for respondent CSMG Inc.*

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*The following are the reasons for judgment rendered in English by*

**EVANS J.A.:**--

**A. INTRODUCTION**

1 Public contracts lie at the intersection of public law and private law. The question raised in this appeal is whether a subcontractor of an unsuccessful bidder for a government procurement contract may apply for judicial review to challenge the fairness of the process for awarding the contract when the unsuccessful bidder decides not to litigate.

2 This is an appeal from a decision of the Federal Court in which Justice Harrington (applications Judge) dismissed an application for judicial review by Irving Shipbuilding Inc. and Fleetway Inc. (appellants) to set aside a contract awarded by the Minister of Public Works and Government Services Canada (PWGSC) to CSMG Inc. (CSMG), a company formed by Devonport Management Limited and Weir Canada Inc. (Weir) for the purpose of bidding on this contract.

3 The appellants were subcontractors to BAE Systems (Canada) Inc. (BAE), the unsuccessful bidder on a contract to provide in-service support to Canada's Victoria Class submarines (the submarine contract). If the submarine contract had been awarded to BAE, which is not a party to this litigation, the appellants' contract with BAE would have entitled them to 50% of the revenue and 50% of the work from the submarine contract. The potential total value of the submarine [page495] contract is said to be approximately \$1.5 billion over 15 years.

4 The applications Judge held that, unlike BAE, the primary bidder, the appellants were not "directly affected" by the award of the contract to CSMG and hence lacked standing under subsection 18.1(1) [as enacted by S.C. 1990, c. 8, s. 5] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. by S.C. 2002, c. 8, s. 14)], to make an application for judicial review. Nonetheless, he went on to consider the application on its merits. The applications Judge rejected the appellants' argument that the award of the contract to CSMG was vitiated by procedural unfairness, namely, conflict of interest and reasonable apprehension of bias. The decision is reported as *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2008 FC 1102, 89 Admin. L.R. (4th) 200.

5 The appellants say that the applications Judge erred in law by construing too narrowly the words "anyone directly affected" in subsection 18.1(1). Since the termination of their rights under the subcontract to perform work and to receive remuneration was, the appellants argued, the inevitable and foreseen consequence of the Minister's award of the contract to CSMG, they had standing to challenge the fairness of the procurement process. The appellants' essential complaint about the process is that the Minister failed to ensure that no bidder had an unfair advantage over others. More particularly, they allege, an employee of Weir, one of the companies that formed CSMG,

gained an insight into the "mindset", or preferences, of the Department of National Defence (DND) officials who evaluated the bids as a result of having worked, in another capacity, with those officials in developing the solicitation documents.

6 In my view, the appellants have failed to establish that PWGSC owed them a duty of fairness. Since they did not tender to PWGSC's request for proposals (RFP), they cannot claim that the duty was contractual. Nor can [page496] they point to legislation which confers on subcontractors a statutory right to procedural fairness. While a broad right to procedural fairness is afforded by the common law to those whose rights, interests or privileges are adversely affected by administrative action, this public law right has little application, if any, to an essentially commercial relationship governed for the most part by the law of contract. Accordingly, I would dismiss the appeal.

## B. FACTUAL BACKGROUND

7 On March 30, 2004, PWGSC solicited letters of interest for the submarine contract and received requests for information from, among others, Peacock Inc. (which later became Weir), Irving, Fleetway, and BAE. Irving and Fleetway are affiliated.

8 Weir administered, through its marine engineering services division, the Naval Engineering Test Establishment (NETE) which is a government-owned, but privately operated organization. NETE provides independent and impartial test and evaluation services to the Canadian Navy. When Weir was awarded the contract to manage NETE in 1999, it undertook to take steps to ensure that it would not gain any real or perceived unfair competitive advantage in its other dealings with DND as a result of its management of NETE.

9 In March 2005, PWGSC issued an industry solicitation requesting feedback on the proposed statement of work (SOW), developed by NETE, which was to be incorporated into the RFP for the submarine services. In the following months, the SOW was discussed at both public and closed-door meetings with the interested companies, as a result of which changes were made to the SOW.

10 On September 22, 2005, PWGSC issued its first RFP soliciting bids for the submarine contract. Bids [page497] were submitted by three parties, including CSMG and BAE. As already noted, CSMG was formed for the purpose of bidding on the submarine contract and Weir was one of its two shareholders.

11 Rather than form a new corporation or enter into a joint venture, BAE acted as the sole primary bidder and prepared its bid with the cooperation of subcontractors; collectively they referred to themselves as "Team Victoria". The appellants and other subcontractors entered into agreements with BAE, which they called the "teaming agreements". The appellants' teaming agreement provided, among other things, for the creation of a steering committee, through which the appellants would have a 50% say in any management decisions taken in the preparation of the bid and, if successful, the execution of the submarine contract. The teaming agreement also explicitly stated that Team Victoria was not a joint venture between the appellants and BAE, which remained the sole primary bidder on the submarine contract.

12 Before submitting the Team Victoria bid, BAE raised concerns with PWGSC about Weir's role in developing the SOW and requested that it ensure that no conflict of interest arose. In response, PWGSC assured BAE that it had taken all necessary steps and informed it that any bid submitted would constitute an acknowledgment of this. Team Victoria submitted a bid.

13 On June 1, 2006, PWGSC informed BAE that the bidding process was cancelled as none of the bidders met all the mandatory requirements. On July 21, 2006, a second RFP was issued, and both CSMG and BAE again submitted bids. On January 10, 2007, PWGSC informed BAE that, although its bid was compliant, CSMG would be awarded the submarine contract because it had received a higher score for the technical aspects of the bid.

[page498]

14 The appellants brought an application for judicial review in the Federal Court to challenge the validity of the award of the contract to CSMG. Since the contract concerns national security, the Canadian International Trade Tribunal has no jurisdiction over complaints arising from its award.

### C. DECISION OF THE FEDERAL COURT

15 The applications Judge held that the appellants had no standing to seek judicial review because, as subcontractors of the unsuccessful bidder, they were not "directly affected" by the award of the contract to CSMG within the meaning of subsection 18.1(1) of the *Federal Courts Act*. Relying by way of analogy on actions in tort for purely economic loss, he held (at paragraph 22) that "direct" means "without intermediaries", and that, as the primary bidder on the submarine contract, BAE was an "intermediary". He relied also (at paragraph 28) on *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737 (*Design Services*), where subcontractors of an unsuccessful bidder failed to establish that PWGSC owed them a duty of care in tort not to award a contract to a non-compliant bidder.

16 Finally, the applications Judge held (at paragraphs 52-54) that, even if the appellants had the requisite standing, he would have dismissed their claim on its merits, because they had only established a "possibility of mischief", and not a "probability of mischief", as a result of any failure by PWGSC to prevent CSMG from benefiting from an unfair advantage based on Weir's involvement in the development of the RFP. The facts of this case, the applications Judge concluded, did not give [page499] rise to a reasonable apprehension that PWGSC was biased in its evaluation of the bids.

17 Accordingly, the applications Judge dismissed the appellants' application for judicial review.

### D. ISSUES AND ANALYSIS

#### (i) Jurisdiction

18 The parties do not dispute that the award of the submarine contract can be the subject of an application for judicial review as an exercise of power conferred by an Act of Parliament on a federal board, commission or other tribunal. I agree with the parties for the following reasons.

19 The relevant provisions of the *Federal Courts Act* provide as follows [s. 2 (as am. by S.C. 2002, c. 8, s. 15)]:

2. (1) ...

"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, ....

...

**18.1** (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

**20** The Minister of Public Works and Government Services Canada has broad statutory responsibilities for the acquisition of goods and services for the Government of Canada. The following statutory provisions are of particular relevance to the present case:

*Department of Public Works and Government Services Act*, S.C. 1996, c. 16 [s. 6 (as am. by S.C. 2001, c. 4, s. 157; 2005, c. 30, s. 121)]

**6.** The powers, duties and functions of the Minister extend to and include all matters over which Parliament has [page500] jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

(a) the acquisition and provision of articles, supplies, machinery, equipment and other materiel for departments;

(b) the acquisition and provision of services for departments;

...

(e) the construction, maintenance and repair of public works, federal real property and federal immovables;

*Defence Production Act*, R.S.C., 1985, c. D-1 [s. 16(a) (as am. by S.C. 2004, c. 25, s. 125(F))]

**16.** The Minister may, on behalf of Her Majesty and subject to this Act,

(a) buy or otherwise acquire, utilize, store, transport, sell, exchange or otherwise dispose of defence supplies;

In my view, these provisions include a power to contract for the maintenance and servicing of submarines for the DND.

**21** The fact that the power of the Minister, a public official, to award the contract is statutory, and that this large contract for the maintenance and servicing of the Canadian Navy's submarines is a matter of public interest, indicate that it can be the subject of an application for judicial review un-

der section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27], a public law proceeding to challenge the exercise of public power. However, the fact that the Minister's broad statutory power is a delegation of the contractual capacity of the Crown as a corporation sole, and that its exercise by the Minister involves considerable discretion and is governed in large part by the private law of contract, may limit the circumstances in which the Court should grant relief on an application for judicial review challenging the legality of the award of a contract.

[page501]

**22** This Court reached a similar conclusion in *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694 (C.A.) (*Gestion Complexe*), at paragraphs 7-17. The Court held that the exercise by a Minister of a statutory power to call for tenders and to enter into contracts for the lease of land by the Crown could be the subject of judicial review under the former paragraph 18(1)(a) [as am. by S.C. 1990, c. 8, s. 4] of the *Federal Court Act* [R.S.C., 1985, c. F-7] as a decision of "a federal board, commission or other tribunal".

**23** Although not addressing the particular issue in dispute in the present case, Justice Décary, writing for the Court, also emphasized the difficulties facing an applicant in establishing a ground of review that would warrant the Court's intervention in the procurement process through its judicial review jurisdiction. Thus, he said (at paragraph 20):

As by definition the focus of judicial review is on the legality of the federal government's actions, and the tendering procedure was not subject to any legislative or regulatory requirements as to form or substance, it will not be easy, in a situation where the bid documents do not impose strict limitations on the exercise by the Minister of his freedom of choice, to show the nature of the illegality committed by the Minister when in the normal course of events he compares the bids received, decides whether a bid is consistent with the documents or accepts one bid rather than another.

**24** This view of the Court's jurisdiction is consistent with that generally adopted by other courts in Canada: see Paul Emanuelli, *Government Procurement*, 2nd ed. (Markham, Ont.: LexisNexis, 2008), at pages 697-706, who concludes (at page 698):

As a general rule, the closer the connection between a procurement process and the exercise of a statutory power, the greater the likelihood that the activity can be subject to judicial review. Conversely, to the extent that the procurement falls outside the scope of a statutory power and within the exercise of government's residual executive power, the less likely that the procurement will be subject to judicial review.

[page502]

English authorities on public contracts and judicial review are considered in Lord Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith's Judicial Review*, 6th ed. (London: Sweet & Maxwell, 2007), at pages 138-145. Courts generally require an "additional public element" before concluding that the exercise by a public authority of its contractual power is subject to judicial review, even when the power is statutory.

25 Consequently, on the basis of both authority and principle, I agree that the award of the submarine contract by the Minister of PWGSC is reviewable under section 18.1 of the *Federal Courts Act* as a decision of a "federal board, commission or other tribunal" made in the exercise of "powers conferred by or under an Act of Parliament" (section 2).

(ii) Standard of review

26 The principal issue that I need to decide in order to dispose of this appeal is whether the appellants had a right to procedural fairness in the process by which PWGSC awarded the submarine contract to CSMG. This is a question of law to be determined on a standard of correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), at paragraph 129.

Issue 1: Are the appellants "directly affected" by the award of the submarine contract to CSMG?

27 The parties made lengthy submissions on the question of whether the appellants had standing to challenge the award of the submarine contract to CSMG as a result of the loss of both their contractual rights as subcontractors and significant potential revenue from the work to be performed under that contract. In particular, the argument focussed on whether the appellants' losses made them "directly affected" by PWGSC's decision to award the submarine contract to CSMG so as to enable them to make this application for [page503] judicial review under subsection 18.1(1) of the *Federal Courts Act*.

28 In my view, the question of the appellants' standing should be answered, not in the abstract, but in the context of the ground of review on which they rely, namely, breach of the duty of procedural fairness. Thus, if the appellants have a right to procedural fairness, they must also have the right to bring the matter to the Court in order to attempt to establish that the process by which the submarine contract was awarded to CSMG violated their procedural rights. If PWGSC owed the appellants a duty of fairness and awarded the contract to CSMG in breach of that duty, they would be "directly affected" by the impugned decision. If they do not have a right to procedural fairness, that should normally conclude the matter. While I do not find it necessary to conduct an independent standing analysis, I shall briefly address two issues that arose from the parties' submissions.

29 First, I do not accept the respondents' contention that, in providing in subsection 18.1(1) of the *Federal Courts Act* that "anyone directly affected by the matter in respect of which relief is sought" may make an application for judicial review, Parliament intended litigants challenging federal administrative action to have more limited access to the Federal Courts than that typically available to those challenging in provincial superior courts administrative action taken by provincial statutory authorities.

30 Indeed, prior to the 1992 amendments to what was then the *Federal Court Act*, the words "directly affected" only applied to standing to bring an application for judicial review in the Appellate Division of the Federal Court of Canada under the former section 28 with respect to a decision or order of a tribunal to which that section applied. Since standing to bring judicial review proceedings in the Trial Division was left undefined, it was determined on the basis of the common law. As a

result of the 1992 amendments, the statutory application for judicial review was extended to the [page504] administrative law jurisdiction of both Federal Courts. It seems to me implausible that, by retaining the words "directly affected" in subsection 18.1(1), Parliament thereby intended to narrow litigants' access to the Federal Court from that which litigants previously had to the Trial Division of the Federal Court.

31 The principal purpose of the administrative law aspects of the *Federal Court Act* [R.S.C. 1970 (2nd Supp.), c. 10] when enacted in 1970 was to transfer from the superior courts of the provinces to the Federal Court of Canada an almost exclusive supervisory jurisdiction over federal administrative action: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (*Khosa*), at paragraph 34. Indeed, far from restricting judicial review, former paragraphs 28(1)(b) and (c) of the Act expanded it somewhat, by removing the common law requirement that any error of law by the tribunal must be apparent on the face of its record, and by including error of fact as a discrete ground of review, even when it could not be said to have been based on "no evidence". The 1992 extension of the application for judicial review as the procedural vehicle for challenging federal administrative action in both Federal Courts was designed to modernize and facilitate judicial review, not to restrict access to the Federal Court.

32 To attach the significance urged by the respondents to Parliament's choice of the words "directly affected", rather than any of the common law standing requirements ("person aggrieved" or "specially affected", for example) would, in my view, ignore the context and purpose of the statutory language of subsection 18.1(1). As the Supreme Court of Canada said recently in *Khosa* (at paragraph 19):

... most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them ... can only sensibly be interpreted in the common law context....

[page505]

33 Moreover, since all these terms are somewhat indeterminate, Parliament's choice of one rather than another should be regarded as of relatively little importance. See also Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986), at pages 163-164 (*Locus Standi*), especially his apt description (at page 163) of the "semantic wasteland" to be traversed by a court in attempting to apply the various "tests" for standing, both statutory and common law. Although directed at differences between the French and English texts of subsection 18.1(4) of the *Federal Courts Act*, the following statement in *Khosa* (at paragraph 39) seems equally apt in the interpretation of the words "directly affected" in subsection 18.1(1):

A blinkered focus on the textual variations might lead to an interpretation at odds with the modern rule [of statutory interpretation] because, standing alone, linguistic considerations ought not to elevate an argument about text above the relevant context, purpose and objectives of the legislative scheme....

34 The interpretation of the standing requirement in subsection 18.1(1) was addressed by this Court in *Sunshine Village Corp. v. Superintendent of Banff National Park* (1996), 44 Admin. L.R.



(2d) 201 (F.C.A.), at paragraphs 66-68. Writing for the Court, Desjardins J.A. concluded that it was not intended to preclude the Court from granting public interest standing to persons who were not directly affected. The appellants in the present case do not rely on public interest standing.

35 Second, I do not necessarily agree with the appellants' argument that standing is determined by the quantum of an applicant's loss. Attempting to determine whether a loss is big enough to confer standing would tend to be arbitrary and productive of undue uncertainty, although a *de minimis* loss may be regarded as no loss at all. At least as important as the quantity of any loss sustained by an applicant for judicial review is its relationship to the administrative action impugned, and [page506] whether it falls within the range of interests protected by the enabling legislation.

Issue 2: Did the appellants have a right to procedural fairness?

36 The appellants argue that the applications Judge was "distracted" by the "contractual matrix" of this litigation. They say that he should have applied the test for the application of the duty of fairness used with respect to administrative action taken pursuant to the exercise of a statutory power, namely, whether it affects the rights, privileges or interests of individuals: see, for example, *Cardinal et al. v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at page 653.

37 I do not agree. In my view, the fact that this case involves the award of a contract provides the essential context in which it must be determined if a duty of fairness is owed to the appellants. On the facts of this case, a duty of fairness may arise in one of three ways: contract, legislation, and the common law.

(i) Contract

38 A tender in response to an RFP creates a contract (contract A) governing the conduct of the party calling for tenders: *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. The terms of contract A may include a promise, express or implied, that the contract for which tenders were requested (contract B) will be awarded in a procedurally fair manner and bidders will be treated equally: *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, at paragraph 88.

39 In the present case, BAE could have relied upon contract A with PWGSC to allege that contract B was awarded to CSMG in breach of the duty of fairness implicit in contract A. Whether BAE would have succeeded, either on an application for judicial review or in [page507] an action for damages for breach of contract, is, of course, another question.

40 However, BAE has elected not to initiate judicial review proceedings, or an action for breach of contract, in order to establish that the contract was awarded to CSMG in breach of the duty of fairness and should be set aside for procedural unfairness or PWGSC should pay damages for breach of contract A. As subcontractors of BAE who have no contractual relationship with PWGSC, the appellants may not rely on contract A between BAE and PWGSC as the source of any legal duty owed to them.

41 It would have been different if the appellants had entered into a joint venture with BAE to bid for the submarine contract or, together, they had formed a company for the purpose of bidding on the contract. In either of these events, the appellants would have had the benefit of contract A with PWGSC. However, having elected to be subcontractors of BAE, and thus not to expose themselves

to potential contractual liability to PWGSC, the appellants cannot now claim the benefit of contract A between PWGSC and BAE because they were not a party to it.

(ii) Statute

42 In the course of oral argument, counsel for the appellants submitted that legislation conferred on them rights to procedural fairness. Counsel relied on the following provisions:

*Financial Administration Act*, R.S.C., 1985, c.  
F-11 [s. 40.1 (as enacted by S.C. 2006, c. 9, s. 310)]

**40.1** The Government of Canada is committed to taking appropriate measures to promote fairness, openness and transparency in the bidding process for contracts with Her Majesty for the performance of work, the supply of goods or the rendering of services.

43 Legislation may, of course, impose a duty of fairness on PWGSC in its conduct of the procurement [page508] process, and specify its content. However, I am not persuaded that the above provision assists the appellants. The phrase "The Government of Canada is committed to taking appropriate measures to promote the fairness ... in the bidding process" is not sufficiently precise to impose an immediate legal duty of procedural fairness enforceable by a bidder, let alone by a subcontractor. Rather, it sets a goal and only commits the Government to take future, unspecified steps to ensure that the procurement process is fair.

(iii) Common law

44 The appellants argue that, as persons adversely affected by the award of the submarine contract to CSMG, they are entitled to challenge the fairness of the process by which it was awarded. They say that their right to procedural fairness arises from the common law in respect of administrative action, namely, the award of the contract to CSMG, because it ended their legal rights under their contract with BAE and caused them substantial financial loss. I do not agree.

45 The common law duty of fairness is not free-standing, but is imposed in connection with the ... particular scheme in which the impugned administrative decision has been taken. In my opinion, it cannot be assumed that a duty imposed on the exercise of administrative action taken in the performance of a statutory, governmental function applies in the case of a decision to purchase goods and services where the legal relations of the parties are largely governed by the law of contract.

46 The context of the present dispute is essentially commercial, despite the fact that the Government is the purchaser. PWGSC has made the contract pursuant to a statutory power and the goods and services purchased are related to national defence. In my view, it will normally be inappropriate to import into a predominantly commercial relationship, governed by contract, a public law duty developed in the context of [page509] the performance of governmental functions pursuant to powers derived solely from statute.

47 First, judicially imposed procedural duties in favour of subcontractors would undermine the right of a bidder for a procurement contract to determine what, if any, steps it should take in the event of an apparent breach of contract A. The law should normally not override the decision of an unsuccessful bidder to do nothing because, for example, of a fear that the institution of litigation

would jeopardize its prospects of obtaining a contract in the future, or of its desire not to be involved in costly and time-consuming litigation. See also *Locus Standi*, at page 171, where Justice Cromwell notes that the law generally defers to the decision of "the more obvious plaintiff" not to institute legal proceedings and therefore does not confer standing on a person less affected by the impugned administrative action.

48 Second, while also serving the public interest in good government, procedural rights are, to a large extent, personal to those whose substantive rights or interests they protect. For example, in most cases, a person who has waived a right to procedural fairness may not subsequently challenge an administrative decision on the ground that it was made in breach of the duty of fairness: for the relevant authorities, see Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback Publishing, 1998), at paragraph 11: 5500.

49 The decision in *Ratepayers of the School District of the New Ross Consolidated School et al. and Chester and District Municipal School Board, Re* (1979), 102 D.L.R. (3d) 586 (N.S.S.C. (T.D.)) is anomalous in conferring standing on a ratepayers' group challenging the dismissal of a school principal on the ground that he had not been afforded a fair hearing, even though he himself had not litigated the matter: see David J. Mullan and Andrew J. Roman, "Minister of Justice of [page510] *Canada v. Borowski: The Extent of the Citizen's Right to Litigate the Lawfulness of Government Action*" (1984), 4 *Windsor Y.B. Access Just.* 303, at pages 339-341 and 349.

50 Third, the logic of the appellants' argument that they are entitled to procedural fairness opens the alarming possibility of a cascading array of potential procedural rights holders. What, for example, of employees of unsuccessful bidders or their subcontractors who lose their employment as the result of the award of the contract to another bidder? The adverse impact on such employees may be just as serious to them as the loss of the subcontract is to the appellants. It would be unduly formalistic to say that the appellants' position is distinguishable because their contract provided that their right to share the revenue terminated if the submarine contract was not awarded to BAE.

51 Fourth, the appellants say that to confer upon them a right to procedural fairness would advance the public's interest in obtaining value for money by protecting the fairness of the procurement process; an unfair process may discourage bidders from tendering to future RFPs. However, since those who bid in response to an RFP have contractual rights to ensure that their tenders are evaluated accurately and fairly, the protection of the public interest in the integrity of the process does not require a judicial extension of procedural rights to subcontractors. Moreover, if a free-standing right to procedural fairness existed it would not have been necessary for the courts to have implied it as a term of contract A.

52 Fifth, the public interest in the efficiency of the tendering process may well be compromised by an extension of the right to procedural fairness in the manner urged by the appellants. To extend the right to procedural fairness to subcontractors and, possibly, to others who have been adversely affected by a contract award, can only complicate the procurement process and [page511] introduce new levels of uncertainty into essentially commercial relationships.

53 To supplement the contractual safeguards with the common law duty of fairness would thus frustrate the parties' expectations. A duty of fairness based on the common law would presumably also include a right for subcontractors, and others, to participate in the procurement process by making representations before the contract was awarded. As already noted, the appellants could have

brought themselves within the protection of contract A if they had so chosen, including any duty of fairness arising from it.

54 Sixth, once a contract has been awarded, the public has an interest in the avoidance of undue delays in its performance, and in ensuring that government is able promptly to acquire the goods and services that it needs for the discharge of its responsibilities. The normal remedy for breach of contract is a simple award of damages, which does not delay the performance of the contract by the winning bidder. In contrast, the more intrusive public law remedy sought by the appellants is that the contract awarded to CSMG be set aside, so that the tendering process can start again. Governments' recent resort to funding "shovel-ready" infrastructure projects as part of a strategy for promoting economic recovery vividly illustrates that delays in getting publicly financed work underway may be detrimental to the public interest.

55 Two recent decisions of the Supreme Court of Canada support the conclusion that a duty of fairness was not owed to the appellants with respect to the procurement process: *Design Services* and *Dunsmuir*.

56 The facts of *Design Services* are similar to those of the present case. The appellants were the subcontractors of an unsuccessful bidder on a government contract. As in our case, the appellants in *Design Services* could have entered into a joint venture with the [page512] unsuccessful bidder, but did not. The subcontractors and the unsuccessful bidder sued the Government for damages on the ground that it had awarded the contract to a non-compliant bidder. However, on settling its claim, the unsuccessful bidder discontinued its action.

57 The question for the Court was whether the subcontractor had an action in negligence against the Government for awarding the contract to a non-compliant bidder. In giving the judgment of the Court dismissing the appeal, Justice Rothstein said (at paragraph 56):

In essence, the appellants are attempting, after the fact, to substitute a claim in tort law for their inability to claim under "Contract A". After all, the obligations the appellants seek to enforce through tort exist only because of "Contract A" to which the appellants are not parties. In my view, the observation of Professor Lewis N. Klar (*Tort Law* (3rd ed. 2003); at p. 201) - that the ordering of commercial relationships is usually in the bailiwick of the law of contract - is particularly apt in this type of case. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract.

58 The appellants argue that *Design Services* is distinguishable because the concern of the Court in that case was that the imposition of a duty of care would increase the Crown's exposure to potential financial liability far beyond the contractual arrangements: paragraphs 59-66. But in the present case, they say, no claim for damages is being made and, once granted, the remedy sought, namely the quashing of the award of the contract, can only be granted once. In my view, however, this is too narrow a reading of *Design Services*.

59 In *Dunsmuir* the Court considered (at paragraphs 102-117) the appropriateness of imposing a duty of [page513] fairness prior to the dismissal of a Crown employee and office holder. The Court decided that, as a general rule, a duty of procedural fairness, and remedies other than damages for

breach of contract, have no place in the legal relationship between the Crown on the one hand, and office holders and employees on the other, when their relationship is rooted essentially in contract.

**60** Admittedly, the facts of our case are different from those in *Dunsmuir* because the appellants have no contractual rights against PWGSC. Nonetheless, the broader point made by both *Design Services* and *Dunsmuir* is that when the Crown enters into a contract, its rights and duties, and the available remedies, are generally to be determined by the law of contract.

**61** Finally, if a case arose where the misconduct of government officials was so egregious that the public interest in maintaining the essential integrity of the procurement process was engaged, I would not want to exclude the possibility of judicial intervention at the instance of a subcontractor. However, given the powerful reasons for leaving procurement disputes to the law of contract, it will only be in the most extraordinary situations that subcontractors should be permitted to bring judicial review proceedings to challenge the fairness of the process.

**62** In my view, the facts of this case fall far short of the kind of extraordinary circumstances in which the Court might intervene at the instance of a subcontractor. The appellants do not allege, for example, fraud, bribery, corruption or other kinds of grave misconduct which, if proved, would undermine public confidence in the essential integrity of the process. Indeed, in careful reasons, the applications Judge explained why he was not persuaded that, even if the appellants had standing, they had established a breach of the duty of fairness, including a reasonable apprehension of bias, on the part of PWGSC in its conduct of the procurement process.

[page514]

## E. CONCLUSIONS

**63** For these reasons, I would dismiss the appeal with costs.

RICHARD C.J.:-- I agree.

RYER J.A.:-- I agree.

cp/e/qllls

*Case Name:*

**League for Human Rights of B'Nai Brith Canada v. Canada**

**Between**

**League for Human Rights of B'Nai Brith Canada,  
Applicant, and  
Her Majesty the Queen, the Attorney General of Canada  
and Wasyl Odynsky, Respondents**

[2008] F.C.J. No. 926

2008 FC 732

334 F.T.R. 63

169 A.C.W.S. (3d) 705

Docket T-1162-07

Federal Court  
Toronto, Ontario

**Dawson J.**

Heard: April 14, 2008.  
Judgment: June 12, 2008.

(67 paras.)

*Civil litigation -- Civil procedure -- Parties -- Standing -- Appeal by the League for Human Rights of B'Nai Brith Canada (the League) from the prothonotary's order striking out a judicial review application allowed -- It was not appropriate to decide the issue of public interest standing on a preliminary or interlocutory basis -- Furthermore, the League raised a serious issue and it was not plain and obvious that the League lacked a genuine interest in the proceedings nor that there was another reasonable way to bring the issue before the Court -- Federal Courts Act, s. 18.1(1).*

*Immigration law -- Naturalization or citizenship -- Loss or disqualification from citizenship -- Appeals and judicial review -- Appeal by the League for Human Rights of B'Nai Brith Canada (the League) from the prothonotary's order striking out a judicial review application allowed -- It was not appropriate to decide the issue of public interest standing on a preliminary or interlocutory ba-*

*sis -- Furthermore, the League raised a serious issue and it was not plain and obvious that the League lacked a genuine interest in the proceedings nor that there was another reasonable way to bring the issue before the Court -- Federal Courts Act, s. 18.1(1).*

Appeal by the League for Human Rights of B'Nai Brith Canada (the League) from the prothonotary's order striking out a judicial review application. The League commenced the application in order to challenge the decision not to revoke the citizenship of Odynsky. The prothonotary found that it was plain obvious that the application would not succeed because the League lacked standing. The prothonotary found that the League was not directly affected by the decision at issue and that it did not have public interest standing because it had not raised a serious issue of law. The League took the position that it did have a direct interest in the proceedings and that it should be afforded public interest standing.

HELD: Appeal allowed. It was not appropriate to decide the issue of public interest standing on a preliminary or interlocutory basis. Furthermore, the League's submissions regarding the scope of the Governor in Council's discretion were not so improper as to be devoid of any possibility of success. Therefore, the League raised a serious issue. In addition, it was not plain and obvious that a judge would conclude that the League lacked sufficient expertise or involvement in the area of human rights so as to have a genuine interest in the proceedings. It was also not plain and obvious that a judge would conclude that there was another reasonable way to bring the issue before the Court.

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7

Citizenship Act, R.S.C. 1985, c. C-29, s. 10(1), s. 10(2), s. 18(1), s. 18(3)

Criminal Code, R.S.C. 1985, c. C-46,

Federal Court Rules, Rule 51

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18, s. 18.1, s. 18.1(1)

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.),

Rules of the Supreme Court of Canada, Rule 18

**Counsel:**

David Matas, for the Appellant.

David Gates, for the Respondents, Her Majesty the Queen and the Attorney General of Canada.

Barbara Jackman, for the Respondent, Wasyl Odynsky.

Orest Rudzik and Nestor Woychyshyn, for the Respondent, Vladimir Katriuk.

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**REASONS FOR ORDER**

1 **DAWSON J.:**-- By order dated February 4, 2008, the case management prothonotary struck out this judicial review application. The prothonotary found that it is plain and obvious that the application cannot succeed because the applicant lacks standing. The prothonotary found that the applicant is neither directly affected by the decision at issue, nor does it have public interest standing because it has not raised a serious issue of law.

2 On this appeal from the prothonotary's order, I exercise my discretion *de novo*. I allow the appeal because I conclude that, in this case, the issue of public interest standing should not be decided on a preliminary or interlocutory basis. Instead, the issue should be left for the judge who hears the application for judicial review.

### **Facts**

3 In 1997, the Minister of Citizenship and Immigration (Minister) gave notice to Wasyl Odynsky that she intended to request that the Governor in Council revoke his citizenship. Mr. Odynsky requested that the matter be referred to this Court pursuant to subsection 18(1) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (Act). Previously, the Minister had served a similar notice on Vladimir Katriuk, and he too had requested that the matter be referred to this Court. In accordance with those requests, each matter was referred to this Court for determination as to whether each individual had obtained their citizenship by false representations or fraud, or by knowingly concealing material circumstances.

4 In reasons reported as *Canada (Minister of Citizenship and Immigration) v. Katriuk*, [1999] F.C.J. No. 90 (QL), Justice Nadon found that Mr. Katriuk was admitted to Canada for permanent residence and obtained citizenship by false representation or by knowingly concealing material circumstances. In reasons reported as *Canada (Minister of Citizenship and Immigration) v. Odynsky*, [2001] F.C.J. No. 286 (QL), Justice MacKay reached a similar conclusion in respect of Mr. Odynsky.

5 Following receipt of the Court's decisions, the Minister prepared reports recommending to the Governor in Council that Mr. Odynsky's and Mr. Katriuk's citizenship be revoked. Counsel for Mr. Odynsky and Mr. Katriuk were each given the opportunity to make written submissions on whether their client's citizenship should be revoked. The Minister's reports, together with the submissions and materials provided by Mr. Odynsky and Mr. Katriuk, were then placed before the Governor in Council.

6 On May 17, 2007, the Governor in Council issued separate orders-in-council not revoking the citizenship of Mr. Odynsky or Mr. Katriuk. That day, separate orders-in-council also issued which revoked the citizenship of Helmut Oberlander and Jacob Fast.

7 On June 22, 2007, the League for Human Rights of B'Nai Brith Canada (applicant) commenced this application, challenging the decision not to revoke the citizenship of Mr. Odynsky. The applicant alleged that the Governor in Council erred in law and that the decision violated the *Canadian Charter of Rights and Freedoms*. The applicant brought a similar application in respect of the decision concerning Mr. Katriuk, being Court File No. T-1191-07.

8 After the certified tribunal record had been filed and the applicant had filed its affidavit evidence, Mr. Odynsky moved for an order striking this application on the ground that the applicant lacked standing. This motion was supported by the Attorney General of Canada (Attorney General) and Mr. Katriuk, who each filed written submissions and made oral argument. The parties agreed



that the decision on the motion brought by Mr. Odynsky would apply equally to the application concerning Mr. Katriuk. That agreement remains in place and a copy of these reasons will be placed in Court File No. T-1191-07, together with an appropriate order.

### **The Scope of this Appeal**

9 On this appeal, the applicant argues that the issue of standing should not be decided as a preliminary matter but rather as a component of its application. Mr. Odynsky agrees that, if the Court decides that the prothonotary erred or decides *de novo* that the application should not be struck, the issue of standing should be left to the judge who hears the judicial review application. Accordingly, I do not decide the merits of the applicant's claim to public interest standing.

### **Standard of Review on Appeals under Rule 51**

10 Justice Hugessen recently explained how discretionary decisions of prothonotaries are reviewed on an appeal brought under Rule 51. In *Jazz Air LP v. Toronto Port Authority*, [2007] F.C.J. No. 841 (QL), *aff'd* [2007] F.C.J. No. 1240 (C.A.) (QL), he wrote at paragraphs 38 and 39:

The case law on the standard of review to be applied by a judge of this Court when reviewing a discretionary decision of a prothonotary establishes a clear distinction between decisions which are "discretionary" and those which are not.

A discretionary decision is one respecting a question on which by definition two equally reasonable people may, without error on the part of either one, reach diametrically opposed conclusions. Error, whether of fact or of law will always, of course, open a decision to appellate review. But even where there is no error a discretionary decision may still, in some circumstances invite the reviewing Court to make a fresh and different exercise of its own discretion.

11 On appeal, the Federal Court of Appeal rejected the argument that Justice Hugessen had erred by interfering with the prothonotary's order in circumstances where he had found no error of law or fact on the part of the prothonotary.

12 The Federal Court of Appeal also confirmed, at paragraph 11 of its reasons, that judges of this Court remain bound to apply the test as stated by Justice MacGuigan for the majority in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.). Justice Sharlow, writing for the Court of Appeal in *Jazz Air*, cited above, stated at paragraph 13 that:

The test was recently restated by Justice Décary, on this point writing for the Court in *Merck & Co. v. Apotex Inc.*, [2003] F.C.J. No. 1925, 2003 FCA 488, at paragraph 19. The restated test reads as follows:

Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:

- a) the questions raised in the motion are vital to the final issue of the case, or

- b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

The restatement simply reverses the two branches of the test so that they are considered in a more logical order. Once it is determined that a *de novo* review is required, it is not necessary to attempt to identify any error in the decision under appeal.

13 In the present case, the applicant and the Attorney General submit that the prothonotary's order dismissing the application on the basis of lack of standing disposes of a question vital to the final issue of the case. Thus, they submit that the appeal of the prothonotary's order is by way of a hearing *de novo*.

14 Mr. Odynsky submits, however, that, while the reasoning of the majority in the *Aqua-Gem* decision would support the view that the Court should exercise its discretion *de novo*, the reasoning of the minority ought to be applied. This is said to be appropriate because the issue of standing is unrelated to any issue of substance raised by the judicial review application. In the alternative, if the issue of standing is to be considered *de novo*, Mr. Odynsky submits that the Court should not disregard the reasoning of the prothonotary.

15 In my view, the submissions of the applicant and the Attorney General are correct. The issue of standing is one vital to the final issue of the case. It follows that I should exercise my own discretion *de novo*. The answer to Mr. Odynsky's first submission is that the Federal Court of Appeal in *Jazz Air*, cited above, was clear that this Court is bound by the decision of the majority in *Aqua-Gem*. As to the second submission, I agree with Justice Hugessen that a discretionary decision may, in some circumstances, invite the reviewing judge to make a fresh and different exercise of his or her own discretion. This is one such case.

16 For the reasons that follow, I would not have struck out the application on a preliminary or interlocutory basis.

### **Principles Applicable to Motions to Strike Applications**

17 Before moving to the issue of standing, it is important to remember that different considerations apply to motions to strike applications than apply to motions to strike actions. The applicable principles were recently summarized by Justice Mactavish in *Amnesty International Canada v. Canada (Canadian Forces)* (2007), 287 D.L.R. (4th) 35 (F.C.). I respectfully adopt her summary, found at paragraphs 22 through 30 and at paragraph 33 of her reasons. There, she wrote:

22. Applications for judicial review are intended to be summary proceedings, and motions to strike Notices of Application add greatly to the cost and time required to deal with such matters.
23. Moreover, as the Federal Court of Appeal observed in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1994] F.C.J. No. 1629, the striking out process is more feasible in actions than in applications for judicial review. This is because there are numerous rules governing actions which require precise pleadings as to the nature of the claim or the defence, and the facts upon which the claim is

based. There are no comparable rules governing Notices of Application for Judicial Review.

24. As a consequence, the Federal Court of Appeal has observed that it is far more risky for a court to strike out a Notice of Application for Judicial Review than a conventional pleading. Moreover, different economic considerations come into play in relation to applications for judicial review as opposed to actions. That is, applications for judicial review do not involve examinations for discovery and a trial - matters which can be avoided in actions by a decision to strike: *David Bull*, at para. 10.
25. In contrast, the full hearing of an Application for Judicial Review proceeds in much the same way that a motion to strike the Notice of Application would proceed, namely on the basis of affidavit evidence and argument before a judge of this Court.
26. As a result, the Federal Court of Appeal determined that applications for judicial review should not be struck out prior to a hearing on the merits of the application, unless the application is "so clearly improper as to be bereft of any possibility of success".
27. The Federal Court of Appeal further teaches that "Such cases must be very exceptional and cannot include cases ... where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion": *David Bull*, at para. 15.
28. Unless a moving party can meet this very stringent standard, the "direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself." (*David Bull*, at para. 10. See also *Addison & Leyen Ltd. v. Canada*, [2006] F.C.J. No. 489, 2006 FCA 107, at para. 5, rev'd on other grounds [2007] S.C.J. No. 33, 2007 SCC 33).
29. The reason why the test is so strict is that it is ordinarily more efficient for the Court to deal with a preliminary argument at the hearing of the application for judicial review itself, rather than as a preliminary motion: see the comments of the Federal Court of Appeal in *Addison & Leyen*, at para. 5.
30. By analogy to the process prescribed in the *Federal Courts Rules* with respect to the striking out of statements of claim, as a general rule, no evidence may be led on a motion to strike a Notice of Application. In addition, the facts asserted by the applicant in the Notice of Application must be presumed to be true: *Addison & Leyen Ltd. et al.*, above, at para. 6.

[...]

33. Finally, in deciding whether an Application for Judicial Review should be struck as bereft of any possibility of success, the Notice of Application should be read as generously as possible, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the document: see *Operation Dismantle*, [1985] 1 S.C.R. 441, at para. 14.

18 Considerations of particular relevance are the following:

- Actions must be pleaded with far more specificity than applications. It is thus more feasible to strike a statement of claim or defence than a notice of application.
- An application will not be struck out unless it is so clearly improper as to be bereft of any possibility of success. This is so because it is generally more efficient for the Court to deal with a preliminary argument at the hearing of the application, rather than on a motion. If a motion to strike is considered and fails, the interlocutory proceedings are a waste of time, money, and court resources.

**19** To this I would add the admonition of Justice Evans, sitting in this Court, in *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 (T.D.), that only in very clear cases should a court be prepared to dismiss an application for judicial review on a preliminary motion for lack of standing. At paragraph 25, Justice Evans cautioned that at a preliminary stage the Court may not have the benefit of full legal argument and that, to the extent that the strength of the applicant's case is relevant to the ground of discretionary standing, the Court may not be in a position to make a fully informed decision that would justify a denial of standing. At paragraph 39, he wrote:

However, when the question of standing is raised in a preliminary motion, such as is the case here, a court should not subject the strength of an applicant's claim to a level of scrutiny that probes more deeply than considering whether, on the materials before the court, the applicant has a fairly arguable case or, putting it the other way, has no reasonable cause of action: *Energy Probe v. Canada (Attorney General)* (1989), 68 O.R. (2d) 449 (C.A.); *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, [1998] O.J. No. 2856, supra. The burden will be on the moving party in a preliminary motion to demonstrate that the applicant fails to satisfy even this low threshold test.

### **The Issue of Standing**

**20** The applicant argues that it has a direct interest in this proceeding which distinguishes it from the public at large. The applicant also alleges that it should be afforded public interest standing. Accordingly, I frame the issues to be decided as follows:

- (i) Have the respondents demonstrated that the applicant's claim to direct standing is not fairly arguable or is bereft of any possibility of success?
- (ii) Have the respondents demonstrated that the applicant's claim to public interest standing is not fairly arguable or is bereft of any possibility of success?

### **The Claim to Direct Standing**

**21** The applicant submits that it has been recognized as having a "direct interest" in related proceedings. Particular reliance is placed on the comments of Justice McLachlin (as she then was) in *R. v. Finta*, [1993] 1 S.C.R. 1138.

**22** The applicant also submits that it has four interests which distinguish it from the public at large. First, it says that, as an organization, it has been directly involved in bringing war criminals to justice. Second, it says that the organization has made a number of representations to the Govern-

ment of Canada seeking to have Mr. Odynsky's citizenship revoked. Third, it says that the organization represents the relatives of several persons who died while Mr. Odynsky was stationed at the Poniatowa labour camp in Poland. According to the applicant, these relatives would be willing to be added as parties to this application. Fourth, it says that the organization was denied an opportunity to put its submissions before the Governor in Council. In this regard, the applicant observes that the submissions of another organization were put before the Governor in Council.

23 Section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, confers jurisdiction upon the Federal Court to hear applications for judicial review. Section 18.1 sets out a number of procedural requirements. Specifically, subsection 18.1(1) provides that the Attorney General or "anyone directly affected by the matter in respect of which relief is sought" may make an application for judicial review.

24 The jurisprudence establishes that, for a party to be considered to be "directly affected," the decision at issue must be one which directly affects the party's rights, imposes legal obligations on it, or prejudicially affects it directly. See: *Rothmans of Pall Mall Canada Ltd. v. Canada (Minister of National Revenue)*, [1976] 2 F.C. 500 (C.A.).

25 In *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, an appeal from the Federal Court of Appeal, the Supreme Court of Canada quoted with approval at page 623 the following passage from *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, when considering the existence of direct standing:

A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.  
[emphasis added]

26 Without doubt, the applicant and the family members it says it represents deeply care, and are genuinely concerned, about Mr. Odynsky's citizenship revocation process and his past service as a perimeter guard of the Seidlung at the Poniatowa labour camp in German-occupied Poland. However, that interest does not mean that the legal rights of the applicant, or those it represents, are legally impacted or prejudiced by the decision not to revoke Mr. Odynsky's citizenship. Rather, their interest exists in the sense of seeking to right a perceived wrong arising from, or to uphold a principle in respect of, the non-revocation of Mr. Odynsky's citizenship.

27 It follows that the respondents have demonstrated that the applicant's claim to direct standing is not fairly arguable.

28 In so concluding, I have considered the decision of Justice McLachlin in *Finta*, cited above. However, in that case, Justice McLachlin was considering an application by the applicant to intervene in a case that raised issues about the interpretation of provisions in the *Criminal Code* dealing with war crimes and crimes against humanity. Rule 18 of the *Rules of the Supreme Court of Canada* required a party seeking intervenor status to establish "an interest." Justice McLachlin granted intervenor status, finding that the applicant had "a direct stake in Canada's fulfilling its international legal obligations under customary and conventional international law."

29 In my view, the *Finta* decision is distinguishable from the case before me because subsection 18.1(1) of the *Federal Courts Act* was not engaged. What is capable of establishing an "interest" in order to intervene before the Supreme Court of Canada is not necessarily co-extensive with the requirement of being "directly affected" in order to commence an application for judicial review in this Court.

30 The one interest identified by the applicant that, in my view, deserves specific mention is the fourth one; that is, the claim that the applicant was denied an opportunity to put its submissions before the Governor in Council. On its face, this submission appears to have some merit, especially when, according to the applicant, another organization was provided such an opportunity. However, this submission does not appear to be supported by the evidence. The Governor in Council, when exercising its discretion, owed Mr. Odynsky a duty of fairness. For this reason, Mr. Odynsky was provided an opportunity to make written submissions, which were included in the report of the Minister. According to the Attorney General, this opportunity was only extended to Mr. Odynsky. As part of his written submissions, Mr. Odynsky included information that he had obtained from an organization. Thus, the circumstances surrounding the submissions made to the Governor in Council do not give rise to any concerns as to fairness. Put simply, another organization was not given a right or privilege that was not extended to the applicant.

31 I now turn to the issue of public interest standing, noting that subsection 18.1(1) of the *Federal Courts Act* has been held to be broad enough to encompass applicants who are not directly affected when they meet the test for public interest standing. See: *Canada (Royal Canadian Mounted Police Public Complaints Commission) v. Canada (Attorney General)*, [2006] 1 F.C.R. 53 (C.A.), at paragraph 56.

#### **Public Interest Standing**

32 Given my conclusion that this issue should be left for the judge hearing the application, my reasons will be brief and focus solely on whether the respondents have established that the applicant's argument that it has public interest standing is bereft of any possibility of success.

33 I begin by noting that it is a matter of judicial discretion, to be exercised having regard to the particular circumstances of the case, whether the question of standing should be determined with final effect on a motion to strike. See: *Finlay*, cited above, at pages 616-617.

34 As to the criteria to be met, the parties agree that an applicant for public interest standing must satisfy a conjunctive, three-part test. The applicant must establish:

1. There is a serious question to be raised.
2. The applicant has a genuine or direct interest in the outcome of the litigation.
3. There is no other reasonable and effective way to bring the issue before the Court.

#### **(a) A serious question**

35 One of the issues raised by the applicant is the scope of the discretion possessed by the Governor in Council when deciding whether or not to revoke a person's citizenship. The relevant provision in the Act is section 10, which provides:

10.(1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,

- (a) the person ceases to be a citizen, or
- (b) the renunciation of citizenship by the person shall be deemed to have had no effect,

as of such date as may be fixed by order of the Governor in Council with respect thereto.

- (2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship.

\* \* \*

10.(1) Sous réserve du seul article 18, le gouverneur en conseil peut, lorsqu'il est convaincu, sur rapport du ministre, que l'acquisition, la conservation ou la répudiation de la citoyenneté, ou la réintégration dans celle-ci, est intervenue sous le régime de la présente loi par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels, prendre un décret aux termes duquel l'intéressé, à compter de la date qui y est fixée :

- a) soit perd sa citoyenneté;
- b) soit est réputé ne pas avoir répudié sa citoyenneté.

- (2) Est réputée avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels la personne qui l'a acquise à raison d'une admission légale au Canada à titre de résident permanent obtenue par l'un de ces trois moyens.

36 The applicant argues that "[t]hough the Governor in Council has treated the revocation of citizenship power as a broad discretionary power allowing for consideration of anything and everything, the law does not allow for the exercise of the revocation power in this manner. The only relevant circumstance for revocation is that the person has obtained citizenship by false representation or fraud or by knowingly concealing material circumstances."

37 Mr. Odynsky responds that, in *Oberlander v. Canada (Attorney General)*, [2005] 1 F.C.R. 3 (C.A.), the Federal Court of Appeal recognized that the Governor in Council "had a discretion not to revoke citizenship in the case of a person who has been determined to have misrepresented in acquiring citizenship. The [applicant] did not seek to intervene in this case either at first instance or on appeal. It now seeks, as set out in paragraphs 50 to 91 of its submissions, to overturn the Court of

Appeal's ruling. It is plain and obvious that the [applicant] cannot succeed in this argument. It has been settled by the Court of Appeal."

38 The Attorney General also relies on *Oberlander*, at paragraphs 43 and 58, to argue that the law is settled and that this Court is bound by that decision. Further, the Attorney General relies upon the prior decisions in *Canada (Secretary State) v. Luitjens* (1992), 142 N.R. 173 (F.C.A.), and *Canada (Minister of Citizenship and Immigration) v. Bogutin* (1998), 144 F.T.R. 1 (T.D.). Finally, the Attorney General argues that the applicant's argument is difficult to understand and is circular.

39 Dealing with each point, I believe that, while some confusion may exist as a result of the applicant's comments about the existence and scope of discretion and about "a form of prosecutorial discretion" which is exercised when a decision is made to pursue revocation proceedings, the applicant has stated its position clearly that "the discretion the Governor in Council now purports to exercise does not exist."

40 As to whether this argument is bereft of any possibility of success because the law was settled by the Federal Court of Appeal in *Oberlander*, it is without doubt that the Court of Appeal set aside the revocation of Mr. Oberlander's citizenship because "there was no balancing of the personal interests of Mr. Oberlander and of the public interest." See: *Oberlander*, cited above, at paragraph 58. Thus, the decision of the Governor in Council was found to be patently unreasonable.

41 However, that conclusion must be viewed in the context of paragraph 42 of the Court of Appeal's reasons in *Oberlander*. There, it wrote:

The Attorney General of Canada acknowledged, in his factum and at the hearing, that "[w]hen considering a report by the Minister to revoke a person's citizenship, the Governor in Council must be satisfied that the statutory criteria for revocation have been met. In addition, the Governor in Council may engage in a delicate balancing of the individual's personal interests, the public interest, as well as a consideration of any relevant program policy objectives" (paragraph 60). I assume, for the purposes of this appeal, that this acknowledgment is well-founded. The Minister herself had acknowledged in her report, at page 41, that "[i]n deciding whether to revoke citizenship, the Governor in Council should consider the government's 'no safe haven policy', the findings of the Trial Judge in the reference and any submissions made by Mr. Oberlander." [emphasis added]

42 I read this to be a clear reservation that the Court of Appeal accepted, for the purpose of the appeal, the Attorney General's acknowledgment of the need to balance interests, but that such acceptance was not intended to foreclose future argument on the issue.

43 In the circumstance where the Court of Appeal's decision was expressly stated to be based upon the Minister's acknowledgment, I do not find that the applicant's argument is bereft of any possibility of success because of the *Oberlander* decision.

44 This view is consistent with the observation of Justice Pratte in *Canada (Minister of Employment and Immigration) v. Taggar*, [1989] 3 F.C. 576 (C.A.), at page 582, that the authority of a prior decision "is very limited since, rightly or wrongly, it was partly based on the concession made by counsel for the Minister."



45 I now consider the prior decisions of *Luitjens* and *Bogutin*, cited above, relied upon by the Attorney General.

46 At issue in the *Luitjens* case was whether an appeal lay from a finding of this Court made under paragraph 18(1)(b) of the Act and, if so, whether subsection 18(3) of the Act violated section 7 of the *Charter*. Any comment made about the scope of the Governor in Council's discretion was, therefore, *obiter*.

47 In *Bogutin*, this Court found that Mr. Bogutin had obtained Canadian citizenship by false representation or fraud, or by knowingly concealing material circumstances. Justice McKeown discussed subsection 10(1) of the Act in the following terms:

117. Subsection 10(1) of the Citizenship Act provides that a person ceases to be a Canadian citizen if the Governor in Council is satisfied that the person has obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances. In particular, paragraph 10(1)(a) of the Citizenship Act provides for an automatic statutory cessation of citizenship in circumstances where the Governor in Council is satisfied that a person has obtained citizenship by knowingly concealing material circumstances. In the event that statutory cessation of citizenship takes effect under subsection 10(1) of the Citizenship Act, the person would become a permanent resident of Canada, as that term is defined in subsection 2(1) of the Immigration Act, R.S.C. 1985, C1-2, as amended. As a result, the person would be subject to all provisions of the Immigration Act including those pertaining to removal from Canada. [emphasis added]

48 I do not see how this supports the position of the Attorney General. I note as well that, in the prior case of *Canada (Minister of Citizenship and Immigration) v. Copeland*, [1998] 2 F.C. 493 (T.D.), Justice McGillis also wrote, at paragraph 26, that "paragraph 10(1)(a) of the Citizenship Act provides for an automatic statutory cessation of citizenship in circumstances where the Governor in Council is satisfied that a person has obtained citizenship by knowingly concealing material circumstances."

49 To the extent the Court commented in *Bogutin*, that evidence as to character and lack of good character could be presented, this related to subsection 10(1) of the legislation in force when Mr. Bogutin applied for citizenship. This is made clear in paragraphs 119 and 120 of the Court's reasons:

I must then examine the substantive provisions governing the acquisition of citizenship in subsection 10(1) of the Canadian Citizenship Act, R.S.C. 1952, c. 33, as amended, which was in force in 1958-59 when Mr. Bogutin applied for and was granted citizenship. The section reads as follows:

10. (1) The Minister may, in his discretion, grant a certificate of citizenship to any person who is not a Canadian citizen and who makes application for that purpose and satisfies the Court that,

- (a) either he has filed in the office of the Clerk of the Court for the judicial district in which he resides, not less than one nor more than five years prior to the date of his application, a declaration of intention to become a Canadian citizen, the said declaration having been filed by him after he attained the age of eighteen years; or he is the spouse of and resides in Canada with a Canadian citizen; or he is a British subject;
- (b) he has been lawfully admitted to Canada for permanent residence therein;
- (c) he has resided continuously in Canada for a period of one year immediately preceding the date of the application and, in addition, except where the applicant has served outside of Canada in the armed forces of Canada during time of war or where the applicant is the wife of and resides in Canada with a Canadian citizen, has also resided in Canada for a further period of not less than four years during the six years immediately preceding the date of the application;
- (d) he is of good character;
- (e) he has an adequate knowledge of either the English or the French language, or, if he has not such an adequate knowledge, he has resided continuously in Canada for more than twenty years;
- (f) he has an adequate knowledge of the responsibilities and privileges of Canadian citizenship; and
- (g) he intends, if his application is granted, either to reside permanently in Canada or to enter or continue in the public service of Canada or of a province thereof.

The relevant paragraphs in this hearing are 10(1)(c) and (d) which deal with the acquisition of Canadian domicile and the applicant being of good character. I agree with Collier, J. in the Luitjens case when he ruled that evidence as to good character and lack of good character could be presented. [emphasis added]

50 The Court went on to conclude:

126. In my view, the foregoing is sufficient to decide the reference. However, for greater certainty, I find that Mr. Bogutin was not lawfully admitted to Canada and therefore did not acquire Canadian domicile and he was not a person of good character, all of which is contrary to the Immigration Act in force in 1951. Mr. Bogutin was ineligible in 1958 to apply for Canadian citizenship and he obtained Canadian citizenship by false representation or fraud or by concealing material circumstances. [emphasis added]

51 Any comment about good character was not made in the context of the scope of the discretion currently possessed by the Governor in Council under paragraph 10(1)(a) of the Act.

52 To summarize, in *Oberlander*, the Federal Court of Appeal was careful to state that it proceeded on the basis that it accepted, without deciding, that the Governor in Council was entitled to engage in a delicate balancing of the concerned person's interests. The other jurisprudence relied upon by the Attorney General does not make authoritative findings about the scope of the discretion exercised by the Governor in Council when considering citizenship revocation. Both the *Luitjens* and *Bogutin* decisions involved references to the Court under subsection 18(1) of the Act.

53 While the submissions of the applicant about the scope of the Governor in Council's discretion may not ultimately prevail, I do not find its argument to be so clearly improper as to be bereft of any possibility of success.

54 It follows that I find a serious question is raised.

55 Before leaving this point, in oral argument, Mr. Odynsky stressed that no public interest is raised in this case and that the applicant is trying to intervene in what is a purely private matter. However, in *Harris v. Canada* (2000), 256 N.R. 221 (F.C.A.), public interest standing was granted to one taxpayer to seek relief relating to an allegedly improper interpretation of the *Income Tax Act* by the Minister of National Revenue. Notwithstanding that the issue arose in the context of the tax treatment of an unrelated taxpayer, standing was granted so that Mr. Harris could raise a question about the limit of the Minister of National Revenue's statutory authority. The case is therefore an example of public interest standing being recognized to exist in a private matter.

(b) *A genuine or direct interest*

56 Mr. Odynsky argues that the decision at issue is not rooted in broad public policy considerations and that the applicant has no direct or genuine interest in a decision that impacts upon an individual and his relationship with the state. The Attorney General also argues that public interest standing is granted where there is a connection between the party seeking status and the remedy sought. Reliance is placed upon the decision in *Canadian Bar Assn. v. British Columbia*, [2006] B.C.J. No. 2015 (QL), at paragraph 51. Here, it is said that the applicant will not in any way be affected by an order quashing the decision not to revoke citizenship.

57 I begin by noting that the reference which the Attorney General relies upon in the *Canadian Bar Assn.* decision was made in the context of the Court's determination of the existence of a serious issue and not its determination of the existence of a genuine interest.

58 In *Harris*, cited above, the Federal Court of Appeal's analysis of whether Mr. Harris had a genuine issue in the litigation was as follows:

62. The third criterion is that the public interest litigant must have a genuine interest in the issue. On appeal, the Attorney General did not seriously contest that Mr. Harris did have a genuine interest in the issues he raises. Mr. Harris is a taxpayer. He is a member of an organization that seeks to ensure the fair administration of the taxation system. Accordingly, I conclude that Mr. Harris has a genuine interest in the issues he raises.

59 In *Sierra Club*, cited above, Justice Evans considered whether the Sierra Club had "an experience and expertise with respect to the underlying subject-matter of the litigation that will inform their written and oral submissions made in support of the application for judicial review, and will assist the Court to reach an appropriate result." He also considered whether the Sierra Club had

"demonstrated a degree of involvement with the subject-matter of the application for judicial review that is sufficient to make it an appropriate body to institute this proceeding in the public interest."

60 In the present case, the Attorney General acknowledged the evidence about the applicant's interest in human rights in general and in war crimes.

61 In my view, it is not plain and obvious that a judge would conclude that the applicant lacks sufficient experience, expertise or involvement with human rights, war crimes, or citizenship revocation so as to have a genuine interest in the proper interpretation of section 10 of the Act.

(c) *Another reasonable and effective way to bring the issue before the Court*

62 The Attorney General conceded, for the purpose of this motion, that the applicant has satisfied the third element of the test. The prothonotary agreed, and so do I.

63 Mr. Odynsky, however, disagrees. He submits that it was open to the applicant to intervene in the *Oberlander* case, and that it will be open to the applicant to seek to intervene in future cases where citizenship is revoked and the person concerned challenges that decision.

64 However, there is jurisprudence to the effect that an intervener takes the pleadings and the record as it finds them, and that an intervener may not litigate new issues. See, for example, *Maurice v. Canada (Minister of Indian Affairs and Northern Development)* (2000), 183 F.T.R. 45 (T.D.). In the *Oberlander* case, both the Attorney General and Mr. Oberlander proceeded on the basis that the Governor in Council could engage in a balancing of the individual's personal interests. A similar position has been adopted by the Attorney General in this case.

65 On the basis of jurisprudence such as *Maurice*, cited above, and the nature of the issue raised in the *Oberlander* decision, I conclude that it is not plain and obvious that a judge would conclude that another reasonable and effective way exists to bring the issue of the scope of the Governor in Council's discretion before the Court.

**Conclusion and Costs**

66 For these reasons, the appeal is allowed and the motion to strike is dismissed.

67 Mr. Odynsky sought costs. The issue of costs is reserved to the judge hearing the application for judicial review.

DAWSON J.

cp/e/qlaim/qlpxm/qltxp/qlrxg/qlaxw/qlaxr

*Case Name:*

**League for Human Rights of B'Nai Brith Canada v. Odynsky**

**Between**

**Wasył Odynsky, Appellant, and  
League for Human Rights of B'Nai Brith Canada and the  
Attorney General of Canada, Respondents**

[2009] F.C.J. No. 328

[2009] A.C.F. no 328

2009 FCA 82

387 N.R. 376

85 Admin. L.R. (4th) 19

176 A.C.W.S. (3d) 601

2009 CarswellOnt 632

Docket A-332-08

Federal Court of Appeal  
Toronto, Ontario

**Létourneau, Nadon and Trudel JJ.A.**

Heard: March 12, 2009.

Oral judgment: March 12, 2009.

(12 paras.)

*Immigration law -- Naturalization or citizenship -- Application for grant of citizenship -- Appeals and judicial review -- Appeal by Odynsky from League for Human Rights of B'Nai Brith Canada's successful appeal of prothonotary's decision which had granted motion to strike League's application for judicial review dismissed -- Best approach was to let judicial review application proceed, and any appeal would come back to Federal Court.*

Appeal by Odynsky from the League for Human Rights of B'Nai Brith Canada's successful appeal from a prothonotary's decision granting a motion to strike the League's application for judicial review. The judge found that the League's claim to direct standing was not fairly arguable. However, she concluded that, with respect to the public interest standing, there was a serious question to be determined. The application for judicial review was to be heard in four days,

HELD: Appeal dismissed. The best approach was to let the application for judicial review proceed on the merits where all the issues raised in this appeal would be dealt with. Any appeal would come back to the Federal Court.

**Statutes, Regulations and Rules Cited:**

Citizenship Act, R.S.C. 1985, c. C-29, s. 10

**Counsel:**

Barbara Jackman, for the Appellant.

David Matas, for the Respondent (B'Nai Brith).

David Gates, for the Respondent (A.G. of Canada).

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The judgment of the Court was delivered by

**1 LÉTOURNEAU J.A.** (orally) :-- This is an appeal against a decision of Dawson J. of the Federal Court (judge) allowing an appeal from a decision of a prothonotary who granted a motion to strike the application for judicial review filed by the League for Human Rights of B'Nai Brith Canada (League).

**2** The prothonotary had found it plain and obvious that the application could not succeed because the League lacked standing. In his view, the League was neither directly affected by the decision at issue, nor did it have public interest standing because it had not raised a serious issue of law.

**3** The judge found that the League's claim to direct standing was not fairly arguable. However, she came to the conclusion that, with respect to the public interest standing, there was a serious question to be determined.

**4** She also ruled that it was not plain and obvious that a judge would conclude that the League did not have a genuine interest in the interpretation of section 10 of the *Citizenship Act*, R.S.C. 1985, c. C-29 and that "another reasonable and effective way exists to bring the issue of the scope of the Governor in Council's discretion before the Court": see paragraph 65 of her reasons for judgment. Hence the dismissal of the motion to strike and the appeal by Mr. Wasyl Odynsky.

**5** In the case of *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc. (C.A.)*, [1995] 1 F.C. 588, this Court ruled that motions to strike an application for judicial review should be resorted to only in the most exceptional circumstances, i.e. when the application is bereft of any possibility of success.

6 The rationale for this ruling was that judicial review proceedings are designed to proceed expeditiously and motions to strike have the potential to unduly and unnecessarily delay their determination. In other words, as per the *Bull* case, justice is better served by allowing the application judge to deal with all of the issues raised by the judicial review application.

7 This appeal illustrates the soundness and wisdom of the earlier ruling of this Court in the above-mentioned case.

8 We are asked today, Thursday, March 12, 2009, to decide an appeal on a dismissal of a motion to strike when the very merit of the application for judicial review is due to be heard in four days, a fact we were unaware of until we reached the stage of the submissions by counsel for the League.

9 The hearing on the merit is scheduled for two days starting next Monday. In fairness to all parties, this short time-frame leaves us very little time to adequately consider the contentious issues raised by the motion to strike.

10 In these circumstances, we believe the best approach to take is to let the application for judicial review proceed on the merit where all the issues raised in this appeal will be dealt with, knowing very well that an appeal will come back to us irrespective of the outcome in the Federal Court.

11 In our respectful view, this solution although not ideal creates no prejudice to any of the parties while a precipitated decision on our part could and would leave the parties with an appeal to the Supreme Court of Canada as their only recourse.

12 For these reasons, the appeal will be dismissed without costs in the circumstances.

LÉTOURNEAU J.A.

cp/e/qlccl/qlpxm/qlced/qlhcs/qljyw

*Case Name:*  
**R. v. Ciarniello**

**Between**  
**Rickey W. Ciarniello, Petitioner, and**  
**Her Majesty the Queen, Respondent**

[2006] B.C.J. No. 2929

2006 BCSC 1671

147 C.R.R. (2d) 351

152 A.C.W.S. (3d) 826

71 W.C.B. (2d) 558

Vancouver Registry No. 23883

British Columbia Supreme Court  
Vancouver, British Columbia

**Ehrcke J.**

Heard: October 16 - 18, 2006.

Judgment: November 14, 2006.

(87 paras.)

*Civil procedure -- Parties -- Standing -- Necessary interest -- Application by Attorney General for dismissal of petition allowed -- Petitioner, member of Hells' Angels, sought declaration that sections of Criminal Code dealing with criminal organizations infringed s. 7 of Charter -- Ontario judgment had found Hell's Angels to be criminal organization across Canada -- Petitioner had no private interest standing to bring petition -- As no claim to have public interest standing made, petition dismissed pursuant to Rule 19(24)(a).*

*Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Life, liberty and security of person -- Application by Attorney General for dismissal of petition allowed -- Petitioner, member of Hells' Angels, sought declaration that sections of Criminal Code dealing with criminal organizations infringed s. 7 of Charter -- Ontario judgment had found Hell's Angels to be criminal*



*organization across Canada -- Petitioner had no private interest standing to bring petition -- No claim to have public interest standing made -- Petitioner's being shunned and socially ostracized was result of actions of individuals who were not state agents -- Canadian Charter of Rights and Freedoms, s. 7.*

Application by Attorney General for dismissal or stay of petition -- Petitioner sought declaration that ss. 467.1(1) to 467.2(2) of Criminal Code dealing with criminal organizations infringed s. 7 of Charter and were of no force or effect -- Petitioner was member of Hell's Angels and argued that his security and liberty interests were directly affected by impugned sections, particularly as applied in an Ontario judgment declaring Hell's Angels a criminal organization across Canada - Petitioner argued he had been negatively affected and stigmatized as a result of judgment without his being given opportunity to adduce evidence or make submissions -- HELD: Application allowed -- Petitioner had no private interest standing to bring petition -- Assuming that facts pleaded in petition could be proven, they could not establish infringement of his s. 7 Charter rights -- As no claim to have public interest standing made, petition dismissed pursuant to Rule 19(24)(a) -- Even if petitioner could show that he had a sufficiently direct interest, petition would be dismissed, since declaration sought would not settle any real issue between parties -- Petitioner's being shunned and socially ostracized was result of actions of individuals who were not state agents -- State could not be held accountable for manner in which customers in restaurants or clerks in supermarkets and service stations treated petitioner -- Finding that Hell's Angels was a criminal organization was not an in rem judgment and not binding on anyone except parties to case -- Even if it could be found that judge's pronouncement constituted sufficient nexus to state action, the stress, anxiety and stigma suffered by petitioner could not be considered such serious incursion against his psychological integrity as to constitute a violation of his right to liberty and security of the person.

**Statutes, Regulations and Rules Cited:**

British Columbia Rules of Court, Rule 10, Rule 14(6.1), Rule 19(24), Rule 19(24)(a), Rule 19(24)(d), Rule 19(27)

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 7, s. 24(1), s. 52(1)

Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 11

Criminal Code, s. 467.1(1), s. 467.2(2), s. 467.11(1), s. 467.12(1)

**Counsel:**

Counsel for the Petitioner: Alan D. Gold, Richard S. Fowler

Counsel for the Respondent Attorney General of Canada: W. Paul Riley,  
Raymond D. Leong

Counsel for the Respondent Attorney General of British  
Columbia:

Mark K. Levitz,

M. Joyce DeWitt-Van Oosten

EHRCKE J.:--

### Introduction

1 Rickey Ciarniello is a member of the Hells Angels Motorcycle Club ("H.A.M.C.") and has been for over 20 years. He is the President of the Vancouver Chapter. On June 5, 2006, he filed a petition (the "Petition") in this court challenging the constitutional validity of ss. 467.1(1) to 467.2(2) of the *Criminal Code*. He gave Notice of Constitutional Question and served both the Attorney General of Canada (the "A.G. Canada") and the Attorney General of British Columbia (the "A.G.B.C.").

2 In the Petition, Mr. Ciarniello seeks the following relief:

- i) a declaration that sections 467.1(1) to 467.2(2) of the *Criminal Code of Canada* [Code] infringes the Applicant's rights as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* [Charter];
- ii) an Order declaring sections 467.1(1) to 467.2(2) of the *Code* of no force or effect pursuant to sections 24(1) and 52(1) of the *Charter*; and
- iii) such further and other relief as this Honourable Court considers appropriate and just in the circumstances.

3 The only evidence filed in support of the Petition is Mr. Ciarniello's own affidavit, sworn June 2, 2006.

4 Both the A.G. Canada and the A.G.B.C. (collectively, the "Respondents") brought preliminary applications that the Petition be stayed or dismissed, either for lack of standing, or as disclosing no reasonable claim, or on the ground that this court is not the correct and appropriate forum. It is those two applications that are now before me.

### The Basis for the Petitioner's Claimed Relief

5 Mr. Ciarniello claims that ss. 467.1(1) to 467.2(2) of the *Code* infringe his rights under s. 7 of the *Charter*. Section 7 provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

6 The impugned sections of the *Code* deal with criminal organizations. Section 467.1(1) defines the term "criminal organization". Section 467.11 makes it an offence for a person knowingly, by act or omission, to participate in or contribute to any activity of a criminal organization for the purpose of enhancing the ability of the criminal organization to facilitate or commit an indictable offence. Section 467.12 makes it an offence for a person to commit an indictable offence for the benefit of, at the direction of, or in association with, a criminal organization.

7 Mr. Ciarniello asserts that the infringement of his *Charter* rights under s. 7 stems from defects in the impugned legislation as applied in the June 30, 2005 judgment of Madam Justice Fuest of the Ontario Superior Court of Justice in *R. v. Lindsay and Bonner*, [2005] O.J. No. 2870. It will be convenient to refer to that judgment variously as the "Ontario Judgment", "Justice Fuest's Judgment", or simply "*R. v. Lindsay*".

8 In that Ontario trial, Justice Fuerst convicted Mr. Lindsay and Mr. Bonner of extortion in association with a criminal organization, contrary to s. 467.12(1) of the *Code*. Although the indictment did not specify the group alleged to be the criminal organization, the Crown took the position that it was the H.A.M.C. as it exists in Canada, while the defence contended that only the H.A.M.C. as it exists in Ontario should be considered.

9 In the course of her extensive reasons for judgment, Justice Fuerst made reference not only to the H.A.M.C. in Ontario, but also to the H.A.M.C. across Canada. She wrote at paras. 942 - 945 of her judgment:

#### The Scope of the Group

942 The indictment did not specify the group alleged to be the criminal organization. At all times, counsel understood that the Crown took the position that it was the H.A.M.C. as it exists in Canada, while the defence contended that it was appropriate to consider only the H.A.M.C. as it exists in Ontario.

943 I am satisfied beyond a reasonable doubt on the evidence that the scope of the group is the H.A.M.C. as it exists in Canada. Evidence about the manner in which the Ontario chapters of the H.A.M.C. were created, the adherence of Ontario chapters to Canada as well as world rules, policies and practices, the relationship of Ontario chapters to others in Canada, and the recognition of Canada as an entity at the world level all support this conclusion. Ontario, also known as the Central Region, is an administrative subdivision of the larger entity. The fact that it, like individual chapters, and individual members, enjoys some degree of autonomy does not render it autonomous. As Dr. Abadinsky testified, it is difficult to conceive of an organization where there is not some degree of autonomy, other than a prison.

944 I am conscious that the relevant time frame for consideration of the H.A.M.C. in Canada is the period in January 2002 specified in count two of the indictment. Events before and after that date are relevant, however, in establishing the character of the group at that time.

945 The evidence is clear and the Crown has established beyond a reasonable doubt that during that period in January 2002, the H.A.M.C. in Canada consisted of many more than three members in Canada. This also was true of the H.A.M.C. in Ontario. The defence raised no issue about this.

At para. 1079 she wrote:

1079 It is a reasonable inference from the evidence and one that I draw that one of the main activities of the H.A.M.C. as it existed in Canada during the relevant time period, January 2002, was the commission of one or more serious offences for the economic benefit of its members, in particular drug trafficking. I am satisfied beyond a reasonable doubt of this element of s. 467.1(1).

And at para. 403, she made a specific reference to Mr. Ciarniello:

403 Minutes of a British Columbia Officers meeting in December 1997 referred to Stockford, Mayrand, and Ciarniello meeting with Weggars. This was to try to end the war between the H.A.M.C. and the RM. There also was a reference to RM being seen in Regina.

10 Under the heading "The Grounds Upon Which this Petition is Based", Mr. Ciarniello says at ground 5 that as a member of the H.A.M.C. his security and liberty interests are directly affected by the operation of the impugned sections of the *Code*, "particularly as applied by Justice Fuerst in the Ontario Judgment to declare the H.A.M.C. a criminal organization across Canada ....". He elaborates in ground 6 that the impugned provisions "do not afford un-indicted members of organizations that are the subject of such prosecutions, like the Petitioner, procedural fairness of any kind before their security and/or liberty interests are infringed upon."

11 He submits that as a result, the impugned sections are inconsistent with s. 7 of the *Charter* and are of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. He goes on to assert in ground 7 that the impugned sections are also impermissibly vague and overbroad, and therefore infringe his s. 7 rights in a manner that is not saved by s. 1 of the *Charter*.

12 Mr. Ciarniello's argument, as I understand it, is essentially this. The impugned provisions create a new category in the criminal law, that of a criminal organization. In the course of prosecuting particular individuals under the provisions, it will be necessary for a trial judge to make findings about whether or not a particular group constitutes a criminal organization. Such a finding is one that may impact other members of the organization, beyond those who are the subject of the prosecution. Notwithstanding that fact, the legislation provides no mechanism for those persons who will potentially be affected, to make any submissions or lead any evidence as to whether their organization should be classified as a criminal organization.

13 Mr. Ciarniello submits that this problem is illustrated by what occurred in *R. v. Lindsay*. There, Justice Fuerst made a finding that the H.A.M.C. across Canada is a criminal organization. He says this has had a negative impact on his life. He says it has affected his right to liberty and security of the person under s. 7 of the *Charter*, without his being given an opportunity to adduce evidence or make submissions. Therefore, he submits, he has been deprived of his right to liberty and security of the person by a process that is not in accordance with the principles of fundamental justice, and this constitutes a breach of his rights under s. 7 of the *Charter*.

#### **The Facts Alleged in the Petition**

14 Mr. Ciarniello sets out the facts on which he relies in this way in his Petition:

1. The Petitioner is the President of the Vancouver Chapter of the H.A.M.C and has been a member of that association for over twenty years;
2. The Respondent prosecuted two individuals in Ontario [the Ontario Proceedings] and during the course of that prosecution sought, pursuant to s. 467.1(1) of the *Code*, and obtained a declaration that the H.A.M.C is a criminal organization in Canada [the Ontario Judgment];
3. The Petitioner was not a party to the Ontario Proceedings. There is no requirement found in s. 467.1 through to 467.2 requiring the Respondent to

- notify known members of the alleged criminal organization of their intention to have a court label the organization in this way;
4. Since the Ontario Judgment, the legitimacy of the Petitioner's ongoing membership in the H.A.M.C is in question;
  5. The Petitioner's freedom to speak to the media to advocate on behalf of the H.A.M.C has been severely limited by the combined operation of sections 467.1 through 467.2, especially because of the prospect of being charged with participating in the activities of a criminal organization contrary to s. 467.11(1) of the Code;
  6. The Petitioner has been subjected to harassment by law enforcement officials, ostracism in the community, and has been and continues to suffer the stigma of having been labelled a member of an association that has been judicially pronounced a criminal organization in Canada.

### **Mr. Ciarniello's Affidavit**

15 In his affidavit, Mr. Ciarniello gives a number of specific examples of how he says his life has been affected by the judgment in *R. v. Lindsay*. In para. 8 he says that he is now much more reluctant to speak or make comments to the media on issues relating to the H.A.M.C. He says this is because of "the stigma associated with being a member of a club that has now been declared a criminal organization." He says he is much more guarded now about speaking with the press "because of my concern that I may be charged with participating in the activities of a criminal organization, an offence under section 476.11 of the *Criminal Code*."

16 In para. 9, Mr. Ciarniello gives further examples of how his life has been affected since the judgment in *R. v. Lindsay* and "the attendant press it has attracted". He says he is now more regularly stopped by the police, who give as their reason, his membership in the H.A.M.C. He goes on to say that people treat him differently now. He cites an occasion on which he was wearing his "colours", identifying him as a member of the organization, in a restaurant in Coquitlam, when he overheard a couple ask to move because "they did not want to sit next to a criminal, namely a member of the H.A.M.C." That made him uncomfortable, and he decided to leave the restaurant. He says people who see him wearing his colours now treat him with fear, loathing, and avoidance, whereas before they were friendly. He gives examples of this happening at his local gas station and grocery store.

17 In para. 10, Mr. Ciarniello cites an example from the fall of 2005 when his luggage was searched by customs officers at Vancouver airport. He was also asked whether he was taking more than \$10,000 out of the country. He believes he was singled out for attention because of his membership in the H.A.M.C..

18 Mr. Ciarniello also gives examples how other members of the H.A.M.C. have been affected. Much of that evidence is hearsay and therefore inadmissible. In any event, for purposes of the applications before me, the central issue is the manner in which Mr. Ciarniello's *Charter* rights have been affected, if at all, and I have therefore recited only those parts of his affidavit in which he speaks of his own experience.

### **Issues**

19 The Respondents submit that the Petition should not proceed to a full hearing, but rather should be stayed or dismissed now on the basis of their preliminary objections. They rely on the

court's inherent jurisdiction to control its own process, as well as Rules 14(6.1) and 19(24) of the *Rules of Court*.

20 Rule 14(6.1) provides:

14(6.1) Whether or not a party referred to in subrule (6) makes an application or allegation under that subrule, the party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.

21 Rule 19(24)(a) and (d) provides:

19(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence as the case may be,

... or

(d) it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

22 The Respondents advance three reasons why this court should not hear the Petition. First, they say it is an attack on the Ontario Judgment and should therefore not be heard in British Columbia; that is, they say that this court is the wrong forum. Second, they say Mr. Ciarniello lacks standing to seek the relief he requests. Third, they say the Petition discloses no reasonable claim and should be dismissed on the basis that it cannot succeed.

### **Is This Court the Wrong Forum to Hear Mr. Ciarniello's Arguments?**

23 One way of looking at Mr. Ciarniello's Petition is that it is, in essence, an attempt to have this court reverse, undermine, or neutralize the effect of the Ontario Judgment.

24 Much of the wording of the Petition encourages this interpretation. Thus, grounds 2 and 5 of the Petition state:

2. That the Petitioner's security and/or liberty interests protected by s. 7 of the *Charter* are engaged by the operation of the Criminal Organization provisions found in sections 467.1 through 467.2 of the *Code* and/or the operation of the Judgment of Justice Fuerst of the Ontario Superior Court of Justice dated June 30, 2005 [the Ontario Judgment] applying those provisions and holding that the H.A.M.C. is a "criminal organization" across Canada.

...

5. That as a member of the H.A.M.C. the Petitioner's security and/or liberty interests have been directly affected by the operation of the Criminal Organization provisions found in sections 467.1 through 467.2 of the Code, particularly as applied by Justice Fuerst in the Ontario Judgment to declare the H.A.M.C. criminal organization across Canada, without affording the Petitioner any semblance of procedural fairness before infringing on his security and or/liberty interests.

[Emphasis Added]

25 Those paragraphs of the Petition could be read as asserting that it is Justice Fuerst's Judgment that has affected Mr. Ciarniello's security and/or liberty interests, and that it was the proceedings before her that denied him the procedural fairness to which he claims to be entitled.

26 That interpretation is reinforced by Mr. Ciarniello's affidavit, in which he deposes at paras. 5, 6 and 12:

5. In July 2005 I learned of Justice Fuerst's Judgment [the Ontario Judgment] in which she declares the H.A.M.C. a criminal organization in Canada. While I may have read and heard about the Ontario case in the media, at no time prior to that decision was I provided with notice of the government's desire to have the H.A.M.C. declared a criminal organization throughout the country. I had no idea that the legitimacy of my continued membership in the Vancouver Chapter of the H.A.M.C. was in any way at stake in the proceedings before Justice Fuerst. I did not realize that the effect of that prosecution would be a pronouncement by the court in that case that the H.A.M.C. was a criminal organization across Canada, extending to the Vancouver Chapter of which I am a proud and longstanding member. I have read Justice Fuerst's reasons and was shocked to find that I was mentioned in her reasons despite not being a party to that proceeding ....
6. While I have known for years that there are some members of the H.A.M.C. in Canada that have committed crimes, my understanding is that the Vancouver Chapter has never promoted criminal activity on the part of its members. Certainly, I have never engaged in the promotion of criminal conduct. Nevertheless, the effect of the Ontario Judgment is to declare me a member of a criminal organization notwithstanding that I have never engaged in the promotion of criminal conduct.  
  
...
12. Because of the Ontario Judgment, which pronounces the H.A.M.C. a criminal organization across Canada and specifically refers to me by name as one of its members, I feel as if that decision effectively labels me a criminal. As I have explained above, this is exactly how I have been made to feel by law enforcement, most media, and the public in the wake of the Ontario Judgment. The H.A.M.C. that I am a part of is not a criminal organization. Unfortunately, I never had an opportunity to answer that serious allegation in the proceedings before Justice Fuerst. Although after the judgment came to my attention and I began to feel its affects (sic) I applied, before the two accused in that case were sentenced, along

with a number of other H.A.M.C. members, to be granted intervenor status in the proceedings before Justice Fuerst, that application was not granted ....

[Emphasis Added]

27 One is led by these passages to understand that the complaint is not about the impugned legislation in the abstract, but rather, the particular way in which Justice Fuerst conducted the trial in *R. v. Lindsay*. Mr. Ciarniello seems to be asserting that the infringement of his rights came about as a direct result of the particular findings Justice Fuerst made, and that his deprivation of procedural fairness was a result of her refusal to grant him intervenor status.

28 The Respondents argue that if Mr. Carniello's purpose is to raise objections to what happened in *R. v. Lindsay*, then he should not have brought his Petition in this court.

29 Generally, if a court makes an order that is within its proper jurisdiction, that order may only be set aside or varied by an appeal and cannot be attacked collaterally in other proceedings.

30 In *R. v. Litchfield*, [1993] 4 S.C.R. 333, Iacobucci J. explained the rule against collateral attack at p. 348:

This rule holds that "a court order, made by a court having jurisdiction to make it", may not be attacked "in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment" (*Wilson v. The Queen*, [1983] 2 S.C.R. 594, per McIntyre J., at 599). The lack of jurisdiction which would oust the rule against collateral attack would be a lack of capacity in the court to make the type of order in question, such as a provincial court without the power to issue injunctions. However, where a judge, sitting as a member of a court having the capacity to make the relevant type of order, erroneously exercises that jurisdiction, the rule against collateral attack applies. See, e.g., *B.C.(A.G.) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 129 (S.C.), at p. 141, and *R. v. Pastro* (1988), 42 C.C.C. (3d) 485 (Sask. C.A.), at pp. 498-99, per Bayda C.J.S.. Such an order is binding and conclusive until set aside on appeal.

31 As noted above, Mr. Ciarniello applied for intervenor status before Justice Fuerst. She declined to grant him that status, on the basis that his application came too late in the proceedings, after conviction and just before sentence. She remarked that to grant the application would disrupt the course of the trial and would delay the imposition of sentence for at least several weeks. Justice Fuerst noted, however, that an appeal of the conviction had already been filed in the Ontario Court of Appeal, and she suggested that Mr. Ciarniello could apply for intervenor status on that appeal. In her reasons on the intervenor application she wrote at p. 8:

Finally, I have been advised that a Notice of Appeal already has been filed. It is apparent that there will be another forum in which the Applicants may seek intervenor status, without the risk of disruption of the court process.

32 I am advised that the appeal referred to by Justice Fuerst has not yet been heard. The grounds for appeal seek much the same relief as what Mr. Ciarniello seeks in his Petition. Grounds (b) and (c) in Mr. Bonner's Notice of Appeal are:



- (b) The trial judge erred in finding that the criminal organization provisions in the *Criminal Code* were constitutional;
- (c) The trial judge erred by finding that there was sufficient evidence to find that the Hells Angels was a criminal organization.

33 The Respondents argue that Mr. Ciarniello could apply to the Ontario Court of Appeal for intervenor status, and that would be the appropriate forum in which to challenge the judgment in *R. v. Lindsay*.

34 It must be observed, of course, that the present Petition does not *directly* challenge the judgment in *R. v. Lindsay*. That is, the relief sought in the Petition is not that Justice Fuerst's judgment be set aside or varied. Indeed, this court would have no power to do so. Nevertheless, the Respondents submit that by seeking the declaratory relief set out in the Petition, Mr. Ciarniello is in effect trying to undermine the legitimacy of that judgment. Thus, although the Petition does not, in the fullest sense, constitute a collateral attack, it is analogous to such an attack. On that basis, the A.G. Canada submits that the Petition should be dismissed as an abuse of the court's process under Rule 19(24)(d). He relies on *Toronto (City) v. C.U.P.E. Local 79*, [2003] 3 S.C.R. 77, where the Supreme Court of Canada held it was appropriate for judges to use their inherent discretion to prevent an abuse of process where the proceedings, while not meeting the strict requirements of issue estoppel, nevertheless constituted an implicit attack on the correctness of a factual finding in a previously decided case.

35 The A.G.B.C. frames the point a little differently, arguing that principles of judicial comity, order and fairness require a finding that this court is not the "forum conveniens" for Mr. Ciarniello's Petition: *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205 at para. 21. He refers to the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, proclaimed effective May 4, 2006, which provides in s. 11 that the court may decline to exercise its territorial competence where a court of another state is a more appropriate forum.

36 Alternately, he submits that the present proceedings should be stayed pursuant to Rule 14(6.1). The purpose of that rule was considered by a five-justice division of the Court of Appeal in *472900 B.C. Ltd. v. Thrifty Canada Ltd.* (1998), 57 B.C.L.R. (3d) 332 (C.A.). Esson J.A. delivering the judgment of the Court, said at para. 32:

A primary purpose of the present rule is to avoid having two actions proceeding in different jurisdictions with the attendant risk of conflicting decisions.

37 As the relief sought by Mr. Ciarniello on his Petition is essentially the same as that sought by Mr. Bonner on his appeal of the Ontario Judgment to the Ontario Court of Appeal, the A.G.B.C. submits that this court should decline to exercise jurisdiction, and should stay the Petition under Rule 14(6.1).

38 Mr. Ciarniello's response to all these arguments is that they mischaracterize the nature of the relief sought in the Petition. He says that he is not seeking to overturn *R. v. Lindsay* or otherwise impugn its authority. Indeed, it is obvious that no court in this Province would have the power to do so. Rather, he says that what happened in *R. v. Lindsay* is merely illustrative of the defect that is inherent in the legislation. According to Mr. Ciarniello, the real source of the problem is not that Justice Fuerst committed some error in her application of the legislation, but rather that the legislation put her in a position to make findings about the H.A.M.C. which have an adverse effect on him,

without requiring that she first give him an opportunity to be heard. The problem, he says, is the legislation, not Justice Fuerst's Judgment. As he puts it in para. 2 of his written submissions:

The Petition is not a review or appeal in any way of the judicial decision in *R. v. Lindsay and Bonner*, [2005] O.J. No. 2870 (Ont. Sup. Ct.). That decision is referenced as exemplifying the constitutional vices of the provisions, and in this case, as the causal instigation for those unconstitutional effects. The attack in the Petition is on sections 467.1 through 467.2 of the *Criminal Code*.

39 Mr. Ciarniello's submission is highly reminiscent of the position advanced by the appellants in *Carpenter Fishing Corp. v. Canada*, [2002] B.C.J. No. 2536, 2002 BCCA 611. In that case, a judge in chambers had dismissed their petition on the grounds that they lacked standing to seek declaratory relief and that their petition was a collateral attack on a previous decision of the Federal Court of Appeal. The appellants argued that they did not seek to impugn the previous decision, but rather contended that "their experience [in the Federal Court] provides a factual backdrop that highlights how the impugned legislation affects litigants from British Columbia." The British Columbia Court of Appeal rejected that argument and upheld the decision of the chambers judge. Mackenzie J.A. wrote at para. 10:

10 In my view, the history of the Federal Court Action undermines the appellants' claim for standing on both private interest and public interest grounds. As that litigation is *res judicata*, it does not provide a base for private interest standing. The appellants' connections to the fishing industry and British Columbia are interests they share as members of the public and factors that go to public interest standing but not to private interest standing.

40 If the object of Mr. Ciarniello's Petition were to impugn the validity of the Ontario Judgment, I would dismiss or stay the Petition under Rule 19(24)(d) as being an abuse of this court's process. However, on the basis of Mr. Ciarniello's clear and unequivocal submission that he is not attacking the legitimacy of the decision in *R. v. Lindsay*, but is merely using what happened in that case to illustrate his more general point about alleged defects in the legislation, I shall go on to consider the issue of standing.

#### **Relationship Between The Issues Of Standing and No Reasonable Claim**

41 The Respondents have framed what they say are two distinct reasons for dismissing the Petition on this preliminary application. On the one hand, they submit that Mr. Ciarniello lacks standing to seek the relief set out in his Petition. For that reason, they say the court lacks jurisdiction to grant him his relief, and the Petition should therefore be dismissed. The Respondents also argue that even if Mr. Ciarniello had standing, his Petition would be bound to fail and should therefore be dismissed as disclosing no reasonable claim under Rule 19(24)(a).

42 The test for dismissal under Rule 19(24)(a) is whether, assuming the facts alleged in the pleadings could be proved, it is plain and obvious that they disclose no reasonable claim. The standard for the application of that rule was described by Wilson J. in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980:

Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that gov-

erns an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

43 Rule 19(27) provides that on an application under Rule 19(24)(a), no evidence is admissible. The application must proceed simply by assuming the truth of the facts alleged in the Petition.

44 Although the Respondents have framed their argument under Rule 19(24)(a) as separate from their argument on standing, it is not clear to me that they are truly distinct. Whether the issue of the sustainability of the claim can be separated from the issue of standing depends on the nature of the claim and the identity of the plaintiff or petitioner. In some cases, the only real reason for asserting that the claim must fail is that the petitioner is not a person who has a right to bring that claim. In such a case, the issue of whether the Petition should be struck as disclosing no reasonable claim and the issue of standing effectively merge into one.

45 Le Dain J. commented on this point in *Canada (Minister of Finance) v. Finlay*, [1986] 2 S.C.R. 607, at p. 635:

As I indicated at the outset of these reasons, the appellants contended, as an alternative ground in their motion to strike, that the statement of claim did not disclose a reasonable cause of action. I may say that as I understood the argument of counsel for the appellants in this Court he did not press this contention. The emphasis was on the question of standing and the related question of justiciability. The issues of standing and reasonable cause of action are obviously closely related, and as acknowledged by counsel for the appellants, tend in a case such as this to merge. Indeed, I question whether there is a true issue of reasonable cause of action distinguishable, as an alternative issue, from that of standing. With respect, I think that is perhaps reflected in the reasons of Thurlow C.J. on the question of reasonable cause of action in which there is reference to cases on standing in support of his conclusion.

46 As I understand the Respondents' argument under Rule 19(24)(a), it is not that the constitutionality of ss. 467.1(1) to 467.2(2) is unjusticiable, nor is it that the constitutional validity of those sections is so manifestly unassailable that any argument to the contrary is bound to fail. Rather, their submission is that Mr. Ciarniello is not affected by those sections in a manner that directly engages his s. 7 *Charter* rights. In my view, that is an argument properly to be considered under the rubric of standing.

### **The Issue of Standing**

47 Where an issue of standing is raised, it may either be determined on a preliminary application or deferred to the hearing on the merits. In *Finlay*, Le Dain J. wrote at p. 617:

It depends on the nature of the issues raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding of the nature of the interest asserted.

48 Relying on *Jackson v. Canada (Attorney General)*, [2006] O.J. No. 3737 (C.A.), Mr. Ciarniello submits that the issue of standing should be left for determination at the hearing. I do not agree. The material before me is sufficient to determine the matter now, and nothing would be gained by deferring the decision.

49 A litigant may claim standing on either of two bases: private interest standing or public interest standing. Private interest standing must be founded on the litigant's own personal involvement in the matter under dispute. An individual generally has no standing to challenge the constitutional validity of a statute if he is not specially affected or exceptionally prejudiced by it: *Thorson v. Attorney General for Canada*, [1975] 1 S.C.R. 138.

50 The most common situation in which a person has private interest standing to challenge the validity of a criminal statute is where he or she is being prosecuted for an offence under the impugned legislation. A person on trial for an offence has personal standing to raise a constitutional objection to the charging statute, since everyone has the right not to be convicted under an unconstitutional statute: *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at p. 313. More particularly, where an accused faces the possibility of a sentence of imprisonment, the criminal trial itself engages his or her liberty interests under s. 7: *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at p. 180. Thus, if Mr. Ciarniello were charged with an offence under ss. 467.1(1) to 467.2(2) of the *Code*, he would clearly have personal standing to argue, in the course of his criminal trial, that one or more of those sections should be struck down as violating his rights under s. 7 of the *Charter*. Indeed, Mr. Lindsay and Mr. Bonner did precisely that during the course of their trial before Justice Fuerst.

51 Mr. Ciarniello is not, however, charged with an offence. Rather, he seeks a determination from this court about the constitutional validity of the impugned sections by bringing his Petition under Rule 10 of this court's civil rules. In his Petition, he seeks a declaration that the impugned sections infringe his rights under s. 7 and are therefore of no force and effect.

52 The fact that Mr. Ciarniello brought these proceedings by way of a Petition seeking declaratory relief rather than by means of an action seeking damages or some other remedy, does not relieve him of the requirement of demonstrating standing. As Finch C.J. wrote in *District of Kitimat v. Alcan Inc.*, [2006] B.C.J. No. 376, 2006 BCCA 75, at para. 92:

92 A simple claim to declaratory relief, in the absence of some adversely affected legal interest does not give the Court an overriding discretion to grant that relief, and to ignore the legal principles governing private interest standing.

53 The requirements for private interest standing to bring a petition for declaratory relief were discussed by Hood J. in *Fraser v. Houston*, [1996] B.C.J. No. 2096 (S.C.):

29 It is my opinion, that while there need not necessarily be a cause of action between the parties before the court will have jurisdiction to grant declaratory re-

lief, and that jurisdiction is quite broad, it is not at large or unfettered. A litigant seeking declaratory relief must demonstrate that he or she has a right which has been infringed by, or requires protection from, the other party. If the right cannot be demonstrated, the party does not have standing and the court does not have declaratory jurisdiction.

54 Hood J. went on to say:

31 Generally there must be a dispute, and some privity in law, between the parties. In this regard it is stated in *The Law of Declaratory Judgments* at page 23:

A proper case for a declaratory judgment generally requires some privity in law between parties concerned, an existent right and an interference or dispute concerning the right. A petitioner who has no right in the nature of a claim capable of being enforced or redressed in a civil action cannot seek a judicial declaration for the evident reason that he cannot take advantage of or suffer the consequences of such an order: the lack of standing to sue robs the court of its declaratory jurisdiction. Questions which are purely academic, hypothetical, obscure or of no relevance to the parties cannot form a suitable basis for an application for relief.

55 The requirement for private interest standing is not absolute. A person who lacks such standing may apply for public interest standing. However, the court will not exercise its discretion to grant public interest standing unless three conditions are met. The applicant must establish first that there is a serious issue to be tried, second that he or she has a direct or genuine interest in the matter, and third that there is no other reasonable and effective way to bring the matter before the court: *Thorson; Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice (Canada) v. Borowski*, [1981] 2 S.C.R. 575; and *Canadian Council of Churches v. The Queen*, [1992] 1 S.C.R. 236.

56 In his submissions, Mr. Ciarniello clearly stated that he does not seek public interest standing. The only question to be determined, then, is whether, despite the fact that he is not charged with an offence, he nevertheless has personal or private interest standing to argue that ss. 467.1(1) to 467.2(2) of the *Code* infringe his rights under s. 7 of the *Charter*.

57 In order for Mr. Ciarniello to have private interest standing, he must be able to show that he has been personally and directly affected by the impugned legislation. The manner in which he claims to be affected is set out as grounds 5, 6 and 7 of the Petition. In ground 5 he asserts that as a member of the H.A.M.C. his security and/or liberty interests have been directly affected by Justice Fuerst's application of ss. 467.1 through 467.2 of *Code* to declare the H.A.M.C. a criminal organization across Canada without affording him procedural fairness. In ground 6 he asserts more generally that the impugned sections do not afford unindicted members of such organizations procedural fairness before their security and/or liberty interests are infringed upon, and in ground 7 he asserts that the impugned sections are impermissibly vague and overbroad so that the limitations imposed on his s. 7 rights flowing from a judicial determination are not in accordance with the principles of fundamental justice, and are therefore unconstitutional.

58 Mr. Ciarniello's assertion of private interest standing as set out in the Petition thus rests on the following claims:

- (1) that he was an unindicted member of an organization that Justice Fuerst found to be a criminal organization pursuant to the impugned sections;
- (2) that he was not afforded procedural fairness in the process that led to that finding; and,
- (3) that the finding has infringed his security and/or liberty interests under s. 7 of the *Charter* in a manner not in accordance with the principles of fundamental justice.

59 The first of those assertions has not been contested; all the parties agree that Mr. Ciarniello is a member of the H.A.M.C. which Justice Fuerst found to be a criminal organization, and that he was not one of the persons indicted in that criminal trial. The second assertion about procedural fairness is open to debate, especially in light of the fact that Justice Fuerst intimated she might have granted him intervenor status if he had applied in a more timely manner. It is the third claim that the Respondents say is not and cannot be made out.

60 On this preliminary application, therefore, the question of standing turns on whether, assuming the facts pleaded in the Petition are true, they could amount to an infringement of Mr. Ciarniello's security and/or liberty interests under s. 7 of the *Charter*.

### The Right to Liberty

61 Mr. Ciarniello argues that his liberty interest is affected because, as a member of the H.A.M.C. that has been labelled a criminal organization, he faces a real threat of imprisonment under the legislation.

62 A theoretical possibility of imprisonment under a penal statute is not, by itself, sufficient to establish private interest standing to challenge its constitutional validity. Everyone in Canada faces a theoretical possibility of imprisonment under the various charging sections of the *Criminal Code* if they do any of the things that those sections proscribe. If such a theoretical possibility of imprisonment were sufficient, then everyone would have private interest standing.

63 Mr. Ciarniello's argument is that the threat posed to his liberty by the impugned legislation is more direct than that of other Canadians, because he is a member of an association that has been named by Justice Fuerst as a criminal organization. In para. 5 of the facts portion of his Petition, he says that Justice Fuerst's pronouncement raises for him "the prospect of being charged with participating in the activities of a criminal organization contrary to s. 467.11(1) of the Code." In particular, he says that this prospect of being charged has limited his "freedom to speak to the media to advocate on behalf of the H.A.M.C."

64 Mr. Ciarniello's argument rests on the premise that Justice Fuerst's finding that the H.A.M.C. is a criminal organization increases the susceptibility of any member of that organization being charged with an offence. There are two reasons, however, why Justice Fuerst's finding has no such effect.

65 First, the impugned legislation does not make it an offence to be a member of an association that has been labelled a criminal organization. In order to run afoul of s. 467.11(1) of the *Code*, a person must knowingly participate in an activity of a criminal organization for the purpose of enhancing its ability to commit an indictable offence. Mere membership is not a crime. Therefore, Justice Fuerst's finding does not increase the likelihood that a person would be charged with an offence simply because he is a member.

66 Second, Justice Fuerst's finding that the H.A.M.C. is a criminal organization would be legally irrelevant in any prosecution of Mr. Ciarniello under the impugned legislation. In para. 7 of his written argument, Mr. Ciarniello asserts:

The State authorities can effectively damn an organization and its members by criminal proceedings to which it is not a party, has no notice, has no status, has no representation, and essentially has no voice. Such a decision is then treated by the State authorities as if it were an *in rem* judgment in respect of the organization made after a full and fair hearing focused on the organization itself, which it absolutely is not.

67 The answer to that argument is that Justice Fuerst's finding that the H.A.M.C. is a criminal organization is not an *in rem* judgment. It is simply a finding of fact that is not binding on anyone except the parties to the case that she was hearing, that is, Mr. Lindsay and Mr. Bonner. If Mr. Ciarniello or any other member of the H.A.M.C. were charged with an offence under the impugned legislation in relation to the H.A.M.C., the Crown would have to prove by admissible evidence in their trial that the H.A.M.C. is a criminal organization. The Crown could not simply rely on Justice Fuerst's ruling.

68 Mr. Ciarniello also argues that his liberty interests have been infringed by his having "been subjected to harassment by law enforcement officials." The problem with this argument is that there is no clear nexus between such alleged harassment and the claimed constitutional defects in the impugned legislation. If Mr. Ciarniello's liberty interests were infringed by being improperly harassed by one or more law enforcement officials, then the breach of his s. 7 rights was caused by those officials, not by the impugned legislation and not by Justice Fuerst's Judgment. Such harassment, if it occurred, would not give Mr. Ciarniello standing to bring his Petition seeking a declaration that the impugned legislation is of no force and effect.

#### **The Right to Security of the Person**

69 Relying on *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, where Lamer C.J. observed that the right to security of the person extends beyond the criminal law context, Mr. Ciarniello argues that his security interests have been negatively impacted by Justice Fuerst's ruling. In para. 6 of the facts set out in his Petition, he says that he has been ostracised by the community and suffers the stigma of being a member of an organization that Justice Fuerst pronounced to be a criminal organization. He argues that these facts show that both his right to liberty and his right to security of the person have been infringed. The Respondents argue that those facts are incapable of supporting such a conclusion.

70 In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, Bastarache J., for the majority, engaged in a thorough discussion of the scope of the right to liberty and security of the person under s. 7 of the *Charter*. With respect to the liberty interest, he observed at para. 49 that it is not limited to freedom from physical restraint, but extends to state compulsion affecting fundamental life choices. At para. 51, he added that the scope of the liberty interest does not encompass all personal choices, but rather is limited to a narrow sphere of inherently personal decision-making, and at para. 54 he concluded that the liberty interest protected by s. 7 is not synonymous with unconstrained freedom.

71 As to the right to security of the person, Bastarache J. wrote at para. 55 that in the criminal context, state-imposed psychological stress may constitute a breach, particularly in "situations where the state has taken steps to interfere, through criminal legislation, with personal autonomy and a person's ability to control his or her own physical or psychological integrity such as prohibiting assisted suicide and regulating abortion."

72 He went on to caution, however, that not all psychological stress will amount to an infringement of the right to security of the person. There are two requirements before s. 7 is engaged: the stress, anxiety and stigma must be serious and must be state-imposed:

57 Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler*, , [1988] 1 S.C.R. 30 at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (*G.(J.)*, at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations ....

73 In the present case, the alleged infringements of Mr. Ciarniello's right to security of the person all relate to the stigma he says has followed him since Justice Fuerst found that the H.A.M.C. is a criminal organization across Canada.

74 The Supreme Court of Canada has on many occasions discussed the stigma that flows from being charged with a criminal offence. In the present case, however, Mr. Ciarniello is not charged with an offence. In *Blencoe*, Bastarache J. warned at para. 95 that subjection to social stigma and ostracism from the community have a diminished role outside the criminal context. In para. 81, he said that psychological stress will not amount to an interference with the right to security of the person unless the state action has had "a serious and profound effect" on the person's psychological integrity. He added at para. 82:

82 The quality of the injury must therefore be assessed. In my opinion, all of the cases which have come within the broad interpretation of "security of the person" outside of the penal context differ markedly from the interests that are at issue in this case. Violations of security of the person in this context include only serious psychological incursions resulting from state interference with an individual interest of fundamental importance.

75 Not only must the stress and stigma amount to a serious and profound incursion on the person's psychological integrity, but in addition, it must have been caused by state action. Where the stress results from the actions of individuals who are not state agents, there is no infringement of s. 7. Thus at the end of para. 59, Bastarache J. wrote:



It would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state.

76 It is useful to compare the effects suffered by Mr. Ciarniello with those endured by Mr. Blencoe. At para. 63 of the *Blencoe* decision, we are told that he and his family were hounded by the media, that his wife feared press leaks and stopped speaking to persons outside their family and friends, that his children were subjected to insults at school, and that he was prescribed antidepressants by his physician. Nevertheless, the Supreme Court of Canada concluded that his rights under s. 7 of the *Charter* had not been infringed. Bastarache J. concluded at para. 97:

97 To summarize, the stress, stigma and anxiety suffered by the respondent did not deprive him of his right to liberty or security of the person. The framers of the Charter chose to employ the words, "life, liberty and security of the person", thus limiting s. 7 rights to these three interests. While notions of dignity and reputation underlie many Charter rights, they are not stand-alone rights that trigger s. 7 in and of themselves. Freedom from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected s. 7 right.

77 In the case of Mr. Ciarniello, I conclude that the facts pleaded in his Petition, assuming they could be proven, cannot establish an infringement of his right to liberty and security of the person. His being shunned and socially ostracized is the result of the actions of individuals who are not state agents. The state cannot be held accountable for the manner in which customers in restaurants or clerks in supermarkets and service stations treat Mr. Ciarniello. Even if it could be found that the pronouncement of Justice Fuerst constituted a sufficient nexus to state action, the stress, anxiety and stigma suffered by Mr. Ciarniello cannot be considered such a serious incursion against his psychological integrity as to constitute a violation of his right to liberty and security of the person.

78 As LaMer C.J. remarked at para. 60 of *G.(J.)*, in order to establish an infringement of s. 7 based on stress and anxiety, "the impugned state action must have a serious and profound effect on a person's psychological integrity." The effect of the state action, assessed objectively in relation to a person of reasonable sensibility, must result in something "greater than ordinary stress or anxiety". The facts pleaded in Mr. Ciarniello's Petition do not rise to that level.

### Conclusion

79 I conclude that Mr. Ciarniello does not have private interest standing to bring his Petition. Assuming that the facts pleaded in the Petition could be proven, they cannot establish an infringement of his s. 7 *Charter* rights. As he makes no claim to have public interest standing, his Petition is dismissed pursuant to Rule 19(24)(a).

80 I would add this. Even if Mr. Ciarniello could show that he had a sufficiently direct interest, there would still be an alternative basis on which this court should refuse to hear his Petition for a declaration relating to the constitutionality of the impugned sections of the *Criminal Code*, since the declaration he seeks would not settle any real issue between the parties.

81 In *Heller v. Greater Vancouver Regional District* (1992), 71 B.C.L.R. (2d) 100 (C.A.) Gibbs J.A. held that the court should not grant declaratory relief where doing so would fail to serve any useful purpose:

One of the principles associated with a claim for declaratory relief is that the court will not make a declaration where it would not serve any useful purpose; where it will not settle the real issue between the parties. See *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at pp. 830 to 833 and the authorities therein referred to. A declaratory order cannot therefore be made in this case in the terms requested in the petition before this Court because it would not settle the real issue.

82 Madam Justice Southin concurred with Justice Gibbs in the result, because she too was of the opinion that the granting of the relief sought would solve nothing. She wrote:

I do not find it necessary to answer the question of what legal or equitable right to relief, if any, an applicant must now have to apply under Rule 10 for the construction of an enactment. It is sufficient to say that, as the granting of the relief sought here would solve nothing, this appeal must fail.

83 In the present case, Mr. Ciarniello has unequivocally taken the position that his Petition does not seek to impugn the validity of the Ontario Judgment. At para. 13 of his written argument he states:

It is respectfully submitted that there is no reason why the Petitioner cannot resort to the Superior Court of his home province once it is recognized that the arguments of the Attorneys General, that *R. v. Lindsay* is somehow sought to be reviewed or appealed or collaterally attacked, are simply wrong. As stated above, that decision is referenced as exemplifying the constitutional vices of the provisions and, in this case, as the causal instigation for those unconstitutional effects.

[Emphasis Added]

84 Again, at para. 17 of his written submissions, Mr. Ciarniello proclaims:

The Attorneys General insist on trying to characterize these proceedings as an attack on the *Lindsay* decision. It is not. That decision is a given. The judgment stands unassailed and is accepted at face value. The Petition is in fact based on giving that judgment full force and effect and showing how perniciously the provisions accordingly operate. There will be no attempt to review or appeal that decision in this forum.

[Emphasis Added]

85 Notwithstanding that disclaimer, the facts upon which the Petition is based clearly show that the ill-effects Mr. Ciarniello professes to have suffered are tied specifically to Justice Fuerst's finding in the Ontario Judgment that the Hells Angels Motorcycle Club is a criminal organization across Canada. If the hearing of this Petition went ahead, it could not undermine the validity of that judgment. Since Mr. Ciarniello claims that his present woes stem from the Ontario Judgment, obtaining the declaration that he now seeks in British Columbia would, as Madam Justice Southin said in *Heller*, "solve nothing". Thus, even apart from the question of standing, I would for that reason as well decline to hear Mr. Ciarniello's Petition.

86 To put it another way, Mr. Ciarniello finds himself on the horns of a dilemma. If he truly accepts that nothing this court could say on a determination of his Petition for declaratory relief could undermine the authority of the Ontario Judgment, then the Petition must be dismissed as having no practical effect. On the other hand, if the object of the Petition is in some way to impugn the validity of the Ontario Judgment, then it is an abuse of this court's process.

87 In either case, the Petition must be, and is dismissed.

EHRCKE J.

cp/e/qw/qlemo/qlbrl

*Indexed as:*

**Canadian Council of Churches v. Canada (Minister of  
Employment and Immigration)**

**The Canadian Council of Churches, appellant;**

**v.**

**Her Majesty The Queen and The Minister of Employment and  
Immigration, respondents, and**

**The Coalition of Provincial Organizations of the  
Handicapped, The Quebec Multi Ethnic Association for the  
Integration of Handicapped People, League for Human  
Rights of B'Nai Brith Canada, Women's Legal Education  
and Action (LEAF) and Canadian Disability Rights Council  
(CDRC), interveners.**

[1992] 1 S.C.R. 236

[1992] S.C.J. No. 5

File No.: 21946.

Supreme Court of Canada

1991: October 11 / 1992: January 23.

**Present: La Forest, L'Heureux-Dubé, Sopinka,  
Gonthier, Cory, Stevenson and Iacobucci JJ.**

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (45 paras.)

*Standing -- Public interest group -- Immigration Act amendments making provisions with respect to determination of refugee status more stringent -- Public interest group active in work amongst refugees and immigrants -- Action commenced to challenge constitutionality of Act under the Charter -- Whether standing should be granted to challenge provisions -- Immigration Act, 1976, S.C. 1976-77, as am. by S.C. 1988, c. 35 and c. 36 -- Canadian Charter of Rights and Freedoms, s. 7.*

The Canadian Council of Churches is a federal corporation which represents the interests of a broad group of member churches including the protection and resettlement of refugees. The Council had expressed its concerns about the refugee determination process in the proposed amendments to the

Immigration Act, 1976 [page237] (which later came into force on January 1, 1989) to members of the government and to the parliamentary committees considering the legislation. These amendments changed the procedures for determining whether applicants came within the definition of a Convention Refugee.

The Council sought a declaration that many, if not most, of the amended provisions violated the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights. The Attorney General of Canada brought a motion to strike out the claim on the basis that the Council did not have standing to bring the action and had not demonstrated a cause of action. The application to strike out was dismissed at trial but to a large extent was granted on appeal. Appellant appealed and respondents cross-appealed. At issue here is whether the appellant should be granted status to proceed with an action challenging, almost in its entirety, the validity of the amended Immigration Act, 1976.

Held: The appeal should be dismissed; the cross-appeal should be allowed.

Recognition of the need to grant public interest standing, whether because of the importance of public rights or the need to conform with the Constitution Act, 1982, in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. A balance must be struck between ensuring access to the courts and preserving judicial resources. The courts must not be allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases.

Status has been granted to prevent the immunization of legislation or public acts from any challenge. Public interest standing, however, is not required when it can be shown on a balance of probabilities that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court, while they should be given a liberal and generous interpretation, need not and should not be expanded.

[page238]

Three aspects of the claim must be considered when public interest standing is sought. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or, if not, does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the Court?

Although the claim at issue made a sweeping attack on most of the many amendments to the Act, some serious issues as to the validity of the legislation were raised. Appellant had a genuine interest in this field. Each refugee claimant, however, has standing to initiate a constitutional challenge to secure his or her own rights under the Charter and the disadvantages faced by refugees as a group do not preclude their effective access to the court. Many refugee claimants can and have appealed administrative decisions under the statute and each case presented a clear concrete factual background upon which the decision of the court could be based. The possibility of the imposition of a 72-hour removal order against refugee claimants does not undermine their ability to challenge the legislative scheme. The Federal Court has jurisdiction to grant injunctive relief against a removal order. Given the average length of time required for an ordinary case to reach the initial "credible

basis" hearing, there is more than adequate time for a claimant to prepare to litigate the possible rejection of the claim.

### **Cases Cited**

Considered: *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435; *Australian Conservation Foundation Incorporated v. Commonwealth of Australia* (1980), 28 A.L.R. 257; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; referred to: *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Toth v. Minister of Employment and Immigration* (1988), 86 N.R. 302; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[page239]

### **Statutes and Regulations Cited**

Canadian Bill of Rights, R.S.C., 1985, App. III.  
Canadian Charter of Rights and Freedoms, Preamble, s. 7.  
Constitution Act, 1982, s. 52(1).  
Immigration Act, 1976, S.C. 1976-77, c. 52, as am. by S.C. 1988, c. 35 and c. 36.

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United States Constitution, Article III, s. 2(1).

APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal, [1990] 2 F.C. 534, 36 F.T.R. 80, 68 D.L.R. (4th) 197, 106 N.R. 61, 46 C.R.R. 290, 44 Admin. L. R. 56, 10 Imm. L. R. (2d) 81, allowing an appeal from a judgement of Rouleau J., [1989] 3 F.C. 3, 27 F.T.R. 129, 41 C.R.R. 152, 38 Admin. L. R. 269, 8 Imm. L. R. (2d) 298, dismissing an application to strike out. Appeal dismissed and cross-appeal allowed.

Steven M. Barrett, Barb Jackman and Ethan Poskanzer, for the appellant.  
Graham R. Garton, for the respondents.  
Anne M. Molloy, for the interveners, The Coalition of Provincial Organizations of the Handicapped and The Quebec Multi Ethnic Association for the Integration of Handicapped People.  
David Matas and Marvin Kurz, for the intervener, League for Human Rights of B'Nai Brith Canada.  
Mary Eberts and Dulcie McCallum, for the interveners, Women's Legal Education and Action [page240] (LEAF) and Canadian Disability Rights Council (CDRC).

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

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The judgment of the Court was delivered by

**1 CORY J.:**-- At issue on this appeal is whether the Canadian Council of Churches should be granted status to proceed with an action challenging, almost in its entirety, the validity of the amended Immigration Act, 1976 which came into effect January 1, 1989.

#### Factual Background

**2** The Canadian Council of Churches (the Council), a federal corporation, represents the interests of a broad group of member churches. Through an Inter-Church Committee for Refugees it co-ordinates the work of the churches aimed at the protection and resettlement of refugees. The Council together with other interested organizations has created an organization known as the Concerned Delegation of Church, Legal, Medical and Humanitarian Organizations. Through this body the Council has commented on the development of refugee policy and procedures both in this country and in others.

**3** In 1988 the Parliament of Canada passed amendments to the Immigration Act, 1976, S.C. 1976-77, c. 52, by S.C. 1988, c. 35 and c. 36. The amended act came into force on January 1, 1989. It completely changed the procedures for determining whether applicants come within the definition of a Convention Refugee. While the amendments were still under consideration the Council expressed its concerns about the proposed new refugee determination process to members of the government and to the parliamentary committees which considered the legislation. On the first business day after the amended act came into force, the Council commenced this action, seeking a declaration that many if not most of the amended provisions violated the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights, R.S.C., 1985, App. III. The Attorney General of Canada brought a motion to strike out the claim on the basis that the Council did not have standing to [page241] bring the action and had not demonstrated a cause of action.

#### Proceedings in the Courts Below

Federal Court, Trial Division, Rouleau J., [1989] 3 F.C. 3

**4** Rouleau J. dismissed the application. His judgment reflects his concern that there might be no other reasonable, effective or practical manner to bring the constitutional question before the Court. He was particularly disturbed that refugee claimants might be faced with a 72-hour removal order. In his view, such an order would not leave sufficient time for an applicant to attempt either to stay the proceedings or to obtain an injunction restraining the implementation removal order.

Federal Court of Appeal, [1990] 2 F.C. 534

**5** MacGuigan J.A. speaking for a unanimous Court allowed the appeal and set aside all but four aspects of the statement of claim.

**6** In his view the real issue was whether or not there was another reasonably effective or practical manner in which the issue could be brought before the Court. He thought there was. He observed that the statute was regulatory in nature and individuals subject to its scheme had, by means of judicial review, already challenged the same provisions impugned by the Council. Thus there was a rea-

sonable and effective alternative manner in which the issue could properly be brought before the Court.

7 He went on to consider in detail the allegations contained in the statement of the claim. He concluded that some were purely hypothetical, had no merit and failed to disclose any reasonable cause of action. He rejected other claims on the grounds that they did not raise a constitutional challenge and others on the basis that they raised issues that had already been resolved by recent decisions of the Federal Court of Appeal.

[page242]

8 He granted the Council standing on the following matters raised on the statement of claim.

1. The claim in paragraph 3(c) of the statement of claim which alleges that the requirement that detainees obtain counsel within 24 hours from the making of a removal order violates s. 7 of the Charter (at p. 558);
2. The claim in paragraph 6(a) which alleges that provisions temporarily excluding claimants from having claims considered violate s. 7 of the Charter (at p. 554);
3. The claim in paragraph 10(a) which alleges that provisions allowing the removal of a claimant within 72 hours leave too short a time to consult counsel and violate s. 7 of the Charter (at p. 561);
4. The claim in paragraph 14(c) which alleges that the provisions permitting the removal of a claimant with a right to appeal within 24 hours if a notice of appeal is not filed in that time violate the Constitution (at p. 562).

9 The appellant seeks to have the order of the Federal Court of Appeal set aside. The respondents has cross-appealed to have the remaining positions of the statement of claim struck out.

#### Issues

10 The principal question to be resolved is whether the Federal Court of Appeal erred in holding that the Canadian Council of Churches should be denied standing to challenge many of the provisions of the Immigration Act, 1976.

11 The secondary issue is whether the Federal Court of Appeal erred in holding that certain allegations in the statement of claim failed to disclose a cause of action and others were hypothetical or premature.

[page243]

#### The Approaches Taken in Other Common Law Jurisdictions to Granting Parties' Status to Bring Action

12 It may be illuminating to consider by way of comparison the position taken in other common law jurisdictions on this issue of standing. The highest Courts of the United Kingdom, Australia and the United States have struggled with the problem. They have all recognized the need to balance the



access of public interest groups to the Courts against the need to conserve scarce judicial resources. It will be seen that each of these jurisdictions has taken a more restrictive approach to granting status to parties than have the courts in Canada.

#### The United Kingdom

**13** Traditionally only the Attorney General of the United Kingdom had standing to litigate matters for the protection of public rights. The Attorney General was not a member of cabinet and as a result had a greater appearance of independence from the political branch of government than holders of the same office in other jurisdictions. As well, it must be remembered that in the United Kingdom, Parliament is supreme. Thus there is no prospect of the courts' finding that the government has acted unconstitutionally as there is in Canada and the United States.

**14** The English courts have developed three exceptions to the rule that only the Attorney General can represent the interests of the public. First an individual may have standing to litigate a question of public right if the impugned activity simultaneously affects the individual's private rights. Second, an individual may bring an action claiming a violation of a public right if that individual suffered special damage as a result of the impugned activity. Thirdly, a local authority may bring an action where it considers it necessary to protect or promote the interests of the citizens within its borders.

**15** These exceptions were affirmed in *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, at p. 506. [page244] In that case the plaintiff sought standing to obtain an injunction against a postal union. It was argued that the union's announced plan that it would not process any mail for South Africa for a period of one week would violate the criminal law. The Attorney General refused to bring an action against the union. Yet, the House of Lords refused to grant standing to Gouriet. It held that he could only litigate the issue in a relator action brought by the Attorney General.

**16** There are now various statutes in the United Kingdom which provide that a Court may in certain circumstances grant an applicant leave to bring an action. Recent cases have turned upon the wording of the particular statutory provisions and as a result they are of limited assistance in consideration of the issue in Canada.

#### Australia

**17** The Australian Law Reform Commission published a paper on the question of public interest standing in 1977, (*Access to the Courts -- I: Standing: Public Interest Suits* (No. 4, 1977)). The report reviewed circumstances which had resulted in demand for increased access to the Courts in common law jurisdictions. It identified the first as the introduction of legal aid which permitted socially-disadvantaged citizens to assert their private legal rights. The second was the provision of legal representation for "diffuse" interest groups in areas such as consumer and environmental protection. It noted that these organizations often raise issues that are not connected with the private rights or interests in property which would provide the traditional common law basis for standing. The Commission put forward three alternative solutions to the question of when standing should be granted. They were as follows:

[page245]

- (1) Open Door Policy. This would allow any person to take any proceedings in the public law area and reliance would be placed on the discipline of costs to limit the number of these cases.
- (2) United States Method. The so called United States method would enable the Courts to screen the proposed plaintiffs as a part of the determination of the particular case.
- (3) Preliminary Screening. This method would institute a preliminary screening procedure which would be undertaken by the Court before the substantive issue was considered.

**18** The Commission recommended the open-ended approach. The report did not discuss the relative merits of introducing reforms by means of legislation or through the evolution of the common law. Nor did it address concerns as to what should be the role of the courts, a matter which is crucial to the American approach to the question.

**19** Subsequent to the publication of the Law Reform Report the High Court of Australia considered the problem in *Australian Conservation Foundation Incorporated v. Commonwealth of Australia* (1980), 28 A.L.R. 257 (H.C.). The Foundation was an environmental group very active in Australia. It challenged a decision made by the Government of Australia to establish a resort area. The challenge was based upon environmental legislation which, the majority of the High Court concluded, did not create any private rights. It determined the only duty the legislation imposed was a public one cast upon the Minister, which was not owed to any one individual. The application of the Conservation Foundation for status as a party was therefore rejected.

**20** Gibbs J. put the position in this way at p. 270:

A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not [page246] so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.

He specifically rejected the Foundation's claim that it had a special interest either as a result of its communication with the Government on the issue or because its membership had chosen to specify environmental protection as one of its objects.

**21** In concurring reasons Mason J. observed that the Canadian approach as expressed in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, was directly contradicted in Australia by cases holding that the taxpayer has no standing to challenge the validity of a statute which authorizes the appropriation or expenditure of funds in a suit for declaratory relief.

**22** Thus, despite the report and recommendation of the Australian Law Reform Commission, the position taken in that country on the issue of granting status is far more restrictive than it is in Canada.

The United States of America

**23** Article III of the Constitution of the United States is the source of the authority of Federal Courts which extends to all "cases and controversies". This provision provides:

Section 2, Clause 1. Subjects of jurisdiction. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority,--to all Cases affecting Ambassadors, other public Ministers and Consuls,--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;-- between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and [page247] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

**24** The United States Supreme Court has interpreted this provision as restricting access to the courts to litigants who have suffered a personal injury which they wish to redress. The leading decision on the question is *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In that case, a group of citizens challenged the Federal Government's decision to give property to a Christian educational institution without charge. It was the group's contention that the gift of state property violated the Constitution. It claimed standing on the basis that each of their members was an individual taxpayer and that the gift constituted an improper use of their taxes. Rehnquist J. gave the reasons for the majority denying standing to the group. He interpreted Article III as demanding the fulfilment of three conditions. In order to secure standing a plaintiff must show:

- (1) "he has personally suffered some actual or threatened injury" as a result of the impugned act,
- (2) that the injury "fairly can be traced to the challenged action" and
- (3) that the injury is "likely to be redressed by a favorable decision".

To these constitutional requirements for standing, Rehnquist J. added "prudential principles". He determined that a court may exercise its discretion to deny standing even if all the above conditions were met if the plaintiff presents "abstract questions of wide public significance", rests its claim on the rights of third parties, or does not present a claim falling within the "zone of interests" protected by the law in question.

[page248]

**25** He observed that, "This Court repeatedly has rejected claims of standing predicated "'on the right, possessed by every citizen, to require that the Government be administered according to law' ... ." He expressed his concern that the Federal Court should not overstep its traditional role by entering into conflict with the legislative branch over claims asserted by individuals who have not suffered a "cognizable injury".

**26** Tribe has referred to the position taken by the Supreme Court of the United States as "one of the most criticized aspects of constitutional law". (See *American Constitutional Law* (2nd ed.), at p. 110.) However, he carefully noted that the court's position was a legitimate approach to standing based upon a coherent view of the role of the courts. He observed that a narrow rule of standing en-

hanced the view that the Federal Court should determine issues between private parties and not take on a role "as the branch of government best able to develop a coherent interpretation of the Constitution ... ." He noted that the courts' resistance to hearing cases brought by those without a personal interest in the impugned activity of the state is founded on a policy of deference to the legislature. He observed that the Congress may, if it wishes, pass legislation which allows for more generous standing than that which the court has discretion to award since Article III limits the court's discretion on standing but not that of the legislature.

**27** Once again it will be seen that the principles enunciated by the United States Supreme Court on standing are more restrictive than those that are applicable in Canada.

#### The Question of Standing in Canada

**28** Courts in Canada like those in other common law jurisdictions traditionally dealt with individuals. [page249] For example, courts determine whether an individual is guilty of a crime; they determine rights as between individuals; they determine the rights of individuals in their relationships with the state in all its various manifestations. One great advantage of operating in the traditional mode is that the courts can reach their decisions based on facts that have been clearly established. It was by acting in this manner that the courts established the rule of law and provided a peaceful means of resolving disputes. Operating primarily, if not almost exclusively, in the traditional manner courts in most regions operate to capacity. Courts play an important role in our society. If they are to continue to do so care must be taken to ensure that judicial resources are not over-extended. This is a factor that will always have to be placed in the balance when consideration is given to extending standing.

**29** On the other hand there can be no doubt that the complexity of society has spawned ever more complex issues for resolution by the courts. Modern society requires regulation to survive. Transportation by motor vehicle and aircraft requires greater regulation for public safety than did travel by covered wagon. Light and power provided by nuclear energy requires greater control than did the kerosene lamp.

**30** The state has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of state activism has led to the growth of the concept of public rights. The validity of government intervention must be reviewed by courts. Even before the passage of the Charter this Court had considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources. It expanded the rules of standing in a trilogy of cases; *Thorson v. Attorney General of Canada*, *supra*, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, and *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575. Writing for the majority in *Borowski*, *supra*, Martland J. set forth the conditions [page250] which a plaintiff must satisfy in order to be granted standing, at p. 598:

... to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

Those then were the conditions which had to be met in 1981.

**31** In 1982 with the passage of the Charter there was for the first time a restraint placed on the sovereignty of Parliament to pass legislation that fell within its jurisdiction. The Charter enshrines the rights and freedoms of Canadians. It is the courts which have the jurisdiction to preserve and to enforce those Charter rights. This is achieved, in part, by ensuring that legislation does not infringe the provisions of the Charter. By its terms the Charter indicates that a generous and liberal approach should be taken to the issue of standing. If that were not done, Charter rights might be unenforced and Charter freedoms shackled. The Constitution Act, 1982 does not of course affect the discretion courts possess to grant standing to public litigants. What it does is entrench the fundamental right of the public to government in accordance with the law.

**32** The rule of law is recognized in the preamble of the Charter which reads:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

The rule of law is thus recognized as a corner stone of our democratic form of government. It is the rule of law which guarantees the rights of citizens to protection against arbitrary and unconstitutional government action. This same right is affirmed in s. 52(1) which states:

[page251]

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Parliament and the legislatures are thus required to act within the bounds of the constitution and in accordance with the Charter. Courts are the final arbiters as to when that duty has been breached. As a result, courts will undoubtedly seek to ensure that their discretion is exercised so that standing is granted in those situations where it is necessary to ensure that legislation conforms to the Constitution and the Charter.

**33** The question of standing was first reviewed in the post-Charter era in *Finlay v. Canada* (Minister of Finance), [1986] 2 S.C.R. 607. In that case Le Dain J. speaking for the Court, extended the scope of the trilogy and held that courts have a discretion to award public interest standing to challenge an exercise of administrative authority as well as legislation. He based this conclusion on the underlying principle of discretionary standing which he defined as a recognition of the public interest in maintaining respect for "the limits of statutory authority".

**34** The standard set by this Court for public interest plaintiffs to receive standing also addresses the concern for the proper allocation of judicial resources. This is achieved by limiting the granting of status to situations in which no directly affected individual might be expected to initiate litigation. In *Finlay*, supra, it was specifically recognized that the traditional concerns about widening access to the courts are addressed by the conditions imposed for the exercise of judicial discretion to grant public interest standing set out in the trilogy. Le Dain J. put it in this way, at p. 631:

... the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; [page252] the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in Thorson, McNeil and Borowski.

#### Should the Current Test for Public Interest Standing be Extended

35 The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the Constitution Act, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

36 The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The [page253] decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

#### The Application of the Principles for Public Interest Standing to this Case

37 It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

##### (1) Serious Issue of Invalidity

38 It was noted in Finlay, supra, that the issues of standing and of whether there is a reasonable cause of action are closely related and indeed tend to merge. In the case at bar the Federal Court of Appeal in its careful reasons turned its attention to the question of whether the amended statement of claim raised a reasonable cause of action. The claim makes a wide sweeping and somewhat disjointed attack upon most of the multitudinous amendments to the Immigration Act, 1976. Some of the allegations are so hypothetical in nature that it would be impossible for any court to make a determination with regard to them. In many ways the statement of claim more closely resembles submissions that might be made to a parliamentary committee considering the legislation than it does

an attack on the validity of the provisions of the legislation. No doubt the similarity can be explained by the fact that the action was brought on the first working day following the passage of the legislation. It is perhaps unfortunate that this court is asked to fulfil the function of a motion's [page254] court judge reviewing the provisions of a statement of claim. However, I am prepared to accept that some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation.

(2) Has the Plaintiff Demonstrated a Genuine Interest?

39 There can be no doubt that the applicant has satisfied this part of the test. The Council enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants.

(3) Whether there is Another Reasonable and Effective Way to Bring the Issue Before the Court

40 It is this third issue that gives rise to the real difficulty in this case. The challenged legislation is regulatory in nature and directly affects all refugee claimants in this country. Each one of them has standing to initiate a constitutional challenge to secure his or her own rights under the Charter. The applicant Council recognizes the possibility that such actions could be brought but argues that the disadvantages which refugees face as a group preclude their effective use of access to the court. I cannot accept that submission. Since the institution of this action by the Council, a great many refugee claimants have, pursuant to the provisions of the statute, appealed administrative decisions which affected them. The respondents have advised that nearly 33,000 claims for refugee status were submitted in the first 15 months following the enactment of the legislation. In 1990, some 3,000 individuals initiated claims every month. The Federal Court of Appeal has a wide experience in this field. MacGuigan J.A., writing for the court, took judicial notice of the fact that refugee claimants were bringing forward claims akin to those brought by the Council on a daily basis. I accept without hesitation this observation. It is clear therefore that many refugee claimants can and have appealed administrative decisions under the statute. These actions have frequently been before the courts. Each case presented a clear concrete [page255] factual background upon which the decision of the court could be based.

41 The appellant also argued that the possibility of the imposition of a 72-hour removal order against refugee claimants undermines their ability to challenge the legislative scheme. I cannot accept that contention. It is clear that the Federal Court has jurisdiction to grant injunctive relief against a removal order: see *Toth v. Minister of Employment and Immigration* (1988), 86 N.R. 302 (F.C.A.). Further, from the information submitted by the respondents it is evident that persons submitting claims to refugee status in Canada are in no danger of early or speedy removal. As of March 31, 1990 it required an average of five months for a claim to be considered at the initial "credible basis" hearing. It is therefore clear that in the ordinary case there is more than adequate time for a claimant to prepare to litigate the possible rejection of the claim. However, even where the claims have not been accepted "the majority of removal orders affecting refugee claimants have not been carried out". (See Report of the Auditor General of Canada to the House of Commons, Fiscal Year Ended 31 March 1990, at pp. 352-53, paragraph 14.43.) Even though the Federal Court has been prepared in appropriate cases to exercise its jurisdiction to prevent removal of refugee claimants there is apparently very little need for it to do so. The means exist to ensure that the issues which are

sought to be litigated on behalf of individual applicants may readily be brought before the court without any fear that a 72-hour removal order will deprive them of their rights.

42 From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the Court. On this ground the applicant Council must fail. I would hasten to add that this should not be interpreted [page256] as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Here there is no such immunization as plaintiff refugee claimants are challenging the legislation. Thus the very rationale for the public interest litigation party disappears. The Council must, therefore, be denied standing on each of the counts of the statement of claims. This is sufficient to dispose of the appeal. The respondents must also succeed on their cross-appeal to strike out what remained of the claim as the plaintiff council does not satisfy the test for standing on any part of the statement of claim. I would simply mention two other matters.

#### Intervener Status

43 It has been seen that a public interest litigant is more likely to be granted standing in Canada than in other common law jurisdictions. Indeed if the basis for granting status were significantly broadened, these public interest litigants would displace the private litigant. Yet the views of the public litigant who cannot obtain standing need not be lost. Public interests organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts. Yet that assistance is given against a background of established facts and in a time frame and context that is controlled by the courts. A proper balance between providing for the submissions of public interest groups and preserving judicial resources is maintained.

#### Review of the Statement of Claim to Determine if it Discloses a Cause of Action

44 In light of the conclusion that the appellant has no status to bring this action, there is no need to consider the statement of claim in detail. Had it [page257] been necessary to do so I would have had some difficulty agreeing with all of the conclusions of the Federal Court of Appeal on this issue. Perhaps it is sufficient to set out once again the principles which should guide a court in considering whether a reasonable cause of action has been disclosed by a statement of claim. It was put in this way by Wilson J. giving the reasons of this Court in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:

... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

If these guidelines had been followed a different result would have been reached with regard to some aspects of this statement of claim. A party who did have standing might well find in this vast



broadside of grievances some telling shots that would form the basis for a cause of action somewhat wider than that permitted by the Federal Court of Appeal.

#### Disposition of the Result

**45** In the result I would dismiss the appeal and allow the cross-appeal on the basis that the plaintiff does not satisfy the test for public interest standing. Both the dismissal of the appeal and the allowance of the cross-appeal are to be without costs.

Solicitors for the appellant: Sack Goldblatt Mitchell, Toronto.

Solicitor for the respondents: John C. Tait, Ottawa.

Solicitors for the interveners, The Coalition of Provincial Organizations of the Handicapped and The Quebec Multi Ethnic Association for the Integration [page258] of Handicapped People: Advocacy Resource Centre for the Handicapped, Toronto.

Solicitors for the intervener, League for Human Rights of B'Nai Brith Canada: David Matas, Winnipeg, and Dale Streiman and Kurz, Brampton.

Solicitors for the interveners, Women's Legal Education and Action (LEAF) and Canadian Disability Rights Council (CDRC): Tory, Tory, DesLauriers & Binnington, Toronto and Dulcie McCallum, Victoria.

*Case Name:*  
**Chauvin v. Canada**

**Between**  
**Frank Chauvin O.C., Applicant, and**  
**Her Majesty the Queen in right of Canada, and the Advisory**  
**Council of the Order of Canada, Respondents**

[2009] F.C.J. No. 1496

[2009] A.C.F. no 1496

2009 FC 1202

355 F.T.R. 200

Docket T-1191-08

Federal Court  
Toronto, Ontario

**Aalto, Prothonotary**

Heard: March 27, 2009.

Judgment: November 23, 2009.

(82 paras.)

*Administrative law -- Judicial review and statutory appeal -- When available -- Matters not subject to review -- Moot or academic issues -- Practice and procedure -- Parties -- Standing -- Motion to strike the applicant's Notice of Application allowed -- The applicant member of the Order of Canada sought judicial review of the process by which Dr. Henry Morgantaler was appointed to the Order -- The matter was moot as the appointment had taken place -- The applicant had not taken the required steps to terminate the appointment and did not have standing -- The investiture had no direct affect on the applicant's rights and his interest was nothing more than his own dissatisfaction with Dr. Morgantaler's appointment -- Constitution of the Order of Canada, s. 8, s. 25 -- Policy and Procedures for Termination of the Appointment to the Order in Council, s. 2, s. 3.*

The respondent brought a motion to strike the applicant's Notice of Application. The applicant, a member of the Order of Canada, sought judicial review of the process by which Dr. Henry Morgan-

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taler was appointed to the Order of Canada. The application for judicial review was focused on the process by which the Advisory Council of the Order of Canada had submitted the name of Dr. Morgantaler to the Governor General. The Ordinance appointing Dr. Morgantaler was signed and sealed by the Governor General on April 10, 2008. The applicant asked the Court to set aside the recommendation of Dr. Morgantaler for the Order or to send the recommendation back for reconsideration.

HELD: Motion allowed. The application was bereft of any chance of success. It was not plain and obvious the issues raised by the applicant were not justiciable but the matter was moot. Any tangible dispute about Dr. Morgantaler's investiture had disappeared as the appointment to the Order of Canada had already taken place. The Policy and Procedures for Termination of the Appointment to the Order in Council set out the steps to terminate a person's appointment and the applicant had not taken any of those steps. The applicant had no direct standing, as the investiture had no direct affect on his legal rights and the granting of the honour was far removed from his individual interests. The applicant also did not have public interest standing, as any dishonour due to an alleged diminishment of the Order of Canada was not sufficient to establish there was a serious issue to be tried. It could not be demonstrated the applicant had a genuine interest in the sense that it was anything more than his own dissatisfaction with Dr. Morgantaler's appointment. The applicant could not indirectly attack the work of the Advisory Council by revisiting the Governor General's decision. The Governor General's decision, pursuant to the Royal Prerogative, was not subject to review.

**Statutes, Regulations and Rules Cited:**

Constitution of the Order of Canada, s. 8, s. 9, s. 10, s. 18, s. 20(1), s. 20(2), s. 25

Federal Court Rules, Rule 317

Federal Courts Act, R.S.C. 1985, c. F-7, s. 2

Policy and Procedures for Termination of the Appointment to the Order in Council, s. 2, s. 3

**Counsel:**

Philip Horgan for the Applicant.

Peter Hajacek, Roy Lee for the Respondent.

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**REASONS FOR ORDER AND ORDER**

AALTO, PROTHONOTARY :--

**I. Introduction**

1 An appointment to the Order of Canada by the Governor General is one of Canada's most prestigious civilian honours. It is granted to Canadians who exemplify leadership and distinguished service in or to a particular community, group or field of activity.

2 The Applicant, Mr. Frank Chauvin ("Mr. Chauvin") is a Member of the Order of Canada. He was granted this honour by virtue of his contributions to Canadian society in respect of the extensive charitable work in which he has been engaged.

3 However, Mr. Chauvin takes great umbrage with the appointment of Dr. Henry Morgentaler ("Dr. Morgentaler") by the Governor General to the Order of Canada. Dr. Morgentaler was appointed for "his commitment to increased health care options for women, his determined efforts to influence Canadian Public Policy and his leadership in humanist and Civil Liberties Organizations".

4 Mr. Chauvin seeks to judicially review the process by which Dr. Morgentaler was appointed and raises issues concerning the suitability of Dr. Morgentaler as a candidate for the Order of Canada given Dr. Morgentaler's lifelong commitment to promoting and making abortion available to women. The Ordinance appointing Dr. Morgentaler was signed and sealed by the Governor General on April 10, 2008 and his formal investiture ceremony was held on October 10, 2008.

5 This application for judicial review does not attack the appointment of Dr. Morgentaler, *per se*, but rather is focused on the process by which the Advisory Council of the Order of Canada ("Advisory Council") submitted the name of Dr. Morgentaler to the Governor General.

## II. Procedural History

6 The initial notice of application was filed by Mr. Chauvin on July 31, 2008. Subsequently, Mr. Chauvin sought leave to amend. With minor changes, leave was granted. The amended notice of application makes application for, *inter alia*:

- (a) A declaration that the deliberations of the Advisory Council are subject to Judicial Review;
- (b) A declaration for sufficient disclosure of the deliberations in respect of appointees, including the appointment of Dr. Henry Morgentaler;
- (c) A declaration that the recommendation of the Advisory Council to appoint Dr. Henry Morgentaler to the Order of Canada was procedurally unfair, invalid, unlawful and should be set aside;
- (d) In the alternative, a declaration that the Advisory Council exceeded or ignored the stipulated criteria in their recommendation; and
- (e) An order that the determination of Dr. Henry Morgentaler's appointment to the Order of Canada be referred back for determination in accordance with such directions as this Honourable Court considers appropriate.

7 Pursuant to Rule 317, Mr. Chauvin sought directions from the Court regarding the production of the record pertaining to the appointment of Dr. Morgentaler that was before the Advisory Council. The Respondent resisted the production of the record. However, before that issue could be decided the Respondent brought this motion to dismiss the application.

8 In January 2009, the Court raised the preliminary issue of whether Dr. Morgentaler should be added as a Respondent under Rule 303 of the *Federal Courts Rules* as a person directly affected by the order sought. On January 23, 2009, after considering written and oral submissions from the parties, the Court ordered that the issue of whether Dr. Morgentaler should be added as a party respondent to the application be deferred until the final disposition of the motion to strike.

9 The Respondent seeks an order striking Mr. Chauvin's notice of application. The Respondent asserts that it is plain and obvious that the application cannot succeed on the following grounds:

- (a) the application is an attack on the exercise of the honours prerogative;
- (b) the relief sought is moot;
- (c) an alternative remedy is available;
- (d) Mr. Chauvin is bound by previous case law;
- (e) the royal prerogative of granting honours is outside the bounds of judicial review;
- (f) the award of honours is not justiciable; and,
- (g) Mr. Chauvin lacks standing.

10 These various grounds are considered in detail below. In my view, for the reasons that follow, the notice of application must be struck as it plain and obvious that the application cannot succeed.

### III. The Framework of the Order of Canada

11 The Order of Canada was established in 1967, Canada's centenary year. Appointments to the Order of Canada are governed by the *Constitution of the Order of Canada* (P.C. 1967-389 and subsequent amendments, hereafter the "*Constitution*"). The *Constitution* provides for the establishment of an Advisory Council. The Advisory Council develops a list of potential appointees who have the "greatest merit" and submits the list to the Governor General. It is the Governor General who makes the appointment. Appointments are made for "distinguished service in or to a particular community, group or field of activity". Section 18 of the *Constitution* provides as follows:

18. Appointments of persons as Members and honorary Members shall be made for distinguished service in or to a particular community, group or field of activity.

Further, any Canadian citizen may be appointed, as set out in section 9:

- 9. (1) Any Canadian citizen may be appointed as a Companion, an Officer or a Member.
- (2) A person who is not a Canadian citizen may be appointed as an honorary Companion, Officer or Member.
- (3) A person is not a member of the Order by reason only of being appointed as a member of the Council.

12 The nomination process contemplates that any person or organization may nominate a Canadian citizen by contacting the Secretary General of the Order, who compiles the list for the Advisory Council. Section 10 provides as follows:

- 10. (1) Any person or organization may submit to the Secretary General for consideration by the Council a nomination of a Canadian citizen for appointment as a Companion, Officer or Member, and of a non-Canadian citizen for appointment as an honorary Companion, Officer or Member.
- (2) The Governor General may appoint as honorary Companions, Officers and Members a maximum of five persons in any year.

### The Advisory Council

**13** The Advisory Council is comprised of 11 prominent individuals which includes the Chief Justice of Canada (who is also the chair of the Advisory Council), the Clerk of the Privy Council, the Deputy Minister of the Department of Canadian Heritage, the Chairperson of the Canada Council, the President of the Royal Society of Canada and the Chairperson of the Board of Directors of the Association of University and Colleges of Canada and five others appointed by the Governor General.

**14** The role and mandate of the Advisory Council is to review nominations received and then compile and submit a list of nominees to the Governor General. Section 8 provides:

8. The Council shall

- (a) consider those nominations referred to in paragraph 5 (c) that the Secretary General has transmitted to it;
- (b) compile and submit to the Governor General a list of those nominees in the categories of Companion, Officer and Member and honorary Companion, Officer and Member who have the greatest merit; and
- (c) advise the Governor General on such matters as the Governor General may refer to the Council.

**15** Once the list has been submitted to the Governor General, it is the Governor General who then makes the appointment by way of an "instrument of appointment, signed by the Governor General and sealed with the Seal of the Order" (*Constitution*, s. 20 (1)).

**16** Notably, an appointment to the Order of Canada takes effect on the date on which the instrument of appointment is sealed (*Constitution*, s. 20 (2)).

Length and Termination of an Appointment

**17** Appointments to the Order of Canada are for life and are not hereditary. A person's membership ceases when she/he dies, resigns, or the Governor General makes an Ordinance terminating the person's appointment.

**18** The *Constitution* sets out a detailed mechanism whereby a person's appointment to the Order of Canada can be reviewed and revoked. The termination by Ordinance is governed by the Policy and Procedures for Termination of the Appointment to the Order in Council ("the Policy"). Under the Policy, a person's appointment shall be revoked on the recommendation of the Advisory Council made to the Governor General following an eleven stage process. That process is based on evidence submitted to the Advisory Council and is guided by the principles of fairness. The Advisory Council ascertains the relevant facts before making its determination (see section 2 of the Policy).

**19** A request to consider the termination of an appointment to the Order of Canada may be made by any person in writing to the Deputy Secretary.

**20** Termination of an appointment may be made for a number of reasons. These include conviction of a criminal offence, conduct that significantly departs from recognized standards of public behaviour, or sanctions by a professional body. Section 3 of the Policy provides as follows:

- 3. The Advisory Council shall consider the termination of a person's appointment to the Order of Canada if

- (a) the person has been convicted of a criminal offence; or
- (b) the conduct of the person
  - (i) constitutes a significant departure from generally-recognized standards of public behaviour which is seen to undermine the credibility, integrity or relevance of the Order, or detracts from the original grounds upon which the appointment was based; or
  - (ii) has been subject to official sanction, such as a fine or a reprimand, by an adjudicating body, professional association or other organization.

21 It is against this backdrop of the appointment and termination process that this motion must be decided.

#### IV. The Test on a Motion to Strike

22 The law is clear that a motion to strike should be rejected unless it is plain and obvious that the proceeding has no possibility of success and is so clearly improper as to be bereft of any possibility of success (see *Chiasson v. Canada*, 2003 FCA 155 at para. 6; *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1994] F.C.J. No. 1629). The moving party, in this case the Attorney General, must meet this standard for the matter to be struck (see *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147 per Mactavish J. at para. 28).

23 In *Amnesty International Canada v. Canada (Canadian Forces)*, Mactavish J. reviewed the law on motions to strike, as summarized by Dawson J. in *League for Human Rights of B'nai Brith Canada v. Canada*, 2008 FC 732. At para. 29 Mactavish J. discussed the reasons why the test on a motion to strike is strict. She wrote:

29. The reason why the test is so strict is that it is ordinarily more efficient for the Court to deal with a preliminary argument at the hearing of the application for judicial review itself, rather than as a preliminary motion: see the comments of the Federal Court of Appeal in *Addison & Leyen*, [2006] F.C.J. No. 489, at para. 5.

24 I note that in this case, the Respondent brought this motion to strike early on in the proceeding. This matter has not been set down for a hearing on the merits and there are several procedural steps which yet need to be taken before the matter could proceed to cross-examinations. These steps include addressing the issues of the production of the record before the Advisory Council and adding Dr. Morgentaler as a party. Therefore, striking the motion at this stage would not be less efficient than moving forward to a hearing on the merits and would save the Court's resources.

#### V. Preliminary Issues

25 This motion raises the issues of mootness, standing, the availability of an alternative remedy, Crown prerogative and justiciability.

26 Prior to discussing the issues of mootness, standing, alternative remedy and crown prerogative, it is important to first address the issue of the supplementary affidavit evidence filed by Mr.

Chauvin on this motion and the issue of whether the dispute is justiciable. The issue of the supplementary affidavit goes to what evidence is appropriate on a motion to strike an application. The issue of justiciability should be considered at the outset - if the matter is not justiciable then the other matters need not be considered.

#### Affidavit Evidence on a Motion to Strike

27 Mr. Chauvin swore an affidavit on September 23, 2008 and a supplementary affidavit on December 21, 2009. The supplementary affidavit was filed on this motion to strike. Mr. Chauvin raised *inter alia* two issues in the Supplementary affidavit. First, that the Chancellery of Honours solicited his views on a specific nominee's appointment (not Dr. Morgentaler). Second, Mr. Chauvin included references to public debate in the media that occurred after the investiture of Dr. Morgentaler. Mr. Chauvin argues that this second affidavit addresses the issue of mootness.

28 As a general rule, no evidence may be lead on a motion to strike a notice of application. One exception to the rule is when the basis for the motion to strike is that the issue has become moot. In *Amnesty International Canada, supra*, Mactavish J. held that this exception arises when there is an intervening development in relation to the underlying facts giving rise to the application (para. 30 and paras. 126-127).

29 Mr. Chauvin argues that in this case the intervening matter was the investiture of Dr. Morgentaler on October 10, 2008. However, as noted above, s. 20 (2) of *Constitution*, stipulates that the appointment occurs and takes effect when the instrument of appointment is signed and sealed by the Governor General. This occurred on April 10, 2008 well prior to the commencement of this application.

30 Therefore, as the instrument of appointment was signed and sealed by the Governor General on April 10, 2008, there was no relevant intervening development relating to the underlying facts giving rise to the application. Thus, Mr. Chauvin's supplementary affidavit sworn December 21, 2008 has not been considered on this motion and is struck.

#### Justiciability

31 Is the appointment of Dr. Morgentaler to the Order of Canada by the Governor General a justiciable issue? To be justiciable, an issue is required to be one that is suited to review by a Court. As stated by Barnes J. in *Friends of the Earth v. The Governor in Council*, 2008 FC 1183, the issue of justiciability is a threshold question of law that is not the proper subject of a standard of review analysis. In his discussion of justiciability, Justice Barnes observed as follows:

[24] The parties do not disagree about the principles of justiciability but only in their application in these proceedings. They agree, for instance, that even a largely political question can be judicially reviewed if it "possesses a sufficient legal component to warrant a decision by a court": see *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at para. 27, 83 D.L.R. (4th) 297. The disagreement here is whether the questions raised by these applications contain a sufficient legal component to permit judicial review. The problem, of course, is that "few share any precise sense of where the boundary between political and legal questions should be drawn": see Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough: Carswell, 1999) at p. 133.



[25] One of the guiding principles of justiciability is that all of the branches of government must be sensitive to the separation of function within Canada's constitutional matrix so as not to inappropriately intrude into the spheres reserved to the other branches: see *Doucett-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at paras. 33 to 36 and *C.U.P.E. v. Canada (Minister of Health)*, 2004 FC 1334 at para. 39, 244 D.L.R. (4th) 175. Generally a court will not involve itself in the review of the actions or decisions of the executive or legislative branches where the subject matter of the dispute is either inappropriate for judicial involvement or where the court lacks the capacity to properly resolve it. These concerns are well expressed in *Boundaries of Judicial Review: The Law of Justiciability in Canada*, above, at pp. 4 and 5:

Appropriateness not only includes both normative and positive elements, but also reflects an appreciation for both the capacities and legitimacy of judicial decision-making. Tom Cromwell (now Mr. Justice Cromwell of the Nova Scotia of Appeal) summarized this approach to justiciability in the following terms:

The justiciability of a matter refers to its being suitable for determination by a court. Justiciability involves the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication in light of these factors. This appropriateness may be determined according to both institutional and constitutional standards. It includes both the question of the adequacy of judicial machinery for the task as well as the legitimacy of using it.

While it is helpful to develop the criteria for a determination of justiciability, including factors such as institutional capacity and institutional legitimacy, it is necessary to leave the content of justiciability open-ended. We cannot state all the reasons why a matter may be non-justiciable. While justiciability will contain a diverse and shifting set of issues, in the final analysis, all one can assert with confidence is that there will always be, and always should be, a boundary between what courts should and should not decide, and further, that this boundary should correspond to predictable and coherent principles. As Galligan concludes, "Non-justiciability means no more and no less than that a matter is unsuitable for adjudication."

[Footnotes omitted.] [Emphasis in original.]

[26] While the courts fulfill an obvious role in the interpretation and enforcement of statutory obligations, Parliament can, within the limits of the constitution, reserve to itself the sole enforcement role: see *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, [1989] S.C.J. No. 80 at paras. 68 to 70. Such a Parliamentary intent must be derived from an interpretation of the statutory provisions in issue - a task which may be informed, in part, by considering the appropriateness of judicial decision-making in the context of policy choices or conflicting scientific predictions.

32 The Respondent argues that the issues raised in this application are not justiciable because there are no objective legal criteria to apply or facts to be determined to decide the question (see *Chiasson v. Canada*, 2003 FCA 155 at para. 8). To take the argument further, the bestowing of honours is a discretionary power of the Sovereign and therefore it is outside the bounds of judicial review. This proposition finds strong judicial support. For example, Lord Fraser of Tulleybutton, a member of the House of Lords, in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 A.C. 374 (H.L.) made the following observation:

... prerogative powers are discretionary, that is to say they may be exercised at the discretion of the sovereign (acting on advice in accordance with modern constitutional practice) and the way in which they are exercised is not open to review by the Courts;

...

I therefore assume, without deciding, that his first proposition is correct and that all powers exercised directly under the prerogative are immune from challenge in the courts; (pp. 397 - 98)

33 Further, in *Black v. Canada* (2001) 54 O.R. (3rd) 215, the Court of Appeal for Ontario held that the exercise of the royal prerogative regarding the receiving of a peerage in the United Kingdom was non-justiciable. In *Black*, Mr. Conrad Black sought an appointment as a peer in the United Kingdom, thereby allowing him to sit in the House of Lords. Black alleged that then Prime Minister Jean Chrétien interfered in the appointment process to try and prevent the appointment, and that but for the intervention, Black would have received his peerage. Black brought an action against the Prime Minister for, *inter alia*, abuse of power and misfeasance in public office. The Respondent brought a motion to dismiss the action on the ground that the relief claimed was not justiciable.

34 In his reasons, Justice Laskin provided a thorough analysis of the concept of justiciability. He noted:

[36] Unquestionably, the granting of honours is the prerogative of the Crown. The Monarch is "the fountain, parent and distributor of honours, dignities, privileges and franchises". Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (London: Butterworths and Son, 1820) at p. 6. Because no statute in Canada governs the conferral of honours, this prerogative has not been displaced by federal law. Nor has it been limited by the common law. As Hogg and Monahan observe, *supra*, at pp. 18-19, appointments and honours is one area in which the prerogative power "remains meaningful". Their view is consistent with the opinion of Lord Roskill in the important House of Lords decision, *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374. In his speech in that case Lord Roskill said at p. 418 that the modern exercise of the prerogative includes "the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others ...". [Emphasis added.]

35 Justice Laskin then went on to further analyze the concept of justiciability as follows:

[50] At the core of the subject matter test is the notion of justiciability. The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. See *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Thorne's Hardware Limited v. The Queen*, [1983] 1 S.C.R. 106. Only those exercises of the prerogative that are justiciable are reviewable. The court must decide "whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch". *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 545.

[51] Under the test set out by the House of Lords, the exercise of the prerogative will be justiciable, or amenable to the judicial process, **if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.**

[52] Thus, the basic question in this case is whether the Prime Minister's exercise of the honours prerogative affected a right or legitimate expectation enjoyed by Mr. Black and is therefore judicially reviewable. To put this question in context, I will briefly discuss prerogative powers that lie at the opposite ends of the spectrum of judicial reviewability. At one end of the spectrum lie executive decisions to sign a treaty or to declare war. These are matters of "high policy". *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*, [1989] 1 All E.R. 655 at 660, per Taylor L.J. Where matters of high policy are concerned, public policy and public interest considerations far outweigh the rights of individuals or their legitimate expectations. In my view, apart from Charter claims, these decisions are not judicially reviewable.

[53] At the other end of the spectrum lie decisions like the refusal of a passport or the exercise of mercy. The power to grant or withhold a passport continues to be a prerogative power. A passport is the property of the Government of Canada, and no person, strictly speaking, has a legal right to one. However, common sense dictates that a refusal to issue a passport for improper reasons or without affording the applicant procedural fairness should be judicially reviewable.

... [emphasis added]

36 The Court of Appeal for Ontario upheld the motions judge in striking the action on the basis that the actions of the Prime Minister were an exercise of a prerogative that was non-justiciable. However, on its facts, *Black* is distinguishable from the case at bar. In that case there was no written instrument governing or controlling the power being exercised by the Prime Minister. Here, there are clear criteria set out in sections 8, 9 and 18 of the *Constitution*: the person must have the greatest merit; have distinguished service in or to a particular community, group or field of activity, and be a Canadian Citizen. Thus, as Justice Strayer observed in *Chiasson*:

Unlike the *Black* case where there were no written instruments controlling the power being exercised by the Prime Minister, it is certainly arguable in the present case that the Regulations, once adopted, constitute a set of rules which provide criteria for a Court to determine if the procedure prescribed therein has been followed, and if the Committee has exercised the jurisdiction assigned to it. That the Regulations themselves were promulgated under the royal prerogative does not render questions of compliance with the procedure they prescribe matters plainly beyond judicial review. (para. 8)

37 Therefore, in applying this test to this motion to strike, it is arguable that it is not plain and obvious that the issues raised by Mr. Chauvin are not justiciable. However, that is not the end of the analysis as other grounds argued by the Respondent lead to the conclusion that it is plain and obvious that the application has no chance of success and must be struck.

#### VI. Mootness

38 Having determined that the matter meets the justiciability test, we must now ask the question: given that Dr. Morgentaler's appointment has already taken effect is this application moot? The test for mootness was set out by the Supreme Court in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. At paras. 15 and 16, Sopinka J., for the Court, held that the principle of mootness applies when the decision of the court will have no practical effect of resolving a controversy. The test involves two steps, as described below:

15. The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
16. The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

39 Sopinka J. also noted that under the second step of "discretion", the Court should consider the existence of an adversarial context, judicial economy, and a need for the Court to demonstrate an awareness of its proper function (see paras. 26-42).

40 The Respondent takes the position that the relief sought is moot by virtue of the fact that the Governor General has already bestowed the honour on Dr. Morgentaler. They argue further that Mr. Chauvin cannot undo the recommendation of the Advisory Council without attacking the actual appointment made by the Governor General.

41 Mr. Chauvin argues that there remains a live issue between himself and the Advisory Council. He argues that the *lis* of the controversy is between Mr. Chauvin in his capacity as a Member of the Order of Canada and the Advisory Council, and not with the Governor General's appointment or the formal investiture of Dr. Morgentaler.

42 However, Mr. Chauvin's line of argument cannot change the reality that Dr. Morgentaler has been invested as a member of the Order of Canada. Therefore, any tangible dispute about his investiture has disappeared and there would be no practical effect to any order that the recommendation of the Advisory Council should be set aside or sent back for reconsideration. Thus, as the appointment has taken place, the matter is moot.

43 In any event, Mr. Chauvin is not without a remedy, should he choose to pursue it, as the *Constitution* specifically provides an alternative remedy, discussed below.

## VII. Alternative Remedy

44 The Court will ordinarily not review a decision unless all other avenues of redress and appeal are exhausted. The Respondent argues that the procedure for requesting termination of membership, under section 25 of the *Constitution*, is available to Mr. Chauvin. That section provides that a person's membership in the Order of Canada ceases upon death, resignation, or the Governor General makes an Ordinance terminating the person's appointment. Pursuant to this section, a "Policy and Procedure for Termination of Appointments to the Order of Canada" (the "Termination Policy") sets out the process by which a person's membership may be terminated. Section 2 of the Termination Policy provides as follows:

2. The termination of a person's appointment to the Order of Canada shall be on the recommendation of the Advisory Council made to the Governor General. The recommendation of the Advisory Council shall be based on evidence and guided by the principles of fairness and shall only be made after the Council has ascertained the relevant facts relating to the case under consideration.

...

45 The Termination Policy is a complete code setting out in a detailed eleven stage procedure all of the steps to be followed for the termination of a person's appointment to the Order of Canada. None of these steps have been taken by Mr. Chauvin.

46 Mr. Chauvin argues that this "alternative" is no alternative at all as "the Applicant is not asking that Dr. Morgentaler's honour be terminated. The Applicant is asking that the recommendation of the Advisory Council in this instance be reviewed ... [and] the relief he asks is not available under the *Constitution of the Order of Canada*".

47 However, two of the remedies sought by Mr. Chauvin would result in the loss or potential loss by Dr. Morgentaler of his membership in the Order. In one head of relief, Mr. Chauvin is asking that the Court set aside Dr. Morgentaler's recommendation. In another, Mr. Chauvin is asking the Court to send the recommendation back for reconsideration. In both cases, Dr. Morgentaler's appointment would be in jeopardy.

48 The procedure in section 25 of the *Constitution* is an alternative remedy available to Mr. Chauvin to endeavour to obtain the revocation of Dr. Morgentaler's membership in the Order of Canada. Thus, this further ground supports the proposition that it is plain and obvious that the remedies sought by Mr. Chauvin have no chance of success.

### VIII. Standing

49 The Respondent also challenges Mr. Chauvin's standing to bring this application.

50 There are two avenues by which an applicant can establish standing in a judicial review application in this Court. Subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, allows "anyone directly affected by the matter in respect of which relief is sought" to bring such an application. Further, subsection 18.1(1) is broad enough to authorize the granting of standing whether or not Mr. Chauvin is "directly affected", where the test for public interest standing is met. This rule applies to applications for declaratory relief (see, *Finlay v. Canada (Min. of Finance)*, [1986] 2 S.C.R. 607).

51 The Respondent argues that Mr. Chauvin lacks both a direct interest in the matter and the required public interest to give him standing and therefore, on these grounds alone, the application should be struck.

#### Direct Interest Standing

52 Does Mr. Chauvin have direct interest standing? The Respondent takes the position that Mr. Chauvin's substantive rights are not directly affected and therefore he does not have direct standing. As set out in *Sanofi-Aventis Canada Inc. v. Minister of Health, et al.*, 2007 FC 1156 at para. 9, to be directly affected the matter involved must be one that affects an applicant's legal rights, imposes a legal obligation on the applicant, or prejudices them directly.

53 Mr. Chauvin argues that awarding Dr. Morgentaler the Order of Canada, and any associated irregularities with the process, diminishes the award and the honour bestowed on him. The allegations of irregularities are vague and unsubstantiated. Notwithstanding, Mr. Chauvin's concern that the Order of Canada is diminished by the appointment of Dr. Morgentaler does not create direct standing. He is but one of many members of the Order of Canada, some of whom may not share his view. By analogy, an action that may be perceived as disrespectful, which is akin to the argument of Mr. Chauvin, is insufficient to establish that one is suffering a direct, adverse impact such as to bring oneself within the scope of s. 18.1(1) of the *Federal Courts Act*. Rouleau J. highlighted this fact in *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans)*, 2003 FCT 30; aff'd 2003 FCA 484, as follows:

12. Further, the applicant in his affidavit affirms that the Licence allows the respondent corporation to destroy seals and that this is "disrespectful" to his and the Tribes' culture and way of life. The fact that an activity may be "disrespectful" to one's way of life is not sufficient to establish that one is suffering a direct, ad-

verse impact from such activity such as to bring oneself within the scope of s. 18.1(1) of the *Federal Court Act*. Many government decisions could be perceived by one group or another as being disrespectful or offensive to their culture of personal characteristics. It would be detrimental, if not devastating, to our justice system if applicants were allowed to overburden the courts as a result of the unnecessary proliferation of frivolous suits brought by individuals, however well-intentioned they are. It would also result in having non-justiciable issues brought before the courts. Clearly, this was not Parliament's intention in including the words "directly affected" in subsection 18.1(1) of the *Federal Court Act*.

54 The investiture of Dr. Morgentaler has no direct affect on Mr. Chauvin's legal rights, either as an individual, as argued by Mr. Chauvin, nor does it result in a prejudice directly to him. In my view, therefore, he does not have direct interest standing. My conclusion on this point is reinforced by Justice Laskin's analysis in *Black, supra*, wherein he said at para. 60:

The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake.

Similarly, the granting of an honour is far removed from Mr. Chauvin's individual interests.

#### Public Interest Standing

55 If Mr. Chauvin does not have direct standing, does he have public interest standing? The Respondent argues that Mr. Chauvin cannot meet the test for public interest standing as set out by the Supreme Court of Canada in *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236. To meet the test, an applicant must demonstrate the following three elements:

- a. raise a serious issue to be tried;
- b. must have a genuine interest in the issue, and
- c. there must be no other reasonable and effective means to bring the matter before the courts.

56 In *Canadian Council of Churches v. Canada*, Justice Cory, in canvassing the role of public interest standing, recognized that public interest standing was an avenue to permit interested parties to bring proceedings due to the increasing intervention of the state and the need to enforce the *Charter*.

57 Standing should not be summarily decided on a motion to strike in the ordinary course. Justice Evans, in *Sierra Club of Canada v. Canada*, [1999] 2 F.C. 211 (T.D.) at 39 cautioned against determining the issue of standing on a preliminary motion. This is so because a full evidentiary record may raise matters that will support standing. However, in this case the issue can be determined on the record and there is nothing substantive that can be added to the position of Mr. Chauvin which will affect this issue at a full hearing.

58 Standing, or more properly public interest standing, has been considered numerous times by the Federal Courts. For example, by the Federal Court of Appeal in *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2006 FCA 144 at para. 18. Pelletier J.A. cited the work of T.A. Cromwell,

now a judge of the Supreme Court of Canada at para. 12 of *Canada (Attorney General) v. Vincent Estate*, 2005 FCA 272:

[12] In his book, *Locus Standi: A Commentary on the law of Standing in Canada* (Carswell, Toronto, 1986), T.A. Cromwell (now a judge of the Nova Scotia Court of Appeal) identifies a number of different uses of the term "standing". In some cases, the term is used to refer to the plaintiff's entitlement on the merits. In others, "standing" is a reference to the person's legal capacity to sue. More commonly, the question of standing calls for an inquiry into "the required nature and extent of the plaintiff's 'interest' in the question submitted for adjudication." (Cromwell, at p. 4). Another use of the expression "standing" is found in cases such as *Thorson v. A.G. Canada* (1974), 43 D.L.R. (3d) 1 (S.C.C.) where it is used to refer to the "suitability for judicial determination of the question posed by the plaintiff." (Cromwell, at p. 6). For the purposes of his analysis, Cromwell defines standing as the "entitlement to seek judicial relief apart from questions of the substantive merits and the legal capacity of the plaintiff."

59 However, it cannot be said that all parties with any link or concern with an issue can attain public interest standing: a balance needs to be struck between ensuring access to the courts and preserving judicial resources. In *Canadian Council of Churches v. Canada*, Cory J. held that:

35. The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the Constitution Act, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.
36. The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner. [emphasis added]

60 Canadian Courts have recognized that standing is a device used to discourage litigation by "officious inter-meddlers" (see Pelletier J.A. in *Moresby Explorers*, *supra*, at para. 17). Further, in



*Finlay v. Canada*, [1993] 1 S.C.R. 1080, the Supreme Court recognized the judicial concern about the allocation of scarce resources and the need to screen out the "mere busybody", finding that this issue was addressed in the first and second components of the test set out in *Canadian Council of Churches v. Canada* (at para. 32).

61 Turning to the application of the three-prong test in *Canadian Council of Churches* to Mr. Chauvin, it cannot be concluded that all three parts of the test are met.

62 As for the first prong of the test, raising a serious issue to be tried, it is plain and obvious that Mr. Chauvin is unable to satisfy it. The remedies sought by Mr. Chauvin fall into two categories. First are those that seek relief that is moot (seeking to set aside the appointment of Dr. Morgentaler and a direction that Dr. Morgentaler's appointment be referred back for reconsideration); second are the declarations relating to the conduct of the Advisory Council, which at this juncture serve no purpose.

63 It is clear that declaratory judgments should serve a purpose. In *Terrasses Zarolega Inc. v. R.I.O.*, [1981] 1 S.C.R. 94 at 106, the Supreme Court of Canada stated that a declaratory judgment should not be rendered when it will serve little or no purpose. In *Terrasses Zarolega*, a party to an arbitration applied, before the arbitration committee had been created, for a declaratory judgment on seven questions related to the arbitration. The Supreme Court of Canada held that, as for Question II, no answer should be given. They stated at 106 that:

As the Court pointed out to counsel for the appellants at the hearing, the declaratory judgment they are seeking in the case at bar could only be of very limited usefulness in the circumstances. Question II is so formulated that the finding could only be that the word "include" in s. 27 of the Act respecting the Olympic Village does not have a limiting effect. This would leave the issue unresolved respecting each of the items individually which appellants might wish to submit to the arbitration committee, so that the declaratory proceeding might have to be begun again for each of these.

64 It is to be noted that while a public interest applicant need not prove that the alleged illegality of an administrative decision or act caused harm, there is authority to the effect that the Court must consider the overall strength of an applicant's claim (*Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada* (*Minister of Fisheries and Oceans*, *supra*, at paras. 16-17).

65 In the case at bar, Mr. Chauvin argues that there is a serious issue by virtue of the importance of the honour to him and that he has the right to ensure that it adheres to its historic purpose. These are individual and not public interest standing issues. At the hearing on the motion to strike, Mr. Chauvin's counsel argued that Mr. Chauvin may be satisfied with a declaration that the Advisory Council acted improperly. While I agree that the respect and integrity of the Canadian honours system is important, I weigh this against the fact that the only remedy available to Mr. Chauvin is a declaration which cannot and will not alter the events that have taken place. I do not agree that on these facts a hearing on the issue is a constructive use of judicial resources.

66 While Mr. Chauvin does believe that Dr. Morgentaler's appointment to the Order of Canada diminishes his award, under the rationale used in *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada* (*Minister of Fisheries and Oceans*, *supra*), *vis-à-vis* direct interest standing, a dishonour is not sufficient to support the first prong of the test to grant public interest standing.

67 The Respondent also argues that Mr. Chauvin does not meet the "genuine interest" threshold being the second prong of the test. It is the Respondent's position that Mr. Chauvin has not demonstrated any real and continuing interest in the Order of Canada but is simply expressing dissatisfaction that Dr. Morgentaler was appointed. They argue that his interest is only in the fact that he perceives his own honour is diminished. An applicant's disdain for a particular government law or action is insufficient to meet this part of the test for public interest standing. The Respondent relies upon three cases in support of this proposition: *Marchand v. Ontario* (2006), 81 O.R. (3d) 172 (S.C.J.), aff'd C.A. [2007] O.J. No. 4440; *Talbot v. Northwest Territories (Commissioner)*, [1997] N.W.T.J. 78; and, *League for Human Rights of B'nai Brith Canada v. Canada*, 2008 FC 732.

68 In *Marchand* at para. 14, the Court of Appeal for Ontario agreed that the applicant in that case was not directly affected by the legislation based on the finding that they did not meet the preconditions set out in the legislation. In *Talbot*, the Court stated that the applicant in that case could not achieve public interest standing as he had suffered no damages and there were other means to bring the matter to Court. Finally, in *League for Human Rights of B'nai Brith Canada*, Justice Dawson held that it was not appropriate, in that case, to decide the issue of public interest standing on a preliminary basis and that the issue should be left for the trial judge hearing the application for judicial review. While these three cases can be distinguished from this case, as the Respondent argues, there is support for the general proposition that disdain for government action does not meet the public interest criterion. Thus, it cannot be demonstrated that Mr. Chauvin has a genuine interest in the sense that it is anything more than his own dissatisfaction with Dr. Morgentaler's appointment. Even on a preliminary motion such as this, Mr. Chauvin has not demonstrated enough to meet the second prong of the test.

69 Finally, as to whether there is another reasonable and effective means to bring the matter before the Court, there is no need to consider this criterion as Mr. Chauvin fails to meet the first two prongs of the test. In any event, Mr. Chauvin can seek redress by pursuing the termination provisions set out in the Constitution.

70 In conclusion, an applicant claiming public interest standing must satisfy the Court on a balance of probabilities that it meets each element of the test. As set out in *Sierra Club of Canada*, where an applicant's standing is challenged on a preliminary motion, it is the moving party, in this case the Respondent, that bears the burden of establishing that the applicant lacks standing (see para. 24). In my view of this case, on a balance of probabilities, the Respondent has met its burden to demonstrate that Mr. Chauvin does not have public interest standing.

#### IX. Status of the Advisory Council

71 During the course of argument, the issue was raised whether the Advisory Council constitutes a federal board, commission or tribunal within the meaning of section 2 of the *Federal Courts Act*. This need not be finally decided on this motion but it is one more hurdle in the path of Mr. Chauvin in this application. Suffice it to say that the Advisory Council does what its name indicates - it submits to the Governor General a list of nominees in the prescribed categories. The *Constitution* does not contain any provision that requires the Governor General to accept nominations and the decision to appoint is Her Excellency's alone.

72 There is authority for the proposition that a body constituted to make recommendations is not subject to have those recommendations reviewed. In *Jada Fishing Co. v. Canada*, [2002] F.C.J. No. 436 (FCA) the Federal Court of Appeal concluded that the Federal Board, commission, or tribunal

in that case, insofar as it performed advisory duties, was not subject to section 18.1 judicial review. In *Jada Fishing*, a panel was constituted to provide recommendations which the Minister of Oceans and Fisheries was entitled to accept or reject (per Malone, J.A., para. 12).

73 Other cases also support the position that judicial review should only be undertaken with respect to final administrative rulings. (see for example *Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue)*, [1998] F.C.J. No. 79 and *Sanofi-Aventis Canada Inc. v. Canada*, [2007] FC 1156).

74 Here, the Advisory Council, under the provisions of the *Constitution*, is created exclusively for the purpose of providing non-binding advice. Therefore, Mr. Chauvin may not indirectly attack the work of the Advisory Council by revisiting the Governor General's decision. The Governor General's decision, pursuant to Royal Prerogative, is not subject to review. It is therefore arguable that Her Excellency's Advisory Council is not subject to review.

#### X. Application of *Chiasson v. Canada*

75 Finally, Mr. Chauvin argues the Federal Court of Appeal's decision in *Chiasson v. Canada*, is on all fours with this case and is therefore determinative of this motion. While there are several aspects of the case that have similarities to this case, in my view *Chiasson* is distinguishable from the circumstances of this case.

76 In *Chiasson*, the main issue before the Court was whether a decision of the Canadian Decorations Advisory Committee and of the Honours Directorate amounted to an exercise of the Royal Prerogative and was therefore beyond judicial review.

77 Briefly, a son had proposed his father for a Canadian Bravery Decoration and the nomination was rejected. The rejection was based on the Committee's practice of not considering incidents which occurred more than two years prior to the proposal. The source of the authority for the Committee was letters patent issued on January 28, 1997, which declared that the award of Canadian bravery decorations was governed by the Canadian Bravery Decorations Regulations, 1996. The Regulations did not include any time limit within which nominations must be made following the act of bravery. The Respondent brought a motion to strike the proceeding. This Court denied the motion to strike and ultimately the Federal Court of Appeal concluded that the action could not be dismissed on a motion to strike on the grounds that it was not plain and obvious that the subject matters of the application were not justiciable.

78 The issue of standing was never addressed in *Chiasson*. At first instance, before Prothonotary Aronovitch, the Crown advanced three grounds for its application to strike: that the bestowal of honours is a matter of Crown Prerogative and therefore is not justiciable; the action is moot in that the plaintiff had already obtained the remedy he sought, and that the Court had no jurisdiction to entertain an action for mandamus, which is only available on judicial review (see para. 10 of 2001 FCT 511).

79 In the Federal Court of Appeal decision, Strayer J.A. wrote:

However, it is my view that arguable [sic] that where a procedure has been established by one public authority, in this case by way of Regulations published in the Canada Gazette, as to how and on what basis a specific Committee, another public body, is to deal with nominations made by any citizen, then a legitimate

expectation is thereby created that the prescribed procedure will be followed to screen such nominations prior to the submission of a list of nominees for the exercise by the Governor General of the royal prerogative. (para. 9)

80 Strayer J.A. held that the Regulations took precedence over the informal rule (2 years) created and used by the Committee. Indeed, the two year rule appeared to conflict with the wider Regulations and was therefore deemed not to be plainly and obviously enforceable.

81 In this case, the rules published in the *Constitution* state that the role of the Advisory Committee is only to consider the nominations and compile and submit a list of nominees who have the greatest merit to the Governor General. The Respondent argued that the *Constitution* does not state a procedure of how the nominations will be compiled nor how the Advisory Council should operate. That is the extent of the mandate. The Advisory Council may from time to time establish its own informal rules but following *Chiasson*, any informal rules created by the Advisory Committee, such as a requirement for consensus or for not considering a nominee a second time, are secondary, if not irrelevant. These informal rules, to the extent they exist, do not create any legitimate expectations, as in *Chiasson*, that the Advisory Council must act in a certain manner.

#### XI. Conclusion

82 Mr. Chauvin argues that this application is novel and therefore should be allowed to proceed. However, just because an argument is novel does not mean that it trumps the test to strike out an application. On any one of the several grounds discussed above (except arguably justiciability), in my view, the application is bereft of any chance of success and is therefore struck. Mr. Chauvin has already amended his Notice of Application. Given the conclusions herein with respect to mootness and standing Mr. Chauvin is not given leave to further amend. However, because of the novelty of aspects of the application there will be no order as to costs.

#### ORDER

##### **THIS COURT ORDERS that:**

1. The Respondent's motion to strike is allowed and the application is hereby struck without leave to amend.
2. There will be no award as to costs.

AALTO, PROTHONOTARY

cp/c/qlccl/qlpwb/qlaxw/qljyw/qlhcs

*Indexed as:*  
**R. v. Ferguson**

**Michael Esty Ferguson, Appellant;**  
**v.**  
**Her Majesty The Queen, Respondent, and**  
**Attorney General of Canada, Attorney General of Ontario,**  
**Attorney General of Quebec and Canadian Civil Liberties**  
**Association, Intervenors.**

[2008] 1 S.C.R. 96

[2008] S.C.J. No. 6

2008 SCC 6

File No.: 31692.

Supreme Court of Canada

Heard: November 13, 2007;  
Judgment: February 29, 2008.

**Present: McLachlin C.J. and Bastarache, Binnie, LeBel,**  
**Deschamps, Fish, Abella, Charron and Rothstein JJ.**

(75 paras.)

**Appeal From:**

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

**Catchwords:**

*Constitutional law -- Charter of Rights -- Cruel and unusual punishment -- Detainee being held in cell at RCMP detachment shot by police officer during altercation -- Police officer convicted of manslaughter committed with use of firearm -- Criminal Code providing for mandatory minimum four-year sentence -- Whether minimum sentence constitutes cruel and unusual punishment in circumstances of this case -- If so, whether trial judge entitled to grant constitutional exemption from four-year minimum and impose lesser sentence -- Constitution Act, 1982, s. 52 -- Canadian Charter of Rights and Freedoms, ss. 12, 24(1) -- Criminal Code, R.S.C. 1985, c. C-46, s. 236(a).*

*Constitutional law -- Charter of Rights -- Remedy -- Constitutional exemption -- Availability -- Whether constitutional exemption under s. 24(1) of Canadian Charter of Rights and Freedoms available to accused as remedy in particular case where minimum sentence of imprisonment found to be cruel and unusual punishment contrary to s. 12 of Charter -- Whether appropriate remedy is declaration pursuant to s. 52 of Constitution [page97] Act, 1982 that law imposing such punishment is inconsistent with Charter.*

**Summary:**

During an altercation with a detainee held in a cell at an RCMP detachment, the accused, an RCMP officer, shot and killed the detainee. The accused was charged with second-degree murder but was convicted by a jury of the lesser offence of manslaughter. Notwithstanding the mandatory minimum sentence of four years imposed by s. 236(a) of the *Criminal Code* for manslaughter with a firearm, the trial judge imposed a conditional sentence of two years less a day. He granted the accused a constitutional exemption from the four-year sentence because, on the circumstances of this case, he found that the minimum mandatory sentence constituted cruel and unusual punishment in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*. The majority of the Court of Appeal overturned that sentence and held that the mandatory minimum must be imposed.

*Held:* The appeal should be dismissed.

There is no basis for concluding that the four-year minimum sentence prescribed by Parliament amounts to cruel and unusual punishment on the facts of this case. In the absence of any s. 12 violation, the trial judge's proper course in the circumstances was to apply the four-year minimum sentence. [para. 29] [para. 31]

The appropriateness of the minimum sentence of four years that Parliament has prescribed for the offence of manslaughter committed with the use of a firearm depends on what the jury concluded about the accused's conduct. The trial judge in this case was required to find facts consistent with the jury's manslaughter verdict, to the extent that this was necessary to enable him to sentence the accused. The sentencing inquiry was shaped by a four-year mandatory minimum sentence prescribed by s. 236(a) of the *Criminal Code* and the only issues were whether the sentence should be more than four years, or whether the facts of the case were such that a four-year sentence would be grossly disproportionate. The trial judge correctly concluded that on the basis of the jury's verdict, he must find facts consistent with the jury's rejection of both self-defence and intent for murder. On the basis of the jury's rejection of intent for murder, the trial judge then properly concluded that the jury had found that when he fired the second shot, the accused neither intended to cause death nor bodily harm that he knew was likely to cause death. The trial judge, however, erred when he went on [page98] to make detailed findings of fact on the accused's conduct and went beyond what was required to deal with the sentencing issues before him. It was not open to him to attempt to reconstruct the logical process of the jury and, more critically, to develop a theory to support the jury's verdict which was not only speculative, but contrary to the evidence. When the erroneous findings of the trial judge are set aside, no basis remains for concluding that the four-year mandatory minimum sentence prescribed by Parliament constitutes cruel and unusual punishment on the facts of this case. [para. 15] [paras. 19-21] [para. 24] [para. 28]

In any event, a constitutional exemption is not an appropriate remedy for a s. 12 violation. If the law imposing a minimum sentence is found to be unconstitutional on the facts of a particular case, it

should be declared inconsistent with the *Charter* and hence of no force or effect under s. 52 of the *Constitution Act, 1982*. The arguments for a constitutional exemption under s. 24(1) of the *Charter* are outweighed and undermined by counter-considerations. First, while the availability of constitutional exemptions for mandatory minimum sentencing laws has not been conclusively decided, the weight of authority thus far is against them and sounds a cautionary note. Second, since Parliament's intention in passing mandatory minimum sentence laws is to remove judicial discretion to impose a sentence below the stipulated minimum, to allow courts to grant constitutional exemptions for mandatory minimum sentences would directly contradict Parliament's intent and represent an inappropriate intrusion into the legislative sphere. Third, it is apparent that s. 52(1) of the *Constitution Act, 1982* and s. 24(1) of the *Charter* serve different remedial purposes. Section 52(1) provides a remedy for laws that violate *Charter* rights either in purpose or in effect; s. 24(1), by contrast, provides a remedy for government acts that violate *Charter* rights. Fourth, constitutional exemptions for mandatory minimum sentence laws buy flexibility at the cost of undermining the rule of law and the values that underpin it: certainty, accessibility, intelligibility, clarity and predictability. Allowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. In granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament as to what the Constitution requires [page99] in the circumstances. [para. 13] [para. 40] [para. 48] [paras. 52-56] [para. 61] [paras. 67-69] [paras. 73-74]

### Cases Cited

**Referred to:** *R. v. Morrissey*, [2000] 2 S.C.R. 90, 2000 SCC 39; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Birchall* (2001), 158 C.C.C. (3d) 340, 2001 BCCA 356; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Wiles*, [2005] 3 S.C.R. 895, 2005 SCC 84; *R. v. Brown*, [1991] 2 S.C.R. 518; *R. v. Braun* (1995), 95 C.C.C. (3d) 443; *R. v. Fiqia* (1994), 162 A.R. 117; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Lawrence* (1987), 58 C.R. (3d) 71; *R. v. Thatcher*, [1987] 1 S.C.R. 652; *R. v. Luxton*, [1990] 2 S.C.R. 711; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *R. v. Kelly* (1990), 59 C.C.C. (3d) 497; *R. v. Madeley* (2002), 160 O.A.C. 346; *R. v. Desjardins* (1996), 182 N.B.R. (2d) 321; *R. v. McGillivray* (1991), 62 C.C.C. (3d) 407; *R. v. Netser* (1992), 70 C.C.C. (3d) 477; *R. v. Chief* (1989), 51 C.C.C. (3d) 265; *R. v. Kumar* (1993), 85 C.C.C. (3d) 417; *R. v. Lapierre* (1998), 123 C.C.C. (3d) 332; *R. v. Chabot* (1992), 77 C.C.C. (3d) 371; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81; *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

### Statutes and Regulations Cited

*Canadian Charter of Rights and Freedoms*, ss. 1, 12, 24.

*Constitution Act, 1982*, s. 52.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 34(2), 220(a), 236(a), 718 to 718.2, 724(2), (3)(d), (e).

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### History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Fruman, Paperny and O'Brien JJ.A.) (2006), 65 Alta. L.R. (4th) 44, 397 A.R. 1, 384 W.A.C. 1, 212 C.C.C. (3d) 161, 41 C.R. (6th) 97, 145 C.R.R. (2d) 309, [2006] 12 W.W.R. 1, [2006] A.J. No. 1150 (QL), 2006 CarswellAlta 1216, 2006 ABCA 261, varying the sentence imposed by Hawco J. (2004), 39 Alta. L.R. (4th) 166, 372 A.R. 309, [2005] 4 W.W.R. 737, [2004] A.J. No. 1535 (QL), 2004 CarswellAlta 1780, 2004 ABQB 928. Appeal dismissed.

### Counsel:

Noel C. O'Brien, Q.C., for the appellant.

Richard A. Saull and Michael Conner, for the respondent.

Robert J. Frater and Nancy Dennison, for the intervener the Attorney General of Canada.

David Finley and Kimberley Crosbie, for the intervener the Attorney General of Ontario.

Jean-Vincent Lacroix and Gilles Laporte, for the intervener the Attorney General of Quebec.

Andrew K. Lokan and Caroline V. Jones, for the intervener the Canadian Civil Liberties Association.

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The judgment of the Court was delivered by

**McLACHLIN C.J.:**--

#### I. Introduction

1 This appeal raises two questions. First, does imposition of the four-year mandatory minimum sentence for manslaughter with a firearm constitute cruel and unusual punishment contrary to s. 12 [page101] of the *Canadian Charter of Rights and Freedoms* in the circumstances of this case? Second, can an offender who demonstrates that a mandatory minimum sentence would constitute cruel



and unusual punishment in his case obtain a stand-alone constitutional exemption from the application of that minimum sentence?

2 I conclude that the answer to both questions is no. On the facts of this case, the minimum sentence imposed by s. 236(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, is not grossly disproportionate and so does not constitute cruel and unusual punishment in violation of s. 12 of the *Charter*. In any event, a constitutional exemption is not an appropriate remedy for a s. 12 violation. If a minimum sentence is found to be unconstitutional on the facts of a particular case, the law imposing the sentence is inconsistent with the *Charter* and therefore falls under s. 52 of the *Constitution Act, 1982*.

## II. Facts and Procedural History

3 This case arises out of the fatal shooting of Darren Varley by an RCMP officer, in the small town of Pincher Creek in southwestern Alberta, while he was being held in a cell at the RCMP detachment. The RCMP officer who shot Mr. Varley, Michael Esty Ferguson, was charged with second-degree murder but convicted by a jury of the lesser offence of manslaughter. The judge imposed a conditional sentence of two years less a day, notwithstanding the mandatory minimum sentence of four years imposed by s. 236(a) of the *Criminal Code* for manslaughter with a firearm ( (2004), 39 Alta. L.R. (4th) 166, 2004 ABQB 928). The majority of the Alberta Court of Appeal overturned that sentence, and held that the mandatory minimum must be imposed ( (2006), 65 Alta. L.R. (4th) 44, 2006 ABCA 261). Constable Ferguson appeals to this Court, contending that a four-year sentence in the circumstances would constitute cruel and unusual punishment contrary to s. 12 of the *Charter*, and that the trial judge was right to grant him a [page102] constitutional exemption from the four-year minimum sentence imposed by Parliament.

4 The events leading to the shooting of Mr. Varley may be briefly summarized. On the evening of October 2, 1999, Darren Varley went to Leo's bar in Pincher Creek to socialize with friends. He met up with his fiancée, Chandelie Bachand, and his sister, Alaine Varley. At some point, unnoticed by Mr. Varley, Ms. Bachand left the bar. Later in the evening, Mr. Varley and his friend Rod Tuckey became involved in a fight with a number of persons in the bar's parking lot, because he believed Ms. Bachand had gotten into a van with strangers. Mr. Tuckey required medical attention and was taken to hospital by Pat Bitango and Sarah Weatherill. Mr. Varley stayed behind to search for Ms. Bachand, with the help of his sister.

5 Around 3:30 in the morning of October 3, Darren Varley and Alaine Varley arrived at Pincher Creek Hospital to visit Mr. Tuckey. Mr. Varley remained concerned about the whereabouts of his fiancée. The security officer on duty, Earl Langille, called the RCMP and Mr. Varley spoke to the RCMP Telecoms Operator. As a result of this call, Constable Ferguson was dispatched to the hospital, where he met Darren Varley, Alaine Varley, Sarah Weatherill, Pat Bitango, and Earl Langille in the lobby. Mr. Varley, who was intoxicated, insistently demanded that Constable Ferguson take action to find his fiancée. Constable Ferguson grabbed Mr. Varley and, according to the testimony of witnesses, punched him in the jaw and forced him to the ground. Constable Ferguson handcuffed Mr. Varley and took him to the police cruiser. Alaine Varley repeatedly asked Constable Ferguson to release Mr. Varley into her custody, but he refused.

6 After placing Mr. Varley in the police cruiser, Constable Ferguson returned to the hospital. Left [page103] alone, Mr. Varley kicked in the window of the police cruiser. On returning, Constable Ferguson drove Mr. Varley to the detachment. Constable Ferguson booked Mr. Varley and the two

entered the cell area with the assistance of the booking officer. After opening Mr. Varley's cell, the booking officer walked back to his desk, a few feet away, and Constable Ferguson entered the cell with Mr. Varley. Within a few seconds, Mr. Varley was shot twice: first, non-fatally, in the stomach, and then, fatally, in the head. Up to three seconds elapsed between the first and second shot. Constable Ferguson emerged from the cell and telephoned an off-duty colleague. Mr. Varley died from the second shot after having been transported to Calgary Foothills Hospital by air ambulance. Constable Ferguson testified that Mr. Varley attacked him when he entered the cell, pulling his bulletproof vest over his head and face and grabbing his firearm from its holster. At trial, he testified that he and Mr. Varley were still struggling for the gun when the shots went off. However, in an earlier statement, supported by expert evidence and accepted by the trial judge for sentencing purposes, Constable Ferguson said that he had regained control of the gun when the shots were fired.

### III. Issues

7

1. Does imposition of the four-year minimum sentence imposed by s. 236(a) of the *Criminal Code* constitute cruel and unusual punishment contrary to s. 12 of the *Charter* in the circumstances of this case?
2. If so, was the trial judge entitled to grant a constitutional exemption from the four-year minimum and to impose a lesser sentence?

[page104]

### IV. Analysis

1. *Does imposition of the four-year minimum sentence imposed by s. 236(a) of the Criminal Code constitute cruel and unusual punishment contrary to s. 12 of the Charter in the circumstances of this case?*

8 Section 236(a) imposes a four-year minimum sentence for manslaughter with a firearm:

**236.** Every person who commits manslaughter is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years;

9 Constable Ferguson argues that imposing the minimum sentence in his case violates s. 12 of the *Charter*, which provides a guarantee against cruel and unusual punishment:

**12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

10 This Court has held that the four-year mandatory minimum sentence for criminal negligence causing death with a firearm (s. 220(a) of the *Criminal Code*) is not unconstitutional: *R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 39. In so holding, the Court applied the reasonable hypotheticals analysis of cases that might be expected to arise, developed in *R. v. Goltz*, [1991] 3 S.C.R. 485. Here we are concerned with the mandatory minimum sentence imposed by s. 236(a) for a different offence, manslaughter committed with the use of a firearm.

11 As Arbour J. indicated in her concurring opinion in *Morrisey* (para. 61), there is considerable overlap between unlawful act manslaughter, which is the offence we are dealing with in this case, and criminal negligence causing death, which was the offence before the Court in *Morrisey*. The British Columbia Court of Appeal has taken this [page105] fact into account in upholding the constitutionality of s. 236(a): *R. v. Birchall* (2001), 158 C.C.C. (3d) 340, 2001 BCCA 356. Constable Ferguson's argument at sentencing and in the Court of Appeal appears to have implicitly accepted that, as a matter of precedent, s. 236(a) does not violate s. 12 of the *Charter*.

12 Constable Ferguson relies instead on Arbour J.'s concurring remarks in *Morrisey* to the effect that, given the wide range of circumstances under which the offences of unlawful act manslaughter and criminal negligence causing death can be committed, it is not possible to conclude on the basis of a reasonable hypotheticals analysis that the mandatory minimum sentence will be constitutional in every possible application. He argues that *Morrisey* should be read as having held that s. 220(a) and s. 236(a) are constitutional only in most of their applications, and that a constitutional exemption should be granted in those rare cases where applying the sentence would lead to an unconstitutional result.

13 I have concluded that a constitutional exemption is not an appropriate remedy for a mandatory minimum sentence that results in a sentence that violates s. 12. This does not imply, however, that no remedy is available in the case of a mandatory minimum sentence that brings about an unconstitutional result -- for instance, in circumstances not previously considered as part of a reasonable hypotheticals analysis. If a mandatory minimum sentence would create an unconstitutional result in a particular case, the minimum sentence must be struck down. It is therefore necessary to consider whether imposition of the mandatory minimum sentence provided for in s. 236(a) would result in cruel and unusual punishment on the facts of Constable Ferguson's case.

14 The test for whether a particular sentence constitutes cruel and unusual punishment is [page106] whether the sentence is grossly disproportionate: *R. v. Smith*, [1987] 1 S.C.R. 1045. As this Court has repeatedly held, to be considered grossly disproportionate, the sentence must be more than merely excessive. The sentence must be "so excessive as to outrage standards of decency" and disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable": *R. v. Wiles*, [2005] 3 S.C.R. 895, 2005 SCC 84, at para. 4, citing *Smith*, at p. 1072, and *Morrisey*, at para. 26. The question thus becomes: is a four-year sentence of imprisonment grossly disproportionate to the offence of manslaughter as committed by Constable Ferguson?

15 The appropriateness of a sentence is a function of the purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code* as applied to the facts that led to the conviction. It follows that the appropriateness of the minimum sentence of four years that Parliament has prescribed for Constable Ferguson's offence depends on what the jury concluded about Constable Ferguson's conduct.

16 This poses a difficulty in a case such as this, since, unlike a judge sitting alone, who has a duty to give reasons, the jury gives only its ultimate verdict. The sentencing judge therefore must do his or her best to determine the facts necessary for sentencing from the issues before the jury and from the jury's verdict. This may not require the sentencing judge to arrive at a complete theory of the facts; the sentencing judge is required to make only those factual determinations necessary for deciding the appropriate sentence in the case at hand.

17 Two principles govern the sentencing judge in this endeavour. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict": *R. v. Brown*, [1991] 2 S.C.R. 518, p. 523. The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (*Criminal Code*, s. 724(2)(a)), and must not accept as fact any evidence consistent only with a verdict [page107] rejected by the jury: *Brown*; *R. v. Braun* (1995), 95 C.C.C. (3d) 443 (Man. C.A.).

18 Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown*; *R. v. Fiqia* (1994), 162 A.R. 117 (C.A.). In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(b)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: ss. 724(3)(d) and 724(3)(e); see also *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Lawrence* (1987), 58 C.R. (3d) 71 (Ont. H.C.). It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.

19 Following these principles, the trial judge in this case was required to find facts, consistent with the jury's manslaughter verdict, to the extent that this was necessary to enable him to sentence Constable Ferguson. The sentencing inquiry was shaped by s. 236(a)'s prescription of a four-year mandatory minimum sentence. The only issues were whether the sentence should be more than four years, as the Crown contended, and whether the facts of the case were such that a four-year sentence would be grossly disproportionate, as Constable Ferguson contended.

20 The trial judge correctly turned his mind to the basis on which he had instructed the jury [page108] it could reach a verdict of manslaughter. The trial judge had instructed the jury that if it rejected both self-defence and intent for murder (intent to cause death or bodily harm likely to cause death), it must reach a verdict of manslaughter. The trial judge did not leave any other basis for a manslaughter verdict with the jury. Hence the trial judge correctly concluded that on the basis of the jury's verdict, he must find facts consistent with the jury's rejection of both self-defence and intent for murder. On the basis of the jury's rejection of intent for murder, the trial judge properly concluded that the jury had found that when he fired the second shot, Constable Ferguson neither intended to cause death nor bodily harm that he knew was likely to cause death.

21 However, the trial judge did not stop with these conclusions. He went on to make detailed findings of fact on Constable Ferguson's conduct. It was open to him under s. 724(2)(b) of the *Criminal Code* to supplement the jury's findings insofar as this was necessary for sentencing purposes. However, it was not open to him to go beyond what was required to deal with the sentencing issues before him, or to attempt to reconstruct the logical process of the jury: *Brown*; *Fiqia*. Nor was

it open to him to find facts inconsistent with the jury's verdict or the evidence; a trial judge must never do this. The trial judge in the case at bar committed both these errors.

**22** First, the trial judge erred in attempting to reconstruct the logical reasoning of the jury. The law holds that the trial judge must not do this, and for good reason. Jurors may arrive at a unanimous verdict for different reasons and on different theories of the case: *R. v. Thatcher*, [1987] 1 S.C.R. 652. It is speculative and artificial to attribute a single set of factual findings to the jury, unless it is clear [page109] that the jury must unanimously have found those facts. Where any ambiguity on this exists, the trial judge should consider the evidence and make his or her own findings of fact consistent with the evidence and the jury's findings.

**23** Here the trial judge, having properly concluded that the jury must have rejected self-defence and intent for murder, went on to attempt to reconstruct further facts that may or may not reflect what was in the mind of the jurors. First, he found that the jury must have concluded that the first shot had been fired in self-defence. Although there is evidence capable of supporting such a finding, this finding was not required by the jury's verdict. The jury's verdict does not unequivocally indicate a particular characterization of the two shots. Indeed, the jury was not asked to make a finding one way or the other about the first shot. The Crown based its case on the second shot, presumably because the evidence was that the second shot caused death, and the first shot did not. The trial judge should have considered all the evidence in order to make his own findings of fact consistent with the jury's verdict to the extent they were relevant to the two issues before him.

**24** Second, and more critically, the trial judge went on to develop a theory to support the jury's verdict which was not only speculative, but contrary to the evidence. This theory was that Constable Ferguson's second shot was instantaneous and instinctive, the virtually automatic result of his police training. The theory rests on the premise that Constable Ferguson was following training that made the second shot following on a first self-defence shot a matter of instinctive reaction rather than conscious decision. Based on this theory, the trial judge found as a fact that Constable Ferguson was not acting in anger when he fired the second [page110] shot, but in response to his training. This finding was critical to the trial judge's conclusion that the minimum sentence of four years prescribed by s. 236(a) of the *Criminal Code* constituted cruel and unusual punishment, violating s. 12 of the *Charter*.

**25** There are two problems with this crucial finding. First, it is inconsistent with the trial judge's other conclusions as well as with the jury's verdict. As the Court of Appeal noted, the instantaneous and instinctive shot theory contradicts the trial judge's conclusion that the first shot was fired in self-defence and the second was not, a conclusion that requires that the two shots be regarded as two separate transactions to be evaluated individually according to the criteria for self-defence in *Criminal Code*, s. 34(2). The instantaneous and instinctive theory, on the other hand, rests on the premise that the second shot was a virtual continuation of the first shot, motivated by the same mental state, namely self-defence. Had the trial judge found that the second shot was instantaneous and instinctive, he should have considered the two shots together as a single transaction, and would have been required by the jury's verdict to hold that this transaction, in its entirety, did not constitute self-defence.

**26** Second, the instantaneous and instinctive explanation for the second and fatal shot does not sit comfortably with uncontradicted evidence relating to the circumstances of the shooting. The booking officer estimated the time between the two shots at up to three seconds, as did the inmate in the next cell, Herman No Chief. While the length of the interval between the two shots may be difficult

to determine with precision, it seems clear that there was an interval. This was not a case of immediately successive shots. This is supported by the fact that [page111] Constable Ferguson's firearm did not permit rapid, automatic second shots.

27 The finding that Constable Ferguson's second shot was not a matter of anger or judgment, but simply a matter of training, is a vital component of the trial judge's conclusion that Constable Ferguson was at the very low end of the spectrum of moral blameworthiness, such that four years' imprisonment would be grossly disproportionate and intolerable to an informed public, and so would violate s. 12 of the *Charter*. It follows that his conclusion that the four-year minimum sentence was unconstitutional in this case is fatally flawed.

28 When the erroneous findings of the trial judge are set aside, no basis remains for concluding that the four-year mandatory minimum sentence prescribed by Parliament constitutes cruel and unusual punishment on the facts of this case. The trial judge recognized as aggravating factors that Constable Ferguson was well trained in the use of firearms and stood in a position of trust with respect to Mr. Varley, and correctly noted that the standard of care was higher than would be expected of a normal citizen. By way of mitigation, the trial judge noted that Constable Ferguson's actions were not planned, that Mr. Varley initiated the altercation in the cell, that Constable Ferguson had little time to consider his response, and that his instincts and training played a role in the shooting. The mitigating factors are insufficient to make a four-year sentence grossly disproportionate. The absence of planning, the apparent fact that Mr. Varley initiated the altercation in the cell, and the fact that Constable Ferguson did not have much time to consider his response, are more than offset by the position of trust Constable Ferguson held and by the fact that he had been trained to respond appropriately to the common situation of resistance by a detained person. I agree with the Court of Appeal that the mitigating factors do not reduce Constable [page112] Ferguson's moral culpability to the extent that the mandatory minimum sentence is grossly disproportionate in his case.

29 I conclude that there is no basis for concluding that the four-year minimum sentence prescribed by Parliament amounts to cruel and unusual punishment on the facts of this case.

30 Ordinarily, a s. 12 analysis for a mandatory minimum sentence requires both an analysis of the facts of the accused's case and an analysis of reasonable hypothetical cases: *Goltz*, at pp. 505-6. At his sentencing hearing and in the Court of Appeal, however, Constable Ferguson did not rely on reasonable hypotheticals to contest the constitutionality of s. 236(a). He contended simply that s. 236(a) was unconstitutional as applied to the facts of his case. The reasonable hypotheticals not having been argued, there was no basis for the sentencing judge or the Court of Appeal to reach a conclusion on whether s. 236(a) was unconstitutional on a reasonable hypotheticals analysis. Constable Ferguson offers an alternative argument based on reasonable hypotheticals for the first time in this Court. In my view, Constable Ferguson has not pointed to a hypothetical case where the offender's minimum level of moral culpability for unlawful act manslaughter using a firearm would be less than that in the reasonable hypotheticals considered in *Morrissey*.

31 In the absence of any s. 12 violation, the trial judge's proper course in the circumstances was to apply the four-year minimum sentence: *Morrissey*.

32 Furthermore, the absence of any s. 12 violation renders it unnecessary to proceed to a consideration of whether s. 236(a) could be justified under s. 1.

[page113]

2. *If the imposition of the four-year mandatory minimum sentence violated s. 12 of the Charter in the circumstances of this case, was the trial judge entitled to grant a constitutional exemption from the four-year minimum and to impose a lesser sentence?*

**33** Having found that the four-year minimum sentence of imprisonment required by s. 236(a) does not violate Constable Ferguson's right not to suffer cruel and unusual punishment contrary to s. 12 of the *Charter*, it is not necessary to consider whether a constitutional exemption would have been available had we found a violation of s. 12. As the Court of Appeal recognized, however, there has been considerable debate and disagreement in the lower courts as to whether the remedy of a constitutional exemption is available. The matter having been fully argued, it is appropriate to settle the question of whether a constitutional exemption would have been available to Constable Ferguson, had the minimum sentence violated s. 12 of the *Charter*.

**34** I note at the outset that the issue is not *whether* a remedy lies to prevent the imposition of cruel and unusual punishment contrary to the *Charter*, but *which* remedies are available. The imposition of cruel and unusual punishment contrary to ss. 12 and 1 of the *Charter* cannot be countenanced. A court which has found a violation of a *Charter* right has a duty to provide an effective remedy. The only issue is whether a law imposing such punishment can be permitted to stand subject to constitutional exemptions in particular cases, or whether the only remedy is a declaration that the law is inconsistent with the *Charter* and hence falls under s. 52 of the *Constitution Act, 1982*.

**35** Two remedial provisions govern remedies for *Charter* violations: s. 24(1) of the *Charter* and [page114] s. 52(1) of the *Constitution Act, 1982*. Section 24(1) confers on judges a wide discretion to grant appropriate remedies in response to *Charter* violations:

**24. (1)** Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 24(1) has generally been seen -- at least until now -- as providing a case-by-case remedy for unconstitutional acts of government agents operating under lawful schemes whose constitutionality is not challenged. The other remedy section, s. 52(1) of the *Constitution Act, 1982*, confers no discretion on judges. It simply provides that laws that are inconsistent with the *Charter* are of no force and effect to the extent of the inconsistency:

**52. (1)** The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

When a litigant claims that a law violates the *Charter*, and a court rules or "declares" that it does, the effect of s. 52(1) is to render the law null and void. It is common to describe this as the court "striking down" the law. In fact, when a court "strikes down" a law, the law has failed by operation of s. 52 of the *Constitution Act, 1982*.

36 The usual remedy for a mandatory sentencing provision that imposes cruel and unusual punishment contrary to s. 12 of the *Charter* is a declaration that the law is of no force and effect under s. 52 of the *Constitution Act, 1982*. This was the remedy sought in *Goltz, Morrissey, and R. v. Luxton*, [1990] 2 S.C.R. 711. The mandatory minimum sentence provisions in these cases were held to be constitutional. But it was argued that had the provisions been held to be unconstitutional, the appropriate remedy was the s. 52 remedy of striking down.

[page115]

37 In this case, despite the allegation of a constitutional violation, Constable Ferguson does not request that the law that caused the alleged violation, s. 236(a) of the *Criminal Code*, be struck down. Instead, Constable Ferguson argues that if the four-year mandatory sentence is found to violate the *Charter*, a constitutional exemption under s. 24(1) should be granted. The argument for a constitutional exemption proposes that the law remain in force, but that it not be applied in cases where its application results in a *Charter* violation. The judge would thus be free to impose a sentence below the minimum set by law, which would nevertheless continue to stand.

38 The argument in favour of recognizing constitutional exemptions is simply put. The first prong of the argument is that where a mandatory minimum sentence that is constitutional in most of its applications generates an unconstitutional result in a small number of cases, it is better to grant a constitutional exemption in these cases than to strike down the law as a whole. The s. 52(1) remedy of declaring invalid a law that produces a result inconsistent with the *Charter* is a blunt tool. A law that may be constitutional in many of its applications -- and indeed ruled constitutional on a reasonable hypotheticals analysis -- is struck down because in one particular case, or in a few cases, it produces an unconstitutional result. Would it not be better, the argument goes, to allow the law to stand, while providing an individual remedy in those cases -- arguably rare -- where its application offends the *Charter*?

39 The second and complementary prong of the argument asserts that the remedy is available on the wording of the *Charter* and the jurisprudence. Section 24(1), it is argued, grants courts a wide discretion to grant such constitutional remedies as are "appropriate and just". Granting a constitutional exemption and substituting a constitutional sentence removes the law's inconsistency [page116] with the *Charter*, making s. 52(1) inapplicable. The cases that have considered the matter, while inconclusive, do not rule constitutional exemptions out as a remedy for unconstitutional sentences flowing from mandatory minimum sentence laws. More generally, granting constitutional exemptions for unconstitutional effects of mandatory minimum sentence laws fits well with the Court's practices of severance, reading in and reading out in order to preserve the law to the maximum extent possible: see *Schachter v. Canada*, [1992] 2 S.C.R. 679.

40 Attractive as they are, the arguments for constitutional exemptions in a case such as this are, on consideration, outweighed and undermined by counter-considerations. I reach this conclusion on the basis of four considerations: (1) the jurisprudence; (2) the need to avoid intruding on the role of Parliament; (3) the remedial scheme of the *Charter*; and (4) the impact of granting constitutional exemptions in mandatory sentence cases on the values underlying the rule of law.

(1) The Jurisprudence



41 This Court has not definitively ruled whether constitutional exemptions are available as a remedy for mandatory minimum sentences that produce unconstitutional sentences. In concurring opinions, judges of this Court have expressed both positive and negative evaluations of constitutional exemptions as remedies for unconstitutional minimum sentences.

42 In his concurring opinion in *Smith*, at pp. 1111-12, Le Dain J. considered and rejected the constitutional exemption as a means of upholding minimum sentences that could generate unconstitutional [page 117] results in some circumstances. He stated that allowing such exemptions would create uncertainty, and the assumed validity or application of the provision could have prejudicial effects in particular cases. On the other hand, Arbour J. commented favourably on the possibility of exemptions from mandatory minimum sentence laws in a concurring opinion in *Morrissey*. Arbour J. expressed the concern that the mandatory minimum sentences for certain offences would inevitably be declared unconstitutional if judges had no discretion to grant exemptions to avoid unconstitutional results in unusual cases.

43 Lower courts have taken contradictory positions on the availability of constitutional exemptions from mandatory minimum sentences. The Ontario and New Brunswick courts of appeal have held against the availability of constitutional exemptions from mandatory sentence laws: *R. v. Kelly* (1990), 59 C.C.C. (3d) 497 (Ont. C.A.); *R. v. Madeley* (2002), 160 O.A.C. 346; *R. v. Desjardins* (1996), 182 N.B.R. (2d) 321. By contrast, such exemptions have been granted in Saskatchewan and the Northwest and Yukon Territories and have been recognized in *obiter* in British Columbia: *R. v. McGillivray* (1991), 62 C.C.C. (3d) 407 (Sask. C.A.); *R. v. Netser* (1992), 70 C.C.C. (3d) 477 (N.W.T.C.A.); *R. v. Chief* (1989), 51 C.C.C. (3d) 265 (Y.T.C.A.); *R. v. Kumar* (1993), 85 C.C.C. (3d) 417 (B.C.C.A.). The Quebec Court of Appeal has expressed both positive and negative views on the question in *obiter*: *R. v. Lapierre* (1998), 123 C.C.C. (3d) 332; *R. v. Chabot* (1992), 77 C.C.C. (3d) 371.

44 Constitutional exemptions have been recognized and discussed in other contexts. In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, Wilson J. suggested that once a court finds a legislative provision to violate the *Charter*, it has no alternative but to strike it down under s. 52 of the *Constitution Act, 1982*. To do otherwise would [page 118] be to leave "the legislation in its pristine over-inclusive form outstanding on the books" (p. 77). On the other hand, in *R. v. Rose*, [1998] 3 S.C.R. 262, L'Heureux-Dubé J. opined that s. 24(1) of the *Charter* enables a court to grant a constitutional exemption from legislation that is "constitutional in its general application" if an unconstitutional result would otherwise occur in a particular case (para. 66).

45 In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, the majority, *per* McLachlin J., suggested that a constitutional exemption cannot be used to remedy a constitutional defect in a provision that Parliament intended to be mandatory, because allowing an exemption would "import into the provision an element which the legislature specifically chose to exclude -- the discretion of the trial judge" (p. 628). It was also noted that constitutional exemptions could in principle remove all recourse to s. 52(1), rendering it redundant.

46 However, in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, this Court recognized the availability of a constitutional exemption granted as an interim remedial measure alongside a suspended declaration of invalidity under s. 52(1). Although the Court declined to grant a constitutional exemption, it recognized that a court may grant such an exemption in order to relieve the claimant of the continued burden of the unconstitutional law during the period that the striking out remedy is suspended. The majority emphasized the ancillary nature of this re-

medial exemption and refused to consider expanding the remedy to a stand-alone constitutional exemption.

47 In summary, the majority of this Court in *Seaboyer* has commented critically on the use of constitutional exemptions as a stand-alone remedy in the case of mandatory laws generally, a view supported by Wilson J. in *Osborne* and consistent [page119] with the majority's reasoning in *Corbiere*. In *Smith*, Le Dain J. rejected their use in the context here at issue, mandatory minimum sentence laws. On the other side of the issue are the remarks of L'Heureux-Dubé and Arbour JJ. in their respective concurring opinions in *Rose* and *Morrisey*.

48 I conclude that while the availability of constitutional exemptions for mandatory minimum sentencing laws has not been conclusively decided, the weight of authority thus far is against them and sounds a cautionary note.

## (2) Intrusion on the Role of Parliament

49 Section 52(1) grants courts the jurisdiction to declare laws of no force and effect only "to the extent of the inconsistency" with the Constitution. It follows that if the constitutional defect of a law can be remedied without striking down the law as a whole, then a court must consider alternatives to striking down. Examples of alternative remedies under s. 52 include severance, reading in and reading down. Constable Ferguson is proposing a constitutional exemption under s. 24(1) as an additional tool for minimizing interference with Parliament's legislative role when a court must grant a remedy for a constitutionally defective provision.

50 On the other hand, it has long been recognized that in applying alternative remedies such as severance and reading in, courts are at risk of making inappropriate intrusions into the legislative sphere. An alternative to striking down that initially appears to be less intrusive on the legislative role may in fact represent an inappropriate intrusion on the legislature's role. This Court has thus emphasized that in considering alternatives to striking down, courts must carefully consider [page120] whether the alternative being considered represents a lesser intrusion on Parliament's legislative role than striking down. Courts must thus be guided by respect for the role of Parliament, as well as respect for the purposes of the *Charter*: *Schachter*; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2. These principles apply with equal force to the proposed alternative remedy of the constitutional exemption. In this case, the effect of granting a constitutional exemption would be to so change the legislation as to create something different in nature from what Parliament intended. It follows that a constitutional exemption should not be granted.

51 When a court opts for severance or reading in as an alternative to striking down a provision, it does so on the assumption that had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations now being made by the court by means of severance or reading in. For instance, as this Court noted in *Schachter*, the test for severance "recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part" (p. 697). If it is not clear that Parliament would have passed the scheme with the modifications being considered by the court -- or if it is probable that Parliament would *not* have passed the scheme with these modifications -- then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere. In such cases, the least intrusive remedy is to strike down the constitutionally defective legislation under s. 52. It is then left up to Parliament to decide what legislative response, if any, is appropriate.

52 It follows that we must ask whether granting a constitutional exemption for a mandatory minimum sentence would represent a lesser intrusion on Parliament's legislative role than striking it down. In my view, the answer to this question is no, because allowing courts to grant constitutional [page121] exemptions for mandatory minimum sentences directly contradicts Parliament's intent in passing mandatory minimum sentence legislation.

53 A constitutional exemption has the effect of conferring on judges a discretion to reject the mandatory minimum sentence prescribed by Parliament. The mandatory minimum applies, unless the judge concludes that its application constitutes unjustifiable cruel and unusual punishment and that it therefore should not apply.

54 The intention of Parliament in passing mandatory minimum sentence laws, on the other hand, is to remove judicial discretion to impose a sentence below the stipulated minimum. Parliament must be taken to have specifically chosen to exclude judicial discretion in imposing mandatory minimum sentences, just as it was taken to have done in enacting the rape shield provisions struck down in *Seaboyer*. Parliament made no provision for the exercise of judicial discretion in drafting s. 236(a), nor did it authorize any exceptions to the mandatory minimum. There is no provision permitting judges to depart from the mandatory minimum, even in exceptional cases where it would result in grossly disproportionate punishment. Parliament has cast the prescription for the minimum four-year prison sentence here at issue in clear unambiguous terms. Parliament must be taken to have intended what it stated: that all convictions for manslaughter with a firearm would be subject to a mandatory minimum sentence of four years' imprisonment. The law mandates a floor below which judges cannot go. To permit judges to go below this floor on a case-by-case basis runs counter to the clear wording of the section and the intent that it evinces.

55 In granting a constitutional exemption, a judge would be undermining Parliament's purpose in passing the legislation: to remove judicial [page122] discretion and to send a clear and unequivocal message to potential offenders that if they commit a certain offence, or commit it in a certain way, they will receive a sentence equal to or exceeding the mandatory minimum specified by Parliament. The discretion that a constitutional exemption would confer on judges would violate the letter of the law and undermine the message that animates it.

56 It is thus clear that granting a constitutional exemption from a mandatory minimum sentence law that results in an unconstitutional sentence goes directly against Parliament's intention. To allow constitutional exemptions for mandatory minimum sentences is, in effect, to read in a discretion to a provision where Parliament clearly intended to exclude discretion. If it would be inappropriate to read in such a discretion under s. 52, then necessarily it would be inappropriate to allow judges to grant constitutional exemptions having the same effect under s. 24(1). It cannot be assumed that Parliament would have enacted the mandatory minimum sentencing scheme with the discretion that allowing constitutional exemptions would create. For the Court to introduce such a discretion would thus represent an inappropriate intrusion into the legislative sphere.

57 I conclude that these considerations are sufficient to exclude constitutional exemptions as an appropriate remedy for unconstitutional mandatory minimum sentences. In the absence of any provision providing for discretion, a court that concludes that a mandatory minimum sentence imposes cruel and unusual punishment in an exceptional case before it is compelled to declare the provision invalid.

### (3) The Remedial Scheme of the Charter

58 As I noted at the outset, remedies for breaches of the *Charter* are governed by s. 24(1) [page123] of the *Charter* and s. 52(1) of the *Constitution Act, 1982*.

59 When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. A law may be inconsistent with the *Charter* either because of its purpose or its effect: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties: *Big M*; see also P. Sankoff, "Constitutional Exemptions: Myth or Reality?" (1999-2000), 11 *N.J.C.L.* 411, at pp. 432-34; M. Rosenberg and S. Perrault, "Ifs and Buts in Charter Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada" (2002), 16 *S.C.L.R.* (2d) 375, at pp. 380-82. The jurisprudence affirming s. 52(1) as the appropriate remedy for laws that produce unconstitutional effects is based on the language chosen by the framers of the *Charter*: see Sankoff, at p. 438.

60 Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional: see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6. The acts of government agents acting under such regimes are not the necessary result or "effect" of the law, but of the government agent's applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1).

[page124]

61 It thus becomes apparent that ss. 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights: *Big M*; *R. v. Edwards*, [1996] 1 S.C.R. 128. Thus this Court has repeatedly affirmed that the validity of laws is determined by s. 52 of the *Constitution Act, 1982*, while the validity of government action falls to be determined under s. 24 of the *Charter*: *Schachter*; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81. We are here concerned with a *law* that is alleged to violate a *Charter* right. This suggests that s. 52(1) provides the proper remedy.

62 It is argued that s. 24(1), while normally applicable to government acts, can also be used to provide a stand-alone remedy for the unconstitutional effects of mandatory minimum sentence laws. The wording of s. 24(1) is generous enough to permit this, it is argued, conferring a discretion on judges to grant "such remedy as the court considers appropriate and just in the circumstances".

63 The jurisprudence of this Court allows a s. 24(1) remedy in connection with a s. 52(1) declaration of invalidity in unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy: *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46. However, the argument that s. 24(1) can provide a stand-alone remedy for laws with unconstitutional effects de-

depends on reading s. 24(1) in isolation, rather than in conjunction with the scheme of the *Charter* as a whole, as required by principles of statutory and constitutional interpretation. When s. 24(1) is read in context, it becomes apparent that the intent of the framers of the Constitution was that it function [page125] primarily as a remedy for unconstitutional government acts.

64 The highly discretionary language in s. 24(1), "such remedy as the court considers appropriate and just in the circumstances", is appropriate for control of unconstitutional acts. By contrast, s. 52(1) targets the unconstitutionality of laws in a direct non-discretionary way: laws are of no force or effect to the extent that they are unconstitutional.

65 The presence of s. 52(1) with its mandatory wording suggests an intention of the framers of the *Charter* that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies: see *Osborne, per Wilson J.* In cases where the requirements for severance or reading in are met, it may be possible to remedy the inconsistency judicially instead of striking down the impugned legislation as a whole: *Vriend; Sharpe*. Where this is not possible -- as in the case of an unconstitutional mandatory minimum sentence -- the unconstitutional provision must be struck down. The ball is thrown back into Parliament's court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects. In either case, the remedy is a s. 52 remedy that renders the unconstitutional provision of no force or effect to the extent of its inconsistency. To the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books.

66 As pointed out in *Seaboyer*, if the unconstitutional effects of laws are remediable on a case-by-case basis under s. 24(1), in theory all *Charter* violations could be addressed in this manner, leaving no role for s. 52(1). To meet this concern, it is suggested that s. 24(1) should only be used in the case of laws that usually produce constitutional [page126] results and only rarely produce an unconstitutional effect. The mandatory minimum sentence provision in s. 236(a) is said to be such a law. However one defines the "rare" case, discussed more fully below, the risk is that the role intended for s. 52(1) would be undermined and that laws that should be struck down -- over-inclusive laws that pose a real risk of unconstitutional treatment of Canadians -- would remain on the books, contrary to the intention of the framers of the *Charter*.

#### (4) The Rule of Law

67 Constable Ferguson's principal argument for constitutional exemptions, as we have seen, is an appeal to flexibility. Yet this flexibility comes at a cost: constitutional exemptions buy flexibility at the cost of undermining the rule of law.

68 The principles of constitutionalism and the rule of law lie at the root of democratic governance: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. It is fundamental to the rule of law that "the law must be accessible and so far as possible intelligible, clear and predictable": Lord Bingham, "The Rule of Law" (2007), 66 *Cambridge L.J.* 67, at p. 69. Generality, promulgation, and clarity are among the essential elements of the "morality that makes law possible": L. L. Fuller, *The Morality of Law* (2nd ed. 1969), at pp. 33-39.

69 Constitutional exemptions for mandatory minimum sentence laws raise concerns related to the rule of law and the values that underpin it: certainty, accessibility, intelligibility, clarity and predictability.

70 As noted in the last section, a constitutional exemption under s. 24(1) is a personal remedy. The remedy proposed by Constable Ferguson is thus distinct from a s. 52 remedy that reads in an [page127] exception for a well-defined class of situations -- as, for instance, the remedy in *Sharpe*. When a constitutional exemption is granted, the successful claimant receives a personal remedy under s. 24(1), but the law remains on the books, intact. As Wilson J. put it in *Osborne*, the legislation remains as enacted "in its pristine over-inclusive form" (p. 77). The mere possibility of such a remedy thus necessarily generates uncertainty: the law is on the books, but in practice, it may not apply. As constitutional exemptions are actually granted, the law in the statute books will in fact increasingly diverge from the law as applied.

71 Constitutional exemptions from mandatory minimum sentences leave the law uncertain and unpredictable, as Le Dain J. pointed out in *Smith*. It is up to judges on a case-by-case basis to decide when to strike down a minimum sentence that is inconsistent with the *Charter*, and when to grant an individual exemption under s. 24(1). But the *Charter* is silent on how a judge should make this decision -- the decision, literally, of whether the law stands or falls. In theory, all violations could be remedied under s. 24(1), leaving no role for s. 52(1). The only option would be to introduce a meta-rule as to when a s. 24(1) exemption is available and when a declaration of invalidity should be made under s. 52(1). How such a rule should be fashioned -- where the line should be drawn -- is far from clear. Constitutional exemptions, it is suggested, should be confined to laws that usually operate constitutionally and only occasionally result in constitutional violations. But how is the judge to decide whether the case before her is rare? The bright line required for constitutional certainty is elusive.

[page128]

72 The divergence between the law on the books and the law as applied -- and the uncertainty and unpredictability that result -- exacts a price paid in the coin of injustice. First, it impairs the right of citizens to know what the law is in advance and govern their conduct accordingly -- a fundamental tenet of the rule of law. Second, it risks over-application of the law; as Le Dain J. noted in *Smith*, the assumed validity of the law may prejudice convicted persons when judges must decide whether to apply it in particular cases. Third, it invites duplication of effort. The matter of constitutionality would not be resolved once and for all as under s. 52(1); in every case where a violation is suspected, the accused would be obliged to seek a constitutional exemption. In so doing, it creates an unnecessary barrier to the effective exercise of the convicted offender's constitutional rights, thereby encouraging uneven and unequal application of the law.

73 A final cost of constitutional exemptions from mandatory minimum sentence laws is to the institutional value of effective law making and the proper roles of Parliament and the courts. Allowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. Legislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to remedy legislation that is found to be constitutionally infirm. In granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament as to what the Constitution requires in the circumstances: Rosenberg and Perrault, at

p. 391. Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.

[page129]

## V. Conclusion

74 I conclude that constitutional exemptions should not be recognized as a remedy for cruel and unusual punishment imposed by a law prescribing a minimum sentence. If a law providing for a mandatory minimum sentence is found to violate the *Charter*, it should be declared inconsistent with the *Charter* and hence of no force and effect under s. 52 of the *Constitution Act, 1982*.

75 I would dismiss the appeal and answer the constitutional questions as follows:

1. Does the mandatory minimum sentence prescribed by s. 236(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, constitute cruel and unusual punishment in the appellant's case, in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is not necessary to answer the question.

3. If the answer to Question 2 is "no", does Canadian law recognize the availability of a constitutional exemption on a case-by-case basis from the statutory mandatory minimum sentence set out in s. 236(a) of the *Criminal Code*, R.S.C. 1985, c. C-46?

Answer: No.

### **Solicitors:**

*Solicitors for the appellant: O'Brien Devlin MacLeod, Calgary.*

*Solicitor for the respondent: Attorney General of Alberta, Calgary.*

*Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.*

[page130]

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

*Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.*

*Solicitors for the intervener the Canadian Civil Liberties Association: Paliare, Roland, Rosenberg, Rothstein, Toronto.*

cp/c/qllls



*Indexed as:*

**R. v. Edwards**

**Calhoun Edwards, appellant;  
v.  
Her Majesty The Queen, respondent.**

[1996] 1 S.C.R. 128

[1996] S.C.J. No. 11

File No.: 24297.

Supreme Court of Canada

1995: June 1 / 1996: February 8.

**Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka,  
Gonthier, Cory, McLachlin, Iacobucci and Major JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Constitutional law -- Charter of Rights -- Unreasonable search and seizure -- Evidence -- Admissibility -- Search of apartment of third party -- Real evidence seized and admitted -- Whether or not accused can challenge admission of evidence obtained as a result of a search of third party's premises -- Canadian Charter of Rights and Freedoms, ss. 8, 24(2).*

The accused was convicted of possession of drugs for purposes of trafficking. He had been suspected of drug dealing out of his car using a cellular phone and of keeping the drugs at his residence or at his girlfriend's apartment. The police arrested him on a traffic offence. Two officers later called at his girlfriend's apartment and gained her cooperation through a number of statements, some of which were lies and half-truths -- the evidence was conflicting as to whether they were made before or after the officers were admitted to the apartment. Once inside, the accused's girlfriend directed them to the location of a significant cache of drugs. She was arrested a short time later but the charges against her were later dropped. At no time prior to being taken into custody was she advised of her right to refuse entry to the police or of her right to counsel. At the police station, she gave a statement naming the accused as the person who put the drugs in her apartment. At trial and on appeal, the accused denied being the owner of the drugs. The accused's appeal from conviction was dismissed with a dissenting opinion which found a reasonable expectation of pri-

vacy giving rise to the possibility of an infringement of his s. 8 Charter rights against unreasonable search or seizure. The appeal as of right to this Court was limited to this issue.

Held: The appeal should be dismissed.

Per Lamer C.J. and Sopinka, Cory, McLachlin, Iacobucci and Major JJ.: Several principles pertain to the s. 8 right to be secure against unreasonable search or seizure. A claim for relief under s. 24(2) of the Charter can only be made by the person whose Charter rights have been infringed. Like all Charter rights, s. 8 is a personal right. It protects people and not places. The right to challenge the legality of a search depends upon whether the accused had a reasonable expectation of privacy, and if so, whether the search by the police was conducted reasonably. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. The factors to be considered may include: (i) presence at the time of the search; (ii) possession or control of the property or place searched; (iii) ownership of the property or place; (iv) historical use of the property or item; (v) the ability to regulate access; (vi) the existence of a subjective expectation of privacy; and (vii) the objective reasonableness of the expectation. If an accused person establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner.

The accused had no privacy interest in the goods seized as he had denied that the drugs were his. He demonstrated no expectation of privacy in his girlfriend's apartment which was the only other relevant privacy interest. His girlfriend described him as "just a visitor" who stayed over occasionally. He contributed nothing to the rent or household expenses and had no authority to regulate access to the premises.

The police conduct did not affect a personal right of the accused. It was accordingly not necessary to consider whether the accused could contest the admissibility of the evidence pursuant to s. 24(2) of the Charter or whether the accused's girlfriend did in fact consent to the search of her apartment.

The reasonable expectation of privacy concept has worked well in Canada. It has proved to be reasonable, flexible, and viable and should not be abandoned in favour of the discredited rule of automatic standing.

Per La Forest J.: While concurring with the majority in the result, disagreement with their reasons was expressed on the ground that their effect was to diminish drastically the public's interest in being left alone, guaranteed by s. 8 of the Charter, in a manner inconsistent with previous statements of this Court, which were not addressed in argument.

The appeal should be dismissed because it is not properly before the Court as of right. The dissent in the Court of Appeal dealt only with whether, on the facts as found by the trial judge, the accused had a reasonable expectation of privacy in his girlfriend's apartment. The formal order cannot be read as expanding the basis of the dissent which is quite explicit. Standing raises a separate issue. The unsatisfactory state of the factual findings, which at best indicate a constructive break-in of the accused's girlfriend's apartment, makes this an unsuitable case to deal with broad issues regarding the ambit of the protection accorded the public under s. 8 of the Charter.

Per L'Heureux-Dubé J.: The reasons and result of Cory J. were substantially agreed with. The issue of the relevance of a breach of a third-party Charter right, however, did not arise in this case as this was an appeal as of right. The dissent in the Court of Appeal dealt only with whether, on the find-

ings of the trial judge, the accused had a reasonable expectation of privacy in his girlfriend's apartment. The formal order cannot be read as expanding the basis of the dissent on the issue of standing as the reasons of the dissent are very explicit. Standing is quite a separate argument which was not dealt with in the Court of Appeal judgment.

Per Gonthier J.: The appeal should be dismissed as not properly before the Court as of right. The dissent in the Court of Appeal was as to whether the accused had a reasonable expectation of privacy. The views of Cory J. that he did not were shared.

### **Cases Cited**

By Cory J.

Considered: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Thompson*, [1990] 2 S.C.R. 1111; referred to: *R. v. Pugliese* (1992), 71 C.C.C. (3d) 295; *Katz v. United States*, 389 U.S. 347 (1967); *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Plant*, [1993] 3 S.C.R. 281; *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Alderman v. United States*, 394 U.S. 165 (1969); *Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Salvucci*, 448 U.S. 83 (1980); *R. v. Sandhu* (1993), 82 C.C.C. (3d) 236; *R. v. Rahey*, [1987] 1 S.C.R. 588; *United States v. Gomez*, 16 F.3d 254 (1994); *Jones v. United States*, 362 U.S. 257 (1960).

By La Forest J.

Considered: *R. v. Dymont*, [1988] 2 S.C.R. 417; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Thomson Newspapers Ltd. v. Canada* (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; *R. v. Thompson*, [1990] 2 S.C.R. 1111; referred to: *Jones v. United States*, 362 U.S. 257 (1960); *Katz v. United States*, 389 U.S. 347 (1967); *Rakas v. Illinois*, 439 U.S. 128 (1978); *R. v. Duarte*, [1990] 1 S.C.R. 30.

### **Statutes and Regulations Cited**

Canadian Charter of Rights and Freedoms, ss. 7, 8, 9, 10, 11, 24.

Highway Traffic Act, R.S.O. 1990, c. H.8, s. 217(2).

Narcotic Control Act, R.S.C., 1985, c. N-1, s. 4(2).

### **Authors Cited**

Amsterdam, Anthony G. "Perspectives On The Fourth Amendment" (1974), 58 Minn. L. Rev. 349.

Dawe, Jonathan. "Standing to Challenge Searches and Seizures Under the Charter: The Lessons of the American Experience and Their Application to Canadian Law" (1993), 52 U.T. Fac. L. Rev. 39.

Doernberg, Donald L. "'The Right of the People': Reconciling Collective and Individual Interests Under the Fourth Amendment" (1983), 58 N.Y.U. L. Rev. 259.

Dworkin, Roger B. "Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering" (1973), 48 Ind. L.J. 329.

Macdonald, David A., Jr. "Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course" (1990), 63 Temp. L. Rev. 559.

The Oxford English Dictionary, vol. 12, 2nd ed. Prepared by J. A. Simpson and E. S. C. Weiner. Oxford: Clarendon Press, 1989, "privacy".

APPEAL from a judgment of the Ontario Court of Appeal (1994), 91 C.C.C. (3d) 123, 19 O.R. (3d) 239, 22 C.R.R. (2d) 29, 73 O.A.C. 55, 34 C.R. (4th) 113, dismissing an appeal from conviction by Downie Prov. J. Appeal dismissed.

Keith E. Wright and Peter B. Hambly, for the appellant. Robert W. Hubbard and Joseph DeFilippis, for the respondent.

Solicitor for the appellant: Keith E. Wright, Toronto.

Solicitor for the respondent: The Attorney General of Canada, Toronto.

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The judgment of Lamer C.J. and Sopinka, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

**1 CORY J.:**-- What rights does an accused person have to challenge the admission of evidence obtained as a result of a search of a third party's premises? That is the question that must be resolved on this appeal.

#### Factual Background

**2** As a result of receiving information that the appellant was a drug trafficker operating out of his car using a cellular phone and a pager, the police placed him under surveillance. They were told that he had drugs either on his person, at his residence or at the apartment occupied by his girlfriend, Shelly Evers. At the time, Ms. Evers was an 18-year-old student in grade 11 who lived alone.

**3** On the day of his arrest, the police observed the appellant drive Ms. Evers' vehicle from a residence to her apartment. The appellant entered the apartment and stayed there for a brief period of time. Shortly after he left, he was stopped by the police. They knew his driver's licence was under suspension and that a person driving while his or her licence is under suspension may be arrested without a warrant (pursuant to the provisions of the Highway Traffic Act, R.S.O. 1990, c. H.8, s. 217(2)).

**4** The police saw the appellant speaking on the cellular phone in the car. When they approached the vehicle, they saw the appellant swallow an object wrapped in cellophane about half the size of a golf ball. The car doors were locked, and the appellant did not unlock them until he had swallowed the object. He was arrested for driving while his licence was under suspension and taken into custody. Evers' car was then towed to the vehicle pound.

**5** It was conceded that the usual practice upon arresting a person for driving while under suspension was to impound the car and give the individual a ticket. It was unusual to take someone into custody and it was acknowledged that this procedure was adopted in order to facilitate the drug investigation.

**6** The police suspected that there might be crack cocaine in Ms. Evers' apartment, but they did not consider that they had sufficient evidence to obtain a search warrant. After taking the appellant into custody, two police officers attended at the apartment. They made a number of statements to Evers, some of which were lies and others half-truths, in order to obtain her cooperation. They advised her: (1) that the appellant had told them there were drugs in the apartment; (2) that if she did not cooper-

ate, a police officer would stay in her apartment until they were able to get a search warrant; (3) that it would be inconvenient for them to get a search warrant because of the paperwork involved; and (4) that one of the officers would be going on vacation the following day and regardless of what they found in her apartment, she along with the appellant would not be charged.

7 There is conflicting evidence as to whether these statements were made before or after the officers were admitted to the apartment. Nonetheless, once inside, Ms. Evers directed them to a couch in her living room where she thought she had seen the appellant replacing a cushion a few days earlier. The cushion was removed, revealing a plastic bag containing six baggies of crack cocaine with a value of between \$11,000 and \$23,000. These were seized by the police. Twenty minutes later, they returned and arrested Ms. Evers. This they had been instructed to do by a superior officer after he had consulted a Crown Attorney. At no time prior to being taken into custody was Ms. Evers advised of her right to refuse entry to the police or of her right to counsel.

8 At the police station, Ms. Evers was questioned and in response, she gave a statement naming the appellant as the person who placed the drugs under the cushion of the couch in her apartment. She and the appellant were jointly charged under s. 4(2) of the Narcotic Control Act, R.S.C., 1985, c. N-1, with possession of crack cocaine for the purpose of trafficking. Ms. Evers was then released. Charges against her were eventually dropped on the morning her trial was scheduled to begin.

9 On the evening of the arrest, the police attended at the vehicle pound and without a search warrant seized the cellular phone and pager used by the appellant. Then for several hours, they intercepted a number of calls from people ordering small amounts of crack cocaine from the appellant.

10 At the conclusion of the trial, the appellant was found guilty as charged. His appeal from conviction was dismissed by the Court of Appeal of Ontario, with Abella J.A. dissenting on the issue of the appellant's standing to assert his rights under s. 8 of the Canadian Charter of Rights and Freedoms in relation to the search of his girlfriend's apartment. The appeal to this Court is limited to that issue.

#### Judgments Below

##### Ontario Court, Provincial Division (Downie Prov. J.)

11 A voir dire was held to determine the admissibility of the evidence obtained from Evers' apartment. The trial judge relied on the decision of the Ontario Court of Appeal in *R. v. Pugliese* (1992), 71 C.C.C. (3d) 295, as establishing that s. 8 of the Charter guaranteed a reasonable expectation of privacy for the occupant of a dwelling.

12 The trial judge stated that Ms. Evers' rights guaranteed by ss. 8 and 10(b) of the Charter had clearly been breached and that she could have sought a remedy pursuant to s. 24(2) for the exclusion of the evidence obtained as a result of the search.

13 With regard to the appellant, the trial judge observed that he considered Ms. Evers to be his girlfriend and was an "occasional visitor" to her apartment. Although he had been given a key and kept some of his personal effects there, he maintained a separate residence. The trial judge also noted that the appellant denied ownership of the drugs.

14 After reviewing the evidence, the trial judge concluded that the appellant had not discharged the burden of establishing that he had a reasonable expectation of privacy in Ms. Evers' apartment. As a result, he concluded that s. 24(2) of the Charter was not applicable and that the evidence was admissible.

**15** The trial judge ruled that the seizure of the cellular phone and pager from Ms. Evers' vehicle was proper. He also held that the telephone calls which were intercepted, although hearsay, were admissible to show the nature of the business carried on by the appellant. These rulings were not disputed on appeal and are not in issue here.

Ontario Court of Appeal (1994), 91 C.C.C. (3d) 123, (McKinlay and Finlayson JJ.A. for the majority)

McKinlay J.A.

**16** McKinlay J.A. noted that in claiming a breach of s. 8 of the Charter, the appellant had to demonstrate that his personal right to privacy was infringed by the police search of Evers' apartment. If the appellant was successful, then the state would bear the onus of establishing that its interests, in the circumstances, were superior to his.

**17** Relying on the decision in Pugliese, supra, McKinlay J.A. ruled that the appellant had no proprietary or possessory interest in Evers' apartment. She stated at p. 136:

On the evidence, he was no more than an especially privileged guest. Ms. Evers could admit anyone to the apartment whom the appellant wished to exclude, and could exclude anyone he wished to admit.

**18** McKinlay J.A. held that the lies and trickery were not used by police to gain entrance to the apartment, but only to get Ms. Evers' cooperation once they were inside. In any event, McKinlay J.A. stated, this conduct did not constitute an infringement of any Charter right of the appellant. Therefore, there was no basis for excluding the evidence pursuant to s. 24(2) of the Charter.

**19** McKinlay J.A. then turned to the question of whether the manner in which the search was conducted amounted to an abuse of authority in violation of s. 7 of the Charter. She found that the tactics employed by the police to gain access to Ms. Evers' apartment were acceptable and therefore could not have vitiated the proceedings against the appellant.

On the basis of the evidence which was properly admitted, she upheld the trial judge's conviction of the appellant.

Finlayson J.A. (concurring)

**20** Finlayson J.A. also upheld the conviction of the appellant. He noted that three issues had been raised on the appeal relating to the legality of the search. The first was whether Evers had consented to the search. If she had, there would be no constitutional concern. Finlayson J.A. found that the trial judge had not made a finding on this issue and therefore, as an appellate judge, he was not in a position to substitute his own conclusion.

**21** The second issue was whether the appellant had status to complain about the search. This issue would only arise if Ms. Evers had not consented to the search or was tricked or coerced into giving her consent. Finlayson J.A. concluded that on the state of the record, there was no basis for upsetting the conviction of the appellant by finding a s. 8 violation. He noted that there was a paucity of factual findings in the reasons of the trial judge, particularly with regard to the conduct of the police during the search. He held, however, that this was irrelevant to the privacy issue and only needed to be considered in the event that the trial judge was reversed on his finding that the appellant did not have standing to complain about the search of Ms. Evers' apartment.

22 In the opinion of Finlayson J.A., evidence regarding the manner in which the search was conducted also related to the third issue, namely whether, in the course of the search of Ms. Evers' apartment, there was an abuse of authority which violated s. 7 of the Charter. He concurred with McKinlay J.A. on this issue and held that the findings of the trial judge fell short of the language of intimidation and coercion necessary to elevate this argument to the level of a constitutional challenge.

Abella J.A. (in dissent)

23 Abella J.A. held that the trial judge erred in concluding that since the appellant had no legal right to the premises (that is to say, he did not live there and paid no rent), he had no standing to assert a privacy interest that could protect him from an unreasonable search of Ms. Evers' apartment.

24 It was her position that each arrangement must be looked at in its own context. While the legal title, time spent, and money invested in the premises might be among the factors to be considered when looking for a privacy interest, they were not determinative. Rather, it was the qualitative extent of the access and the character of the governing relationship that were the dominant indications of a reasonable expectation of privacy.

25 Abella J.A. found the decisive factor to be that Ms. Evers and the appellant had been together for three years, that he had been given a key and had "real unrestricted access" to the apartment, and that he occasionally stayed there. It was this element of unrestricted access which, in her opinion, distinguished this case from *Pugliese*, supra.

26 In her view, the quality of the appellant's access was more important than the frequency or the fact that the appellant was not a tenant. The appellant could come and go as he chose and depended on no one else's permission for entry. Abella J.A. also rejected the notion that entitlement to privacy was based on financial contribution. She concluded that as long as the appellant was in a relationship with Ms. Evers and had a key to the apartment, his privacy right attached to it whether he was physically present or not.

27 Abella J.A. then reviewed the circumstances of the search and found at p. 143 that "[t]he line between justifiable police conduct which seeks to enlist co-operation, and unlawful conduct which seeks to compel it was clearly crossed in this case". She concluded that the admission of any evidence yielded by this deliberately unlawful conduct would bring the administration of justice into disrepute. Consequently, the evidence should have been excluded.

#### Analysis

#### The Appellant's Reasonable Expectation of Privacy in Relation to Ms. Evers' Apartment

28 At the outset, I should say that I am in agreement with the conclusions of the majority and in substantial agreement with their reasons. In the ordinary course, I would have favoured dismissal of the appeal on that basis. However, in the circumstances it is appropriate to set out in a somewhat summary manner my own reasons for dismissing the appeal.

29 In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, Dickson J. (as he then was), writing for the Court, emphatically rejected any requirement of a connection between the rights protected by s. 8 and a property interest in the premises searched. He quoted with approval at pp. 158-59 the statement of Stewart J., delivering the majority opinion of the United States Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967), at p. 351, that "the Fourth Amendment protects people, not places". Dickson J. held that this applied equally to construing s. 8.

**30** While Dickson J. advocated a broad general right to be secure from unreasonable search and seizure, he stressed that it only protected a "reasonable expectation of privacy". He stated at pp. 159-60 that the limiting term "reasonable" implied that:

... an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

**31** It has since been determined that this assessment must be made in light of the totality of the circumstances of a particular case. See, for example, *R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 54, and *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 62.

**32** I would, as well, observe that in *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 291, it was held that it is not necessary for an accused to establish a possessory interest in the goods seized before seeking to enforce rights guaranteed under s. 8.

**33** It is important to emphasize that generally, the decision as to whether an accused had a reasonable expectation of privacy must be made without reference to the conduct of the police during the impugned search. There are two distinct questions which must be answered in any s. 8 challenge. The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that right to privacy. See *Rawlings v. Kentucky*, 448 U.S. 98 (1980). Usually, the conduct of the police will only be relevant when consideration is given to this second stage.

**34** In any determination of a s. 8 challenge, it is of fundamental importance to remember that the privacy right allegedly infringed must, as a general rule, be that of the accused person who makes the challenge. This has been stressed by the United States Supreme Court in several cases dealing with searches that allegedly violated the Fourth Amendment guarantee. In *Alderman v. United States*, 394 U.S. 165 (1969), for example, White J., delivering the judgment of the majority, stated at pp. 171-72 that:

... [the] suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. [Emphasis added.]

**35** This principle was adopted and applied in *Rakas v. Illinois*, 439 U.S. 128 (1978), at p. 133, and *United States v. Salvucci*, 448 U.S. 83 (1980), at p. 86. The view expressed in these cases is persuasive and should be applied when s. 8 challenges are considered.

**36** The intrusion on the privacy rights of a third party may however be relevant in the second stage of the s. 8 analysis, namely whether the search was conducted in a reasonable manner. The reasons in *R. v. Thompson*, [1990] 2 S.C.R. 1111, considered this question. At issue was a wiretap authorization which allowed the police to eavesdrop on several public pay telephones that were often used by the appellant as well as other members of the public. The appellants argued that the failure of the authorizing judge to limit the intrusion on those third-party users rendered the search unreasonable. Sopinka J. agreed and stated at p. 1143:



In my view, the extent of invasion into the privacy of these third parties is constitutionally relevant to the issue of whether there has been an "unreasonable" search or seizure. To hold otherwise would be to ignore the purpose of s. 8 of the Charter which is to restrain invasion of privacy within reasonable limits. A potentially massive invasion of the privacy of persons not involved in the activity being investigated cannot be ignored simply because it is not brought to the attention of the court by one of those persons. Since those persons are unlikely to know of the invasion of their privacy, such invasions would escape scrutiny, and s. 8 would not fulfil its purpose.

37 It is important to observe that Sopinka J. was careful to point out that the invasion of third-party privacy rights is not determinative of the reasonableness of the search. He put it in this way at pp. 1143-44:

In any authorization there is the possibility of invasion of privacy of innocent third parties. For instance a wiretap placed on the home telephone of a target will record communications by other members of the household. This is an unfortunate cost of electronic surveillance. But it is one which Parliament has obviously judged is justified in appropriate circumstances in the investigation of serious crime.

38 In what may be somewhat rare circumstances, the extent of the invasion of privacy may be constitutionally relevant. This was the case in Thompson, supra, where the actions of the police were judged at p. 1143 as a "potentially massive invasion of . . . privacy" of members of the general public who were not involved in the suspected criminal activity.

39 In the case at bar, there is no need to consider the reasonableness of the search since the appellant has not established the requisite expectation of privacy. Even if it were necessary to consider the invasion of the privacy of Ms. Evers, I would conclude that there was neither a potentially massive invasion of property nor a flagrant abuse of individual's right to privacy.

40 Like the parties, I agree that the clearly stated reasons of Finlayson J.A. in Pugliese, supra, are correct and applicable to this case. The only difference between the parties arises from their view as to how it should be applied.

In Pugliese, supra, the police obtained a search warrant for an apartment in a building owned by the accused but rented to another person. Illegal drugs, hidden by the tenant for the accused, were found in the apartment. The accused sought to challenge the search warrant on the basis of his right to privacy which, he contended, arose either from his proprietary interest in the apartment or his possessory interest in the goods seized.

41 This argument was rejected by Finlayson J.A. He found that, while the building may have been owned by Pugliese, he had leased the apartment to the tenant with the result that his right of entry was restricted by the provincial landlord-and-tenant legislation. It was the tenant who had a legitimate right to privacy. He alone was in a position to grant or refuse permission to enter the premises. Pugliese, on the other hand, had no right or authority to overrule the tenant's wishes in this regard. Nor did he have any demonstrated possessory interest in the drugs seized, since he had expressly disavowed any connection with them.

42 Finlayson J.A. emphasized that the essence of the test under s. 8 was the existence of a personal privacy right.

He noted, however, that a proprietary or possessory interest could properly be considered as evidence of that personal right. Since Pugliese was unable to advance any ground other than his proprietary interest in the building, Finlayson J.A. concluded that there was nothing in the record that established an expectation of privacy in the apartment or in the portion of it in which the drugs were seized.

43 The following extracts from the reasons of Finlayson J.A. at pp. 301-2 are, I think, apposite:

When an accused, such as the appellant, asserts at his trial that there has been a breach of his s. 8 Charter right to be secure from unreasonable search or seizure, he is asserting a particular right to privacy which may, on occasion, be unrelated to any recognized proprietary or possessory right. Section 8 of the Charter is directed to the protection of the security of the person, not the protection of his property, and it is the appellant's personal exposure to the consequences of the search and seizure that gives him the right to challenge, not the search warrant itself, but the admission into evidence at his trial of the fact of the search and the account of what was seized.

Hunter v. Southam, supra, is authority for the proposition that s. 8 of the Charter does not authorize a search and seizure, but rather acts as a limitation on the powers of search and seizure set out in the Code. Section 8 guarantees a broad and general right to be secure from unreasonable search and seizure which at least protects a person's entitlement to a reasonable expectation of privacy. Accordingly, s. 8 is available to confer standing on an accused person who had a reasonable expectation of privacy in the premises where the seizure took place, even though he had no proprietary or possessory interest in the premises or in the articles seized. In a proper case, the remedy available to such an accused would be the exclusion under s. 24(2) of the Charter of the evidence obtained pursuant to the search.

...

The true test of a protected constitutional right under s. 8 of the Charter is whether there is a reasonable expectation of privacy. This is so even where it is alleged that the privacy shelters illegal activity: see R. v. Wong (1990), 60 C.C.C. (3d) 406, [1990] 3 S.C.R. 36, 1 C.R. (4th) 1 (S.C.C.), and R. v. Mercer, a judgment of the Court of Appeal for Ontario, released January 29, 1992 (since reported 70 C.C.C. (3d) 180, 7 O.R. (3d) 9, 15 W.C.B. (2d) 215).

This is not to say that property rights do not confer privacy rights in a given case. They obviously do. But the appellant must assert a personal privacy right, whatever be the foundation of his assertion. And, since this reasonable expectation of privacy is a Charter protected right, the burden of providing an evidentiary basis for any violation rests with the appellant. . . . There is nothing in

the record that supports any suggestion that the appellant had a reasonable expectation of privacy in McInnis's apartment or in any portion of it where the drugs and drug paraphernalia were seized. The appellant is thus unable to show that he had a constitutionally protected right. [Emphasis by italics in original; emphasis by underlining added.]

44 In the case at bar, one of the bases upon which the appellant asserted his right to privacy in Ms. Evers' apartment was his interest in the drugs. It is possible, in certain circumstances, to establish an expectation of privacy in the goods that are seized. The appellant in *Plant*, *supra*, sought unsuccessfully to do so with respect to the public utility's records of his electricity consumption. See, also, *R. v. Sandhu* (1993), 82 C.C.C. (3d) 236 (B.C.C.A.), where the issue was raised in relation to the suitcase of a co-accused. However, this contention cannot be raised in the circumstances of this case. At trial, the appellant denied that the drugs were his and Ms. Evers testified that they might have belonged to someone else. The appellant maintained in the Court of Appeal that the drugs were not his. It was only in this Court that he acknowledged for the first time that the drugs were his. He should not now be permitted to change his position with regard to a fundamentally important aspect of the evidence in order to put forward a fresh argument which could not be considered in the courts below. The result in this appeal must turn solely on the appellant's privacy interest in Ms. Evers' apartment.

45 A review of the recent decisions of this Court and those of the U.S. Supreme Court, which I find convincing and properly applicable to the situation presented in the case at bar, indicates that certain principles pertaining to the nature of the s. 8 right to be secure against unreasonable search or seizure can be derived. In my view, they may be summarized in the following manner:

1. A claim for relief under s. 24(2) can only be made by the person whose Charter rights have been infringed. See *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 619.
2. Like all Charter rights, s. 8 is a personal right. It protects people and not places. See *Hunter*, *supra*.
3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated. See *Pugliese*, *supra*.
4. As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably. See *Rawlings*, *supra*.
5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. See *Colarusso*, *supra*, at p. 54, and *Wong*, *supra*, at p. 62.
6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
  - (i) presence at the time of the search;
  - (ii) possession or control of the property or place searched;
  - (iii) ownership of the property or place;
  - (iv) historical use of the property or item;

- (v) the ability to regulate access, including the right to admit or exclude others from the place;
- (vi) the existence of a subjective expectation of privacy; and
- (vii) the objective reasonableness of the expectation.

See *United States v. Gomez*, 16 F.3d 254 (8th Cir. 1994), at p. 256.

- 7. If an accused person establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner.

46 Taking all the circumstances of this case into account, it is my view that the appellant has not demonstrated that he had an expectation of privacy in Ms. Evers' apartment.

While the factors set out in *Gomez*, supra, are helpful, they are certainly not exhaustive and indeed other factors may be determinative in a particular case. Nonetheless, it is significant that, apart from a history of use of Ms. Evers' apartment, the appellant cannot comply with any of the other factors listed in *Gomez*, supra.

47 There are, as well, several factors which specifically militate against a finding that the appellant had any reasonable expectation of privacy in the apartment. First, Ms. Evers stated in her testimony that the appellant was "just a visitor" who stayed over occasionally. As McKinlay J.A. found at pp. 136 and 134, respectively, "he was no more than an especially privileged guest" who "took advantage of Ms. Evers by making use of her premises to conceal a substantial quantity of illegal drugs".

48 Second, although the appellant kept a few personal belongings at the apartment, he did not contribute to the rent or household expenses save for his alleged assistance of Ms. Evers in the purchase of a couch.

49 Third, although only he and Ms. Evers had keys to the apartment, the appellant lacked the authority to regulate access to the premises. In the words of McKinlay J.A. at p. 136, "Ms. Evers could admit anyone to the apartment whom the appellant wished to exclude, and could exclude anyone he wished to admit". An important aspect of privacy is the ability to exclude others from the premises. This is apparent from one of the definitions of the word "privacy" found in *The Oxford English Dictionary* (2nd ed. 1989). It is set out in these terms:

b. The state or condition of being alone, undisturbed, or free from public attention, as a matter of choice or right; freedom from interference or intrusion.

50 The right to be free from intrusion or interference is a key element of privacy. It follows that the fact that the appellant could not be free from intrusion or interference in Ms. Evers' apartment is a very important factor in confirming the finding that he did not have a reasonable expectation of privacy. He was no more than a privileged guest.

51 Since no personal right of the appellant was affected by the police conduct at the apartment, the appellant could not contest the admissibility of the evidence pursuant to s. 24(2) of the Charter. It is therefore not necessary to consider either this aspect of the case or whether Ms. Evers did in

fact consent to the search of her apartment. This is, in itself, a sufficient basis for dismissing the appeal.

**52** However, the appellant has argued that automatic standing should be granted to challenge the search of a third party's premises in those circumstances where the Crown alleges that the accused is in possession of the property which was discovered and seized. The United States Supreme Court has resiled from its earlier position on this issue. See *Jones v. United States*, 362 U.S. 257 (1960). In *Salvucci*, *supra*, and in *Rawlings*, *supra*, it was determined that the correct approach to asserting Fourth Amendment rights was to satisfy the "legitimate expectation of privacy test".

**53** Not only has the United States Supreme Court rejected the automatic standing rule, but so too have the great majority of state courts. As one author writes, "they have done so not because they are required to, but rather, because they agree with the policy underlying the Supreme Court decisions". See David A. Macdonald, Jr., "Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course" (1990), 63 Temp. L. Rev. 559, at pp. 571-72 and 576.

**54** Further, the adaptation of the automatic standing rule would seem to fly in the face the wording of s. 24 of the Charter. It provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[Emphasis added.]

**55** As I noted earlier, s. 24(2) provides remedies only to applicants whose own Charter rights have been infringed. This position was adopted by Wilson J. in *Rahey*, *supra*, at p. 619, when she stated:

... I want to stress the following. An application for relief under s. 24(1) can only be made by a person whose right under s. 11(b) has been infringed. This is clear from the opening words of s. 24(1).

**56** The reasonable expectation of privacy concept has worked well in Canada. It has proved to be reasonable, flexible, and viable. I can see no reason for abandoning it in favour of the discredited rule of automatic standing.

Disposition

**57** In the result, I would dismiss the appeal and confirm the order of the Court of Appeal upholding the conviction of the appellant.

The following are the reasons delivered by

**58** LA FOREST J.:-- While I agree with the conclusion arrived at by my colleagues, I do so for quite different reasons than those espoused by the majority. With these I am in profound disagreement. I am deeply concerned with the implications of these reasons which, I think, result in a drastic diminution of the protection to the public s. 8 of the Canadian Charter of Rights and Freedoms was intended to ensure. This is all the more regrettable since this case has come to this Court as of right on facts that are at best obscure and where the arguments raised before this Court were different from those considered by the courts below. Nor did the arguments in this Court raise the full implications of the effect the case may have on the ambit of s. 8.

**59** As I see it, the protection accorded by s. 8 is not in its terms limited to searches of premises over which an accused has a personal right to privacy in the sense of some direct control or property. Rather the provision is intended to afford protection to all of us to be secure against intrusion by the state or its agents by unreasonable searches or seizures, and is not solely for the protection of criminals even though the most effective remedy will inevitably protect the criminal as the price of liberty for all. The section, it must be remembered, reads: "Everyone has the right to be secure against unreasonable search or seizure" (emphasis added). It is a right enuring to all the public. It applies to everyone, an expression that unlike many of the other Charter provisions is not qualified by express circumstances, such as, for example, s. 9 which protects everyone arbitrarily detained or imprisoned, s. 10, which applies to a everyone arrested or detained, and s. 11, which is limited to a person charged with an offence. Moreover, s. 8 does not merely prohibit unreasonable searches or seizures, but also guarantees to everyone the right to be secure against such unjustified state action; see *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427. It draws a line between the rights of the state and the rights of the citizen, and not just those of an accused. It is a public right, enjoyed by all of us. It is important for everyone, not only an accused, that police (or what is even more dangerous for the public, other agents of the state) do not break into private premises without warrant.

**60** The issue has not yet been directly raised because the cases dealt with in this Court have thus far been centred on cases of unreasonable searches directly involving the personal expectation of privacy of an accused person. But the approach I am suggesting is entirely consistent with the conceptual, societal and constitutional underpinnings of the right guaranteed by s. 8. Thus it is noteworthy that in the seminal case of *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, in the very passage cited by my colleagues, Dickson J. (as he then was) for the Court indicated, at p. 159, that what was being protected by s. 8 was "the public's interest in being left alone". In determining whether s. 8 would apply, Dickson J. thus put the matter, at pp. 159-60:

... an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. [Emphasis added.]

I add that Dickson J. stressed the importance of interpreting the right generously and not in a legalistic fashion, an approach reiterated in every subsequent s. 8 case in this Court. Nowhere was the right confined to the protection of an accused.

**61** Similarly in *Dyment*, supra, I emphasized the public aspects of the right protected by s. 8. Having noted that the provision did not merely prohibit unreasonable search and seizure but "goes further and guarantees the right to be secure against unreasonable search and seizure" (p. 427), I added, at pp. 427-28:

The foregoing approach is altogether fitting for a constitutional document enshrined at a time when, Westin tells us, society has come to realize that privacy is at the heart of liberty in a modern state; see Alan F. Westin, *Privacy and Freedom* (1970), pp. 349-50. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state. [Emphasis added.]

**62** The public's interest in being left alone, "to be secure against unreasonable search or seizure", has in fact been determined, or asserted in defining, the application of s. 8 in a number of cases in this Court. This can be seen in the distinction drawn between a search of business documents (which Hunter, *supra*, held ordinarily required a warrant to make it reasonable), and a seizure of similar documents (which *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, held did not require a warrant as a condition of being reasonable). The documents, so far as the corporations under investigation in those cases were concerned, in themselves gave rise to similar claims for privacy on their part. What made the difference was that a search, unlike a seizure, affected the privacy of individual third parties who were not parties against whom the investigation was directed (see my comments at pp. 521-22).

**63** A similar situation occurred in *R. v. Thompson*, [1990] 2 S.C.R. 1111, where both the majority and minority agreed that the interception of conversation from a pay phone, unlike a private phone, required consideration of the rights of the public. For the majority, Sopinka J. had this to say, at p. 1143:

In my view, the extent of invasion into the privacy of these third parties is constitutionally relevant to the issue of whether there has been an "unreasonable" search or seizure. To hold otherwise would be to ignore the purpose of s. 8 of the Charter which is to restrain invasion of privacy within reasonable limits. A potentially massive invasion of the privacy of persons not involved in the activity being investigated cannot be ignored simply because it is not brought to the attention of the court by one of those persons. Since those persons are unlikely to know of the invasion of their privacy, such invasions would escape scrutiny, and s. 8 would not fulfill its purpose.

While he recognized, at pp. 1143-44, that even the interception of a private telephone might give rise to invasions of the privacy of innocent third parties, this was inevitable and Parliament had obviously considered it justified in appropriate cases. However, he went on to say, at p. 1144, that "in some cases the possibility of invasion of privacy of innocent persons may become so great that it requires explicit recognition along with the interests of the investigation of crime". He concluded, at p. 1145, that "given the extent of the invasion of privacy authorized in this case, a total absence of any protection for the public created a potential for the carrying out of searches and seizures that were unreasonable".

**64** From this, it seems, the majority agrees, at para. 38, that at least in "somewhat rare circumstances" the extent of invasion of privacy of members of the public may be constitutionally relevant.

I have no doubt that it is relevant and, in my view, the cases are not confined to massive invasions of privacy but to other situations where one can reasonably conclude that the public right to be secure against unreasonable search and seizure has been infringed. The wilful and forcible breaking in of the home of a person other than the accused would appear to me to be a candidate for consideration. A stronger case would be a break-in by state agents for less compelling reasons than criminal law enforcement. Not to accept this point of view is to accord greater protection to the right of privacy to the accused or other wrongdoer than to a person against whom there may be no reasonable suspicion of wrongdoing. That seems to me to turn the citizen's Charter right to be left alone on its head. We exercise discretion to exclude evidence obtained by unconstitutional searches from being used against an accused, even when it would clearly establish guilt, not to protect criminals but because the only really effective safeguard for the protection of the constitutional right we all share is not to allow use of evidence obtained in violation of this public right when doing so would bring the administration of justice into disrepute. There are other remedies such as trespass, it is true, but these are not constitutional remedies and they are not equal to the task.

65 I should, before going on, point out that the notion of a public right to be left alone, or in Charter terminology "to be secure against unreasonable search or seizure", is not confined to the cases I have cited; for discussions of the issue, see, for example, Donald L. Doernberg, "The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment" (1983), 58 N.Y.U. L. Rev. 259; David A. Macdonald, Jr., "Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course" (1990), 63 Temp. L. Rev. 559; Jonathan Dawe, "Standing to Challenge Searches and Seizures Under the Charter: The Lessons of the American Experience and Their Application to Canadian Law" (1993), 52 U.T. Fac. L. Rev. 39. Just how far the public's right should go, or to what extent appropriate nuances would have to be made in applying s. 24(2) of the Charter, I need not enter into here. It would be inappropriate since the issue of the public right was not even raised; that is the threshold objection I have to my colleagues' reasons (though I confess it is far from exhausting my disagreement with their approach). For the moment, I simply point out that the state courts in the United States that have refused in interpreting their State Constitutions to follow the constricted approach of the United States Supreme Court have followed a variety of paths, and it would seem to me that the proper course in Canada would be to assess the matter in the crucible of experience, rather than by taking an abstract position on the issue. My colleagues suggest that if a flagrant case arose, it could be dealt with on the basis of abuse of process. To adopt this type of "Chancellor's foot" approach, while curtailing the possibility of developing in a principled way in the light of experience the constitutional provision specifically aimed at the evil, seems to me to be at best incongruous.

66 As I mentioned earlier, some aspects of the majority's reasons seem to leave some opening for a public right consistent with Thompson, supra, but this possible avenue appears to be closed by that portion of their reasons where they purport to set forth the law by a series of syllogisms. This is the part that perhaps most concerns me about their reasons. Syllogistic reasoning has its place, no doubt, but that can only be so long as the premises are sound.

It will be evident from my previous discussion that I do not agree with all these premises in so far as they purport to be based on the decisions of this Court. For example, I see no reason why, if we all share in the public right under s. 8, we cannot have resort to s. 24(2) if evidence so obtained is adduced against us. Nor do I read Hunter, supra, as being confined to an individual's personal right to privacy, and indeed this issue was expressly left open (see p. 158). But what I find especially distressing is my colleagues' embracement of recent United States authorities on the subject, whether



directly or through the medium of Canadian cases in the courts below that have accepted these. It was specifically in this connection that Dickson J. in *Hunter*, supra, first warned against the uncritical acceptance of American cases. And this with good reason. The decisions of the United States courts on this subject, and specifically those of the Supreme Court, have not received undiluted acclaim in that country. As early as 1973, the renowned scholar, Roger B. Dworkin, succinctly described them as "a mess"; see Dworkin, "Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering" (1973), 48 Ind. L.J. 329, at p. 329. Similarly, Professor Amsterdam, who wrote extensively in the field, in a piece of studied understatement, described their efforts as "not the Supreme Court's most successful product"; see Amsterdam "Perspectives On The Fourth Amendment" (1974), 58 Minn. L. Rev. 349, at p. 349. In the years since, Professor Doernberg, supra, at p. 259, tells us "the situation has not improved".

67 The sorry state of the law in the United States is a product of history. It seems unfortunate that this Court has the irresistible urge to repeat it. That history is succinctly set forth by Dawe, supra, at pp. 43 et seq., and I shall not attempt to discuss it at any length; see also the other articles I have just cited. Suffice it to say that despite the broad language in which the Fourth Amendment is framed ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ."), the lower federal courts early restricted it to situations where the claimant had some proprietary interest in the goods seized or the place searched. In *Jones v. United States*, 362 U.S. 257 (1960), however, the Supreme Court rejected this narrow property-based approach, and began a process affording wider rules of standing for individuals involving the Fourth Amendment. Of particular importance for Canada is *Katz v. United States*, 389 U.S. 347 (1967), where the court effectively expanded the ambit of this provision by focusing the protection afforded by it on privacy rather than protected places. This was, of course, the case to which this Court turned for guidance in developing its approach to s. 8 of the Charter in *Hunter*, supra. From this base this Court has had some success in developing the protection afforded by that provision in some areas beyond what the United States Supreme Court had done even in its more liberal days, an approach fed of course by the conviction that privacy, the right to be left alone, is at the heart of liberty in a modern state. As such, the right to be secure against unreasonable search or seizure belongs to all of us.

68 A wholly different direction has been taken in recent jurisprudence in the United States. Beginning with *Rakas v. Illinois*, 439 U.S. 128 (1978), the post-Warren court has systematically narrowed the ambit of the Fourth Amendment by rejecting the various rules of standing created in the years when the court was expanding the protection afforded by the Fourth Amendment. Oddly enough, in doing so, it has employed the concept of privacy which we saw had served as a tool for expanding the ambit of the Fourth Amendment, by narrowly constricting it to the most obvious interferences with the accused's personal privacy. So successful has it been in that endeavour that the protection now afforded by the Fourth Amendment is in at least a number of ways narrower than that afforded under the early restrictive property concept. The approach seems largely motivated by the social costs attendant upon the application of the strict exclusionary rule in the United States. But quite apart from the fact that s. 24(2) of the Charter provides a balancing instrument in Canada, the truth of the matter is that there are social costs in giving state agents wide discretion in interfering with the right of the public and of the individual to be left alone that warrant consideration in defining the right. In the absence of close consideration of the underlying policies (and these were not even addressed in the argument), I think it unwise for this Court to adopt the American approach.

69 As I mentioned, however, I agree with the conclusion of my colleagues, but I do so on the narrow ground that the appeal is not properly before us as of right. As my colleague, Justice L'Heureux-Dubé, indicates in her separate reasons, the dissent in the Court of Appeal deals only with whether, on the facts as found by the trial judge, the accused had a reasonable expectation of privacy in his girlfriend's apartment. The formal order cannot be read as expanding the basis of the dissent which is quite explicit. Standing raises a separate issue. I add as a footnote that the argument on this issue in this Court was made on the basis of the narrow perspective adopted in the United States courts without any real attention to the broader view of the ambit of s. 8 espoused in a number of statements in this Court. Even on this broader basis, it is open to doubt that the appellant would have succeeded. From what I can determine from the unsatisfactory state of the factual findings, we appear to be concerned at best with a constructive break-in where the appellant's girlfriend led the police to the evidence. This would appear to have some affinity to the situation described in *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 41, where the Court drew a line between statements of an accused obtained by electronic surveillance by the police, which fell within the protection accorded by s. 8, and statements made by the accused to a trusted individual and revealed by the latter to the police, which did not. What concerns me here is that the majority would appear to have foreclosed the possibility of development where the security of the public could reasonably be held to be engaged.

The following are the reasons delivered by

70 L'HEUREUX-DUBÉ J.:-- Although I substantially agree with Justice Cory's reasons and the result he reaches, I have some concern about the issue of the relevance of a breach of a third-party Charter right in the context of this case.

71 Since this is an appeal as of right, that issue, in my view, does not arise. The dissent deals only with whether, on the findings of the trial judge, the accused had a reasonable expectation of privacy in Ms. Evers' apartment. The formal order cannot be read as expanding the basis of the dissent on the issue of standing as the reasons of the dissent are very explicit. Standing is quite a separate argument which was not dealt with in the Court of Appeal judgment.

The following are the reasons delivered by

72 GONTHIER J.:-- I have had the benefit of the reasons of my colleagues. I concur with Justice La Forest that the appeal be dismissed as not properly before us as of right. The dissent in the Court of Appeal was as to whether the accused had a reasonable expectation of privacy. I share the views of Justice Cory that he did not. I refrain from commenting on the other issues referred to by my colleagues.

cp/d/hbb

**\*\* Preliminary Version \*\***

*Case Name:*  
**Canada (Attorney General) v. TeleZone Inc.**

**Attorney General of Canada, Appellant;**  
**v.**  
**TeleZone Inc., Respondent**

[2010] S.C.J. No. 62

[2010] A.C.S. no 62

2010 SCC 62

410 N.R. 1

2011EXP-42

J.E. 2011-18

327 D.L.R. (4th) 527

196 A.C.W.S. (3d) 98

File No.: 33041.

Supreme Court of Canada

Heard: January 20, 21, 2010;  
Judgment: December 23, 2010.

**Present: Binnie, LeBel, Deschamps, Abella, Charron, Rothstein  
and Cromwell JJ.**

(81 paras.)

**Appeal From:**

## ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Administrative law -- Judicial review and statutory appeal -- Constitutional issues -- Federal v. provincial jurisdiction -- Appeal by Attorney General from decision that Ontario Superior Court of Justice had jurisdiction over action brought by TeleZone against federal Crown dismissed -- Telezone sought compensation in Superior Court for losses on the basis of breach of contract and negligence after Minister rejected its application for a licence -- Minister argued it was a collateral attack, which was barred by grant to Federal Court of exclusive judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals -- Federal Courts Act did not, by clear and direct statutory language, oust jurisdiction of provincial superior courts to deal with these common law and equitable claims.*

*Civil litigation -- Civil procedure -- General principles -- Legislation -- Interpretation -- Statutes -- Constitutional issues -- Federal v. provincial jurisdiction -- Courts -- Jurisdiction -- Federal courts -- Provincial and territorial courts -- Superior courts -- Statutory jurisdiction -- Appeal by Attorney General from decision that Ontario Superior Court of Justice had jurisdiction over action brought by TeleZone against federal Crown dismissed -- Telezone sought compensation in Superior Court against federal Crown for its claimed losses on the basis of breach of contract and negligence after Minister rejected its application for a licence -- Superior Court had jurisdiction over parties, subject matter and remedies sought -- Federal Courts Act did not, by clear and direct statutory language, oust jurisdiction of provincial superior courts to deal with these common law and equitable claims -- That being the case, Superior Court had jurisdiction to proceed.*

*Tort law -- Practice and procedure -- Constitutional issues -- Federal v. provincial jurisdiction -- Appeal by Attorney General from decision that Ontario Superior Court of Justice had jurisdiction over action brought by TeleZone against federal Crown dismissed -- Telezone sought compensation in Superior Court against federal Crown for its claimed losses on the basis of breach of contract and negligence after Minister rejected its application for a licence -- Superior Court had jurisdiction over parties, subject matter and remedies sought -- Federal Courts Act did not, by clear and direct statutory language, oust jurisdiction of provincial superior courts to deal with these common law and equitable claims -- That being the case, Superior Court had jurisdiction to proceed.*

Appeal by Attorney General from the decision that the Ontario Superior Court of Justice had jurisdiction over the action brought by TeleZone against the Federal Crown. TeleZone claimed it was wronged by the decision of the Minister of Industry Canada that rejected its application for a licence to provide telecommunications services. When Industry Canada issued a call for licence applications, it released a document indicating the policy and procedural framework which indicated that it would grant up to six licences based on the criteria it set out. Industry Canada announced that there were four successful applicants and TeleZone was not one of the. TeleZone claimed that it was either an express or implied term of the policy statement that Industry Canada would only issue fewer than six licences if fewer than six applications met the criteria. Telezone sought compensation in the Ontario Superior Court of Justice against the Federal Crown for its claimed losses on the basis of breach of contract, negligence, and, in the alternative, unjust enrichment. The Attorney General challenged the jurisdiction of the Superior Court to proceed with the claim for compensation unless and until TeleZone obtained from the Federal Court of Canada an order quashing the Minister's decision. The Attorney General claimed that TeleZone's claim constituted an impermissible collateral

attack on the Minister's order. He argued that such a collateral attack was barred by the grant to the Federal Court, by s. 18 of the Federal Courts Act, of exclusive judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals. The Attorney General's preliminary motion to dismiss the action for want of jurisdiction was dismissed because it was not plain and obvious that TeleZone's claim would fail. The Court of Appeal held that s. 17 of the Federal Courts Act and s. 21 of the Crown Liability and Proceedings Act conferred concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown. The Ontario Superior Court, as a court of general and inherent jurisdiction, could entertain any cause of action in the absence of legislation or an arbitration agreement to the contrary. Section 18 of the Federal Courts Act removed from the superior courts' jurisdiction the prerogative writs and extraordinary remedies listed. Since the relief sought by TeleZone (damages) was not listed in s. 18, the Superior Court continued to have jurisdiction.

HELD: Appeal dismissed. The Superior Court had jurisdiction to proceed. The Ontario Superior Court had jurisdiction over the parties, the subject matter and the remedies sought by TeleZone. That jurisdiction included the authority to determine every legal and factual element necessary for the granting or withholding of the remedies sought unless such authority was taken away by statute. Any derogation from the jurisdiction of the provincial superior courts required clear and explicit statutory language. The Federal Courts Act did not, by clear and direct statutory language, oust the jurisdiction of the provincial superior courts to deal with these common law and equitable claims, including the potential "unlawfulness" of government orders. The explicit grant to the provincial superior courts of concurrent jurisdiction in claims against the Crown in s. 17 of that Act (as well as s. 21 of the Crown Liability and Proceedings Act) directly refuted it. The grant of exclusive jurisdiction to judicially review federal decision makers was found in s. 18 of the Federal Courts Act and was expressed in terms of particular remedies, which did not include an award of damages. If a claimant sought compensation, he or she could not get it on judicial review. In this case, TeleZone was not attempting to nullify or set aside the Minister's order. Its case was that the Minister, in deciding not to issue a licence to TeleZone, acted in breach of his contractual and equitable duties or in breach of a duty of care. TeleZone did not say that the Minister's decision should be quashed. On the contrary, TeleZone's causes of action in contract, tort and equity were predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby causing it financial loss. To the extent that TeleZone's claim could be characterized as a collateral attack on the Minister's order (i.e., because the order failed to include TeleZone), the grant of concurrent jurisdiction to determine claims against the Crown to the provincial superior courts negated any inference the Crown sought to draw that Parliament intended a detour to the Federal Court. The TeleZone claim as pleaded was dominated by private law considerations.

**Statutes, Regulations and Rules Cited:**

Civil Code of Québec, R.S.Q., c. C-1991,

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 96, s. 101

Corrections and Conditional Release Act, S.C. 1992, c. 20,

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 3, s. 8, s. 21

Federal Court Act, S.C. 1970-71-72, c. 1,

Federal Courts Act, R.S.C. 1985, c. F-7, s. 2, s. 2(1), s. 17, s. 18, s. 18(1), s. 18(1)(a), s. 18(3), s. 18.1, s. 18.1(2), s. 18.4, s. 39, s. 50(1)

Radiocommunication Act, R.S.C. 1985, c. R-2,

### **Subsequent History:**

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

### **Court Catchwords:**

*Courts -- Jurisdiction -- Provincial superior courts -- Action brought against federal Crown in Ontario Superior Court of Justice seeking damages for breach of contract, negligence and unjust enrichment arising from decision rejecting application for telecommunications licence -- Whether plaintiff entitled to proceed by way of action in Ontario Superior Court of Justice without first proceeding by way of judicial review in Federal Court -- Federal Courts Act, R.S.C. 1985, c. F-7, ss. 17, 18; Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 21.*

### **Court Summary:**

In 1995, Industry Canada issued a call for personal communication services licence applications, and released the policy statement within which potential service providers could shape their applications. The statement provided that Industry Canada would grant up to six licences on the basis of criteria it set out. T submitted an application, but when Industry Canada announced its decision, there were only four successful applicants and T was not among them. T filed an action against the Federal Crown in the Ontario Superior Court of Justice for breach of contract, negligence and unjust enrichment, and sought compensation for claimed losses of \$250 million. It claimed that it was an express or implied term of the policy statement that Industry Canada would only issue fewer than six licences if fewer than six applications met the criteria. Since its application satisfied all the criteria, it says, Industry Canada must have considered other undisclosed factors when it rejected T's application. The Attorney General of Canada, relying on *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, challenged the jurisdiction of the Superior Court on the ground that the claim constituted a collateral attack on the decision, which is barred by the grant to the Federal Court, by s. 18 of the *Federal Courts Act*, of exclusive judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals. The Superior Court dismissed the objection on the ground that it was not plain and obvious that the claim would fail. The Court of Appeal upheld the decision, holding that *Grenier* was wrongly decided. In that court's view s. 17 of the *Federal Courts Act* and s. 21 of the *Crown Liability and Proceedings Act* conferred concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown, and s. 18 of the *Federal Courts Act* did not remove relief by way of an award of damages from the jurisdiction of superior courts.

*Held:* The appeal should be dismissed.

This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary costs and complexity. The Court's approach should be practical and pragmatic with that objective in mind. Acceptance of *Grenier* would tend to undermine the effectiveness of the *Federal Courts Act* reforms of the early 1990s by retaining in the Federal Court exclusive jurisdiction over a key element of many causes of action proceeding in the provincial courts despite Parliament's prom-

ise to give plaintiffs a choice of forum and to make provincial superior courts available to litigants "in all cases in which relief is claimed against the [federal] Crown" except as otherwise provided.

Apart from constitutional limitations, none of which are relevant here, Parliament may by statute transfer jurisdiction from the superior courts to other adjudicative bodies including the Federal Court. However, any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language. Nothing in the *Federal Courts Act* satisfies this test. The explicit grant to the provincial superior courts of concurrent jurisdiction in claims against the Crown in s. 17 of that Act (as well as s. 21 of the *Crown Liability and Proceedings Act*) directly refutes the Attorney General's argument. The grant of exclusive jurisdiction to judicially review federal decision makers in s. 18 is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 "in all cases in which relief is claimed against the [federal] Crown". This reservation or subtraction is expressed in s. 18 of the *Federal Courts Act* in terms of particular remedies. All the remedies listed are traditional administrative law remedies and do not include awards of damages. If a claimant seeks compensation, he or she cannot get it on judicial review, but must file an action.

The *Federal Courts Act* contains other internal evidence that Parliament could not have intended judicial review to have the gatekeeper function envisaged by *Grenier*. Section 18.1(2) imposes a 30-day limitation for judicial review applications. A 30-day cut off for a damages claimant would be unrealistic, as the facts necessary to ground a civil cause of action may not emerge until after 30 days have passed, and the claimant may not be in a position to apply for judicial review within the limitation period. While the 30-day limit can be extended, the extension is discretionary and would subordinate the fate of a civil suit brought in a superior court to the discretion of a Federal Court judge ruling upon a request for an extension of time for reasons that have to do with public law concerns, not civil damages. Moreover, the grant of judicial review is itself discretionary and may be denied even if the applicant establishes valid grounds for the court's intervention. This does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course. Further, s. 8 of the *Crown Liability and Proceedings Act*, which codifies the defence of statutory authority, is evidence that Parliament envisaged that the lawfulness of administrative decisions could be assessed by the provincial superior court in the course of adjudicating a claim for damages.

The *Grenier* approach cannot be justified by the rule against collateral attacks. T's claim is not an attempt to invalidate or render inoperative the Minister's decision; rather, the decision and the financial losses allegedly consequent to it constitute the very foundation of the damages claim. In any event, given the statutory grant of concurrent jurisdiction in s. 17 of the *Federal Courts Act*, Parliament has stated that provincial superior courts possess the concurrent necessary jurisdiction to dispose of the whole of a claim and this includes any attack on the validity of the Minister's decision where this issue is essential to the cause of action and where adjudicating the matter is a necessary step in disposing of the claim. While the doctrine of collateral attack may be raised by the Crown in the provincial superior court as a defence, the possible availability of the defence is not an argument against provincial superior court jurisdiction. Similarly, while it may be open to the Crown, by way of defence, to argue that the government decision maker was acting under statutory authority which precludes compensation for consequent losses, this is not a matter of jurisdiction and can be dealt with as well by the provincial superior court as by the Federal Court.

It is true that the provincial superior courts and the Federal Court have a residual discretion to stay a damages claim if, in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. However, where a plaintiff's pleading alleges the elements of a private cause of action, the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that could be pursued on judicial review. If the plaintiff has pleaded a valid cause of action for damages, he or she should generally be allowed to pursue it.

Here, T's claim as pleaded is dominated by private law considerations. It is not attempting to nullify or set aside the decision to issue licences. Nor does it seek to deprive the decision of any legal effect. T's causes of action in contract, tort and equity are predicated on the finality of that decision excluding it from participation in the telecommunications market. The Ontario Superior Court of Justice has jurisdiction over the parties and the subject matter, and has the power to grant the remedy of damages. There is nothing in the *Federal Courts Act* to prevent the Ontario Superior Court from adjudicating T's claim.

### Cases Cited

**Overruled:** *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287; **referred to:** *Canada (Attorney General) v. McArthur*, 2010 SCC 63; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38; *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Agricultural Research Institute of Ontario v. Campbell-High* (2002), 58 O.R. (3d) 321, leave to appeal refused, [2003] 1 S.C.R. vii; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 F.C.R. 476; *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2008 FCA 362, [2009] 3 F.C.R. 568; *Donovan v. Canada (Attorney General)*, 2008 NLCA 8, 273 Nfld. & P.E.I.R. 116; *Lidstone v. Canada (Minister of Canadian Heritage)*, 2008 PESCTD 6, 286 Nfld. & P.E.I.R. 244; *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1; *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2009 BCSC 109, 92 B.C.L.R. (4) 379; *Leroux v. Canada Revenue Agency*, 2010 BCSC 865, 2010 D.T.C. 5123; *Fantasy Construction Ltd., Re*, 2007 ABCA 335, 89 Alta. L.R. (4) 93; *Genge v. Canada (Attorney General)*, 2007 NLCA 60, 270 Nfld. & P.E.I.R. 182; *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694; *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, 314 D.L.R. (4) 340, leave to appeal refused, [2009] 3 S.C.R. vii; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Pringle v. Fraser*, [1972] S.C.R. 821; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Morgentaler* (1984), 41 C.R. (3d) 262; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *Garland v. Consumers'*



*Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *Toronto (City) v. C. U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181; *City of Manchester v. Farnworth*, [1930] A.C. 171; *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, [2002] 10 W.W.R. 1, leave to appeal refused, [2003] 1 S.C.R. xi (sub nom. *Jones v. Attorney General of Canada*); *Lake v. St. John's City*, 2000 NFCA 48, 192 Nfld. & P.E.I.R. 84; *Neuman v. Parkland (County)*, 2004 ABPC 58, 30 Alta. L.R. (4) 161; *Danco v. Thunder Bay (City)* (2000), 13 M.P.L.R. (3d) 130; *Landry v. Moncton (City)*, 2008 NBCA 32, 329 N.B.R. (2d) 212; *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*, [1992] 1 A.C. 624.

### Statutes and Regulations Cited

*Civil Code of Québec*, R.S.Q., c. C-1991.

*Constitution Act, 1867*, ss. 96, 101.

*Corrections and Conditional Release Act*, S.C. 1992, c. 20.

*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, ss. 3, 8, 21.

*Federal Court Act*, S.C. 1970-71-72, c. 1.

*Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 2(1) "federal board, commission or other tribunal", 17, 18, 18.1, 18.4, 39, 50(1).

*Radiocommunication Act*, R.S.C. 1985, c. R-2.

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### History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Borins and Feldman JJ.A.), 2008 ONCA 892, 94 O.R. (3d) 19, 303 D.L.R. (4) 626, 245 O.A.C. 91, 86 Admin L.R. (4) 163, 40 C.E.L.R. (3d) 183, [2008] O.J. No. 5291 (QL), 2008 CarswellOnt 7826, affirming a decision of Morawetz J. (2007), 88 O.R. (3d) 173, [2007] O.J. No. 4766 (QL), 2007 CarswellOnt 7847. Appeal dismissed.

**Counsel:**

*Christopher M. Rupar, Alain Préfontaine and Bernard Letarte*, for the appellant.

*Peter F. C. Howard, Patrick J. Monahan, Eliot N. Kolers and Nicholas McHaffie*, for the respondent.

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The judgment of the Court was delivered by

**1 BINNIE J.:**-- TeleZone Inc. claims it was wronged by the decision of the Minister of Industry Canada that rejected its application for a licence to provide telecommunications services. It seeks compensation in the Ontario Superior Court of Justice against the Federal Crown for its claimed losses of \$250 million. It pleads breach of contract, negligence, and, in the alternative, unjust enrichment arising out of monies it had thrown away on the application.

**2** The Attorney General challenges the jurisdiction of the Superior Court to proceed with the claim for compensation unless and until TeleZone obtains from the Federal Court of Canada an order quashing the Minister's decision. TeleZone's claim, he says, constitutes an impermissible collateral attack on the Minister's order. Such a collateral attack is barred, he argues, by the grant to the Federal Court of *exclusive* judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals -- *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18. The Attorney General relies on a line of cases in the Federal Court of Appeal to this effect, giving particular prominence to *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, hence the "*Grenier* principle".

**3** The definition of "federal board, commission or other tribunal" in the Act is sweeping. It means "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" (s. 2), with certain exceptions, not relevant here, e.g., decisions of Tax Court judges. The federal decision makers that are included run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between. The *Grenier* principle would shield the Crown from private law damages involving any of these people or entities in respect of losses caused by unlawful government decision making without first passing through the Federal Court. Such a bottleneck was manifestly not the intention of Parliament when it enacted the judicial review provisions of the *Federal Courts Act*.

**4** The *Grenier* principle would undermine s. 17 of the same Act granting concurrent jurisdiction to the provincial superior courts "in all cases in which relief is claimed against the Crown" as well as the grant of concurrent jurisdiction to the superior courts in s. 21 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, to deal with tort claims. A central issue in some (but not all) damages claims against the federal Crown will be the "lawfulness" of the government decision said

to have caused the loss. *Grenier* would deny the provincial superior courts the jurisdiction to deal with that central issue in a damages claim pending before them. Adoption of the *Grenier* principle would relegate the provincial superior courts in such matters to a subordinate and contingent jurisdiction -- not concurrent, i.e., subordinate to the Federal Court's decision on judicial review and contingent on the Federal Court being willing to grant a discretionary order on judicial review in favour of the plaintiff.

5 The Ontario Court of Appeal rejected the Attorney General's position, and in my respectful opinion, it was correct to do so. *Grenier* is based on what, in my respectful view, is an exaggerated view of the legal effect of the grant of judicial review jurisdiction to the Federal Court in s. 18 of the *Federal Courts Act*, which is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 "in all cases in which relief is claimed against the [federal] Crown". The arguments of the Attorney General, lacking any support in the express statutory language of s. 18, are necessarily based on suggested inferences and implications, but it is well established that inferences and implications are not enough to oust the jurisdiction of the provincial superior courts.

6 In the present case, the Ontario Superior Court has jurisdiction over the parties, the subject matter and the remedies sought by TeleZone. That jurisdiction includes the authority to determine every legal and factual element necessary for the granting or withholding of the remedies sought unless such authority is taken away by statute. The *Federal Courts Act* does not, by clear and direct statutory language, oust the jurisdiction of the provincial superior courts to deal with these common law and equitable claims, including the potential "unlawfulness" of government orders. That being the case, the Superior Court has jurisdiction to proceed. The Ontario Superior Court ( (2007), 88 O.R. (3d) 173) and the Ontario Court of Appeal ( 2008 ONCA 892, 94 O.R. (3d) 19) so held. I agree. I would dismiss the appeal.

#### I. Facts

7 The alleged faults of the Minister of Industry Canada in dealing with the application under the *Radiocommunication Act*, R.S.C. 1985, c. R-2, are detailed in the amended Statement of Claim. For present purposes, we must take TeleZone's allegations as capable of proof.

8 TeleZone was created in 1992 with the ultimate goal of obtaining a licence to provide personal communication services ("PCS") -- essentially a cell phone network. In December 1992, as a preliminary step toward this goal, TeleZone obtained a licence to provide personal cordless telephone service ("PCTS"). Between 1993 and 1995, TeleZone alleges that it kept Industry Canada apprised of its efforts to raise capital and acquire the necessary expertise to provide PCS services. TeleZone says that Industry Canada encouraged it to continue these efforts.

9 In June 1995, Industry Canada issued a call for PCS licence applications ("the Call"), and released a document setting out the policy and procedural framework within which potential service providers could shape their applications (the "Policy Statement"). The Policy Statement provided that Industry Canada would grant up to six PCS licences on the basis of criteria it set out. TeleZone alleges that Industry Canada promoted a general policy in favour of awarding more rather than fewer licences to encourage competition and consumer choice. TeleZone governed itself accordingly.

10 Article 9.1 of the Call created a three-step application process: (1) expressions of interest by potential service providers; (2) detailed applications by potential service providers; and (3) the announcement and awarding of PCS licences by Industry Canada. Articles 9.4 to 9.5.6 set out the criteria that would be used to evaluate the applications. The Call did not explicitly reserve to Industry Canada the right to consider additional factors. TeleZone alleges that Industry Canada was prohibited from considering any criteria beyond the factors set out in the Call.

11 In September 1995 TeleZone submitted its detailed application for a PCS licence to Industry Canada, which was prepared, it says, at a cost of approximately \$20 million. In December 1995, Industry Canada announced its decision regarding the PCS licence applications. There were only four successful applicants. TeleZone was not among them.

12 The amended statement of claim pleads that it was either an express or implied term of the Policy Statement that Industry Canada would only issue fewer than six licences if fewer than six applications met the criteria (para. 12). TeleZone says that its application satisfied all the criteria in the Call. Accordingly, it says, the Minister must have considered factors other than those in the Call when it rejected TeleZone's application (para. 17). These other factors were not disclosed to TeleZone.

13 On the contractual branch of its case, TeleZone argues that the tendering process gave rise to a tendering contract (Contract A) which imposed an obligation on Industry Canada to act in accordance with the Call and the Policy Statement and to treat all applicants fairly and in good faith in awarding the PCS licences (R.F., at para. 133). TeleZone submits that the Crown breached "Contract A" by (1) granting fewer licences than it represented would be awarded; (2) not adhering to the requirements of the Call including the listed criteria (para. 134); and (3) failing to conform to a duty of care and a duty to act in good faith (para. 135).

14 In its amended statement of claim, TeleZone does not seek to impugn the Minister's decision to award the licences. TeleZone does not seek a licence for itself or to remove licences from the successful applicants; it simply seeks damages. Accordingly, TeleZone submits that whether or not the licences were validly issued to the other applicants is irrelevant because under the Call and Policy Statement, there was still room for two more PCS licences and TeleZone only takes issue with the conduct of the Crown *vis-à-vis* TeleZone itself (para. 136).

## II. Judicial History

### A. *Ontario Superior Court of Justice (Morawetz J.), (2007), 88 O.R. (3d) 173*

15 On a preliminary motion to dismiss TeleZone's action for want of jurisdiction, the Attorney General argued that TeleZone must first have the Minister's order quashed on judicial review in the Federal Court as a condition precedent to a civil suit against the Crown. TeleZone countered that its claim is based on causes of action that are distinct from an application for judicial review. It does not seek to set aside the licences. It seeks damages for negligence, breach of contract, or unjust enrichment. Morawetz J. dismissed the objection because, in his view, it was not plain and obvious that TeleZone's claim in the Superior Court would fail.

### B. *The Ontario Court of Appeal (Laskin, Borins and Feldman J.J.A.), 2008 ONCA 892, 94 O.R. (3d) 19*

16 Borins J.A., writing for a unanimous court, held that s. 17 of the *Federal Courts Act* and s. 21 of the *Crown Liability and Proceedings Act* conferred concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown. The Ontario Superior Court, as a court of general and inherent jurisdiction, may entertain any cause of action in the absence of legislation or an arbitration agreement to the contrary. Section 18 of the *Federal Courts Act* removed from the superior courts' jurisdiction the prerogative writs and extraordinary remedies listed (para. 94). Since the relief sought by TeleZone (damages) is not listed in s. 18, he concluded that the Superior Court continues to have jurisdiction. The appeal was dismissed.

### III. Relevant Enactments

#### 17 *Constitution Act, 1867*

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

*Federal Courts Act*, R.S.C. 1985, c. F-7

#### 2. (1) ...

"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

17. [Relief Against the Crown] (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

[Cases] (2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which

...

(b) the claim arises out of a contract entered into by or on behalf of the Crown;

...

(d) the claim is for damages under the *Crown Liability and Proceedings Act*.

[Relief in favour of Crown or against officer] (5) The Federal Court has concurrent original jurisdiction

...

(b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

18. [Extraordinary remedies, federal tribunals] (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

...

[Remedies to be obtained on application] (3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

18.1 [Application for judicial review] (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

[Time limitation] (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

[Powers of Federal Court] (3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

18.4 [Hearings in summary way] (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

[Exception] (2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

*Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50*

3. [Liability] The Crown is liable for the damages for which, if it were a person, it would be liable

(a) in the Province of Quebec, in respect of

- (i) the damage caused by the fault of a servant of the Crown, or
- (ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

(b) in any other province, in respect of

- (i) a tort committed by a servant of the Crown, or
- (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

8. [Saving in respect of prerogative and statutory powers] Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute, and, in particular, but without restricting the generality of the foregoing, nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.

21. [Concurrent jurisdiction of provincial court] (1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the

claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

#### IV. Analysis

**18** This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.

**19** If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

**20** The Attorney General argues that a detour to the Federal Court is necessary because the damages action represents a "collateral attack" prohibited by "inferences" derived from s. 18 of the *Federal Courts Act*. His argument, in a nutshell, is:

Simply pleading damages, or some other remedy that is not available by way of judicial review in the Federal Court, should not be accepted as a means to bypass the intention of Parliament that review of federal administrative decisions must take place in the Federal Court.

(Attorney General factum<sup>1</sup>, at para. 4)

**21** The Attorney General accepts that judicial review is not required "for all proceedings that in any manner involve a decision or conduct of a federal board, commission or tribunal" (para. 29). However, the detour is required for claims that engage, directly or indirectly, the "validity and unlawfulness" of such decisions (para. 2). "Lawfulness" is a broad term. The Attorney General uses "invalid" and "unlawful" conjunctively (e.g., at para. 49). He seems to use the term "unlawful" to cover virtually any government order that could lay the basis for a finding of fault in the private law sense although he excludes such bureaucratic actions as providing erroneous information, performing a "physical task or activity" negligently, or breaching a duty to warn (Factum, at para. 50).

**22** The Attorney General's concern is that permitting different damages claims to proceed in different provinces before a variety of superior court judges arising out of the same or related federal government decisions would re-introduce the spectre of inconsistency and uncertainty across Canada which the enactment of the *Federal Courts Act* was designed to alleviate. However, this concern must have been considered by Parliament when it granted concurrent jurisdiction in all cases in which relief is claimed against the federal Crown to the superior courts. Undoubtedly, the juxtaposition of ss. 17 and 18 of the *Federal Courts Act* creates a certain amount of subject matter overlap with respect to holding the federal government to account for its decision making. This degree of overlap is inherent in the legislative scheme designed to provide claimants with "convenience" and "a choice of forum" in the provincial courts (see statement of the Minister of Justice in Parliament,



*House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414), reproduced below, at para. 58).

23 I do not interpret Parliament's intent, as expressed in the text, context and purposes of the *Federal Courts Act*, to require an awkward and duplicative two-court procedure with respect to all damages claims that directly or indirectly challenge the validity or lawfulness of federal decisions. Such an outcome would have to be compelled by clear and explicit statutory language. Neither the *Federal Courts Act* nor the *Crown Liability and Proceedings Act* do so, in my opinion. With respect, not only is such language absent, but the reasonable inferences from both statutes, especially the concurrent jurisdiction in all cases where relief is claimed against the Crown granted to the provincial superior courts, leads to the opposite conclusion.

#### A. The Nature of Judicial Review

24 The Attorney General correctly points to "the substantive differences between public law and private law principles" (Factum, at para. 6). Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases or causes of action under the *Civil Code of Québec*, R.S.Q., c. C-1991, and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief.

25 Not all invalid government decisions result in financial losses to private persons or entities. Not all financial losses that *do* occur will lay the basis for a private cause of action. Subordinate legislative and adjudicative functions do not in general attract potential government liability for damages. For practical purposes, the real concern here is with executive decisions by Ministers and civil servants causing losses that may or may not be excused by statutory authority.

26 The focus of judicial review is to quash invalid government decisions -- or require government to act or prohibit it from acting -- by a speedy process. A bookstore, for example, will have a greater interest in getting its foreign books through Canada Customs -- despite ill-founded allegations of obscenity -- than in collecting compensation for the trifling profit lost on each book denied entry (*Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38). Thus s. 18.1 of the *Federal Courts Act* establishes a summary procedure with a 30-day time limit. There is no pre-hearing discovery, apart from what can be learned through affidavits and cross-examination. The applications judge hears no *viva voce* evidence. Damages are not available. Judicial review suits the litigant who wishes to strike quickly and directly at the action (or inaction) it complains about. A damages claimant, on the other hand, will often be unaware of the nature or extent of its losses in a 30-day time frame, and may need pre-trial discovery to either make its case or find out it has none.

27 The question must therefore be asked: What is the practical benefit to a litigant who wants compensation rather than a reversal of a government decision, to undergo the *Grenier* two-court procedure? TeleZone, for example, would acquire no practical benefit from a judicial review application. Its primary complaint is for damages arising from the breach of an alleged tendering contract. It no longer seeks the benefit of the contract (or the PCS licence). It seeks compensation for substantial costs thrown away and lost profits. The Crown does not argue that the tendering contract (if it was made) was *ultra vires*, or that the alleged breach (if it occurred) was mandated by statutory authority. The argument, instead, is that TeleZone's claim constitutes a collateral attack on the min-

isterial order under the *Radiocommunication Act* that failed to award it a PCS licence. But in TeleZone's circumstances, judicial review of the Minister's decision would not address the claimed harm and would seem to offer little except added cost and delay.

28 Negligence is also alleged by TeleZone. Tort liability, of course, is based on fault, not invalidity. As the Court made clear many years ago in *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, at pp. 222-25, breach of a statute is neither necessary nor is it sufficient to ground a private cause of action. It is not necessary because a government decision that is perfectly valid may nevertheless give rise to liability in contract. *Agricultural Research Institute of Ontario v. Campbell-High* (2002), 58 O.R. (3d) 321 (C.A.), leave to appeal refused, [2003] 1 S.C.R. vii, [2003] S.C.C.A. No. 8) or tort (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201).

29 Nor is a breach of statutory power necessarily sufficient. Many losses caused by government decision making do not give rise to any cause of action known to the law. As the Attorney General correctly points out, "[e]ven if a discretionary decision of a federal board, commission or tribunal has been declared invalid or unlawful, that in itself does not create a cause of action in tort or under the Quebec regime of civil liability" (Factum, at para. 28).

30 In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, Charron J. wrote that "[a] person accused of a criminal offence enjoys a private right of action when a prosecutor acts maliciously in fraud of his or other prosecutorial duties with the result that the accused suffers damage. However, the civil tort of malicious prosecution is not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion" (para. 7 (emphasis added)). H. Woolf, J. Jowell and A. Le Sueur point out in *De Smith's Judicial Review* (6th ed. 2007), that "[u]nlawfulness (in the judicial review sense) and negligence are conceptually distinct" (pp. 924-25). Put another way, while Crown liability in tort and the validity of an underlying administrative decision may generate some overlapping considerations, they present distinct and separate justiciable issues.

31 The main difficulty in suing government for losses arising out of statutory decisions is often not the public law aspects of the decision but the need to identify a viable private cause of action, and thereafter to meet such special defences as statutory authority. In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, for example, it was alleged that the conduct of the Registrar of mortgage brokers contributed significantly to the loss of some claimant investors, but it was held that there was insufficient proximity between the Registrar and the claimants to give rise to a duty of care. See also *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 8.

32 The enactment of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and the subsequent amendments in 1990 were designed to enhance government accountability as well as to promote access to justice. The legislation should be interpreted in such a way as to promote those objectives. The *Grenier* approach does not do so, in my respectful opinion, as will now be discussed.

#### B. The *Grenier* Case

33 The shadow of the *Grenier* case perhaps extends beyond what was intended by the *Grenier* court itself.

34 *Grenier* did not concern a conflict between the Federal Court and a provincial superior court. It concerned which of two alternative Federal Court modes of procedure should be pursued by an inmate of a federal penitentiary. He complained of the adverse effects of administrative segregation

for 14 days pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. The inmate did not seek judicial review of the decision of the head of the institution to place him in administrative segregation. Instead, after waiting three years, he brought an action for damages against the federal Crown under s. 17 of the *Federal Courts Act*. At trial, the administrative segregation was found to be arbitrary. He was awarded \$5,000 in compensatory and exemplary damages.

35 On appeal, the Attorney General objected that the inmate should have sought judicial review of his administrative segregation under s. 18 of the Act before bringing his action for damages under s. 17 of the Act. The argument, in essence, was that the *Federal Courts Act* has several procedural doors and the inmate had tried to enter the wrong one. He knocked on s. 17 whereas he should have gone through s. 18. The Federal Court of Appeal agreed, taking the view that "Parliament assigned the exercise of reviewing the lawfulness of the decisions of federal agencies to a single court, the Federal Court. This review must be exercised under section 18, and only by filing an application for judicial review" (para. 24 (emphasis added)). The court reasoned that even within the same court, the s. 17 action for damages constituted an impermissible collateral attack on the decision of the prison authority (at paras. 32-33) because the trial court "had to review the lawfulness of the institutional head's decision ... and set it aside" (at para. 34), which could only be done under s. 18 of the same Act. It was thought that the judicial review jurisdiction of the Federal Court, with its unique statutory procedure, must be protected from erosion. Such a conclusion, in the *Grenier* court's view, was consistent with *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706.

36 Moreover, according to the *Grenier* court, it made no difference that the administrative segregation Mr. Grenier complained of had long since been served. "[A] decision of a federal agency, such as the one by the institutional head in this case", the court reasoned, "retains its legal force and authority, and remains juridically operative and legally effective so long as it has not been invalidated" (para. 19). Accordingly, the prison order, even in its afterlife, was still a complete answer to the s. 17 damages action.

37 More recently, the Federal Court of Appeal itself seems to be losing some enthusiasm for *Grenier*'s "separate silos" approach. In *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 F.C.R. 476, the court allowed an application for judicial review to be converted into an action for damages which was also certified as a class action, Sexton J.A. commenting that "[s]ometimes, such as the case at bar, it may prove too cumbersome to initiate a separate action for damages either concurrently with, or subsequent to, an application for judicial review" (para. 50).

38 More recently in *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2008 FCA 362, [2009] 3 F.C.R. 568 (which, on appeal, was heard concurrently in this Court with the present appeal), Sharlow J.A., dissenting, took the view that "the *Grenier* principle was developed without taking into account certain aspects of the statutory scheme governing federal Crown litigation [including the *Crown Liability and Proceedings Act*] that in my view cast doubt on the *Grenier* analysis" (para. 41).

39 At the same time, some provincial courts have accepted the *Grenier* approach; see, e.g., *Donovan v. Canada (Attorney General)*, 2008 NLCA 8, 273 Nfld. & P.E.I.R. 116, *Lidstone v. Canada (Minister of Canadian Heritage)*, 2008 PESCTD 6, 286 Nfld. & P.E.I.R. 244. Most provincial courts, however, have either not followed *Grenier* or distinguished it: see, e.g., *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1, at para. 30; *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2009 BCSC 109, 92 B.C.L.R. (4th) 379, at para.

24; *Leroux v. Canada Revenue Agency*, 2010 BCSC 865, 2010 D.T.C. 5123, at para. 54; see also *Fantasy Construction Ltd., Re*, 2007 ABCA 335, 89 Alta. L.R. (4th) 93, at para. 43; *Genge v. Canada (Attorney General)*, 2007 NLCA 60, 270 Nfld. & P.E.I.R. 182, at para. 34.

#### C. The Attorney General's Expansive View of the Grenier Decision

40 According to the Attorney General, *Grenier* denied the jurisdiction of either the Federal Court or a provincial superior court to proceed to adjudicate a damage claim without first passing through the "unique" judicial review procedure set out in s. 18 of the *Federal Courts Act* if the "lawfulness" of an administrative decision or order is in issue. The Attorney General uses the expression "invalidity or lawfulness" which, he points out, may extend even to contract claims. He cites *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694, at pp. 703-706, where the Federal Court of Appeal concluded that the exercise by a Minister of a statutory power to seek tenders and to enter into contracts for the lease of land by the Crown could be subject to judicial review. See also *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, 314 D.L.R. (4th) 340, at paras. 21-25, leave to appeal refused, [2009] 3 S.C.R. vii, [2009] S.C.C.A. No. 252. However, in this Court's decision in *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, a tendering case, although in the end the claim was dismissed, there was no suggestion in the judgment that judicial review was a necessary preliminary step to the recovery of contract damages against the Crown.

41 Moreover, I do not think the Attorney General's position is supported by *Consolidated Maybrun* or its companion case of *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737. Those cases dealt with the narrow issue of whether a person facing penal charges for failing to comply with an administrative order can challenge the validity of the order by way of defence despite failure to take advantage of the appeal process provided for by the law under which the order was issued. In both cases, the Court paid close attention to the regulatory statute under which an order is made and concluded that to permit such a defence "would encourage conduct contrary to the [regulatory] Act's objectives and would tend to undermine its effectiveness" (*Consolidated Maybrun*, at para. 60). These cases thus stand for a rather nuanced view of where collateral attack is (or is not) permissible. The outcome largely depends on the court's view of the statute under which an order is made "and must be answered in light of the legislature's intention as to the appropriate forum" for resolving the dispute (*Consolidated Maybrun*, at para. 52). In my respectful view, having regard to these policy considerations, it would be adherence to the *Grenier* approach that "would tend to undermine [the] effectiveness" of the *Federal Courts Act* reforms which had as one of their objectives making the provincial superior courts an equally "appropriate forum" for resolving in an efficient way financial claims against the federal Crown.

#### D. The Jurisdiction of the Provincial Superior Courts

42 What is required, at this point of the discussion, is to remind ourselves of the rule that any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language: "[The] ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court ... requires clear and explicit statutory wording to this effect": *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 46; see also *Pringle v. Fraser*, [1972] S.C.R. 821, at p. 826; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 38. The Attorney General's argument rests too heavily on what he sees as the negative implications to be read into s. 18.

43 The oft-repeated incantation of the common law is that "nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged": *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88. In contrast, the jurisdiction of the Federal Court is purely statutory.

44 The term "jurisdiction" simply is shorthand for the collection of attributes that enables a court or tribunal to issue an enforceable order or judgment. A court has jurisdiction if its authority extends to "the person and the subject matter in question and, in addition, has authority to make the order sought": *Mills v. The Queen*, [1986] 1 S.C.R. 863, per McIntyre J., at p. 960, quoting Brooke J.A. in *R. v. Morgentaler* (1984), 41 C.R. (3d) 262, at p. 271, and per Lamer J., dissenting, at p. 890; see also *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 603; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 15; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. The Attorney General does not deny that the Superior Court possesses *in personam* jurisdiction over the parties, or dispute the superior court's authority to award damages. The dispute centres on subject matter jurisdiction.

45 It is true that apart from constitutional limitations (see, e.g., *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, and cases under s. 96 of the *Constitution Act, 1867*, which are not relevant here), Parliament may by statute transfer jurisdiction from the superior courts to other adjudicative bodies including the Federal Court. It did so, for example, with respect to the judicial review of federal decision makers: *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, at p. 154. However, the onus lies here on the Attorney General to establish the existence and extent of such a transfer of jurisdiction in statutory terms that are clear, explicit and unambiguous.

46 Nothing in the *Federal Courts Act* satisfies this test. Indeed, as mentioned, the explicit grant to the provincial superior courts of concurrent jurisdiction in claims against the Crown in s. 17 of that Act (as well as s. 21 of the *Crown Liability and Proceedings Act*) directly refutes it. As Sharlow J.A., dissenting, pointed out in *Parrish & Heimbecker Ltd.* (appeal allowed and judgment released concurrently herewith, 2010 SCC 64), s. 8 of the *Crown Liability and Proceedings Act*, which codifies the defence of statutory authority, is evidence that Parliament envisaged that the assessment of lawfulness would be made by the provincial superior court in the course of adjudicating a claim for damages (para. 39).

#### E. Claimed "Inferences" from Section 18 of the *Federal Courts Act*

47 An application for judicial review under the *Federal Courts Act* combines an allegation that a federal authority has acted contrary to the substantive principles of public law, along with a claim for one of the kinds of relief listed in s. 18(1). It is only this procedure that is in the exclusive jurisdiction of the Federal Court. As the Court recently observed in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, "[t]he genesis of the *Federal Courts Act* lies in Parliament's decision in 1971 to remove from the superior courts of the provinces the jurisdiction over prerogative writs, declarations, and injunctions against federal boards, commissions and other tribunals" (para. 34). Section 18 does *not* say that a dispute over the lawfulness of exercise of statutory authority cannot be assessed in the course of a trial governed by the *Crown Liability and Proceedings Act* brought in the provincial superior court or pursuant to s. 17 of the *Federal Courts Act* itself.

48 The Attorney General argues that a "remedies" oriented approach, similar to the view adopted by the Ontario Court of Appeal in this case, results in "a rigid, formalistic and literal interpretation" of s. 18 (Factum, at para. 66) and gives insufficient weight to context and, in particular, to the intention of Parliament. I agree that the context and Parliamentary purpose are essential to a proper interpretation of s. 18, but I do not think a broad and contextual approach assists the Attorney General's argument.

(i) The Parliamentary Context

49 The Parliamentary debates in 1971 took place in the context of the enormous growth of federal regulatory regimes, the perceived need for a "national perspective" on judicial review, and a concern about inconsistent supervision of federal public bodies by various provincial superior courts across the country (see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 2:4100). Thus, Parliament radically transformed the old Exchequer Court into a new Federal Court and crafted a new procedure which resulted in the Federal Court's supervisory jurisdiction over federal decision makers.

50 The Minister of Justice in 1970 emphasized that Parliament's concern was supervision (not compensation) and in particular its concern was about fragmented judicial review of federal adjudicative tribunals. One provincial superior court might uphold as valid an important decision, e.g., by the National Energy Board, which a superior court in a different province might decide to quash. Thus:

This multiple supervision [by the provincial courts], with a lack of consistent jurisprudence and application, can work serious hardship not only on the boards and commissions but on those who appear before them... It is for this reason ... that the conclusion was reached that this superintending jurisdiction should be vested in a single court that enjoyed the same nation wide jurisdiction as the federal boards, commissions and tribunals themselves. The bill is therefore designed to create a single and uniform basis of superintending jurisdiction in relation to federal boards and commissions and to place them on the same footing in this regard as provincial boards and commissions.

(*House of Commons Debates*, 2nd Sess., 28th Parl. March 25, 1970, at pp. 5470-71; see also Factum, at para. 79; *Khosa*, at para. 34.)

However, the very broad statutory definition in s. 2 of "federal board, commission or other tribunal" goes well beyond what are usually thought of as "boards and commissions" and its very breadth belatedly (and perhaps unintentionally) precipitated the *Grenier* controversy about how to prioritize the overlapping subject matter shared by judicial review and the trial of common law claims for compensation based on fault. The grant of concurrent jurisdiction in s. 17 does not negate the possibility of inconsistency, but Parliament has agreed to live with the possibility in the interest of easier access to justice.

(ii) The Statutory Text

51 The grant of *exclusive* jurisdiction to judicially review federal decision makers is found in s. 18 of the *Federal Courts Act* and is expressed in terms of particular remedies:

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

...

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

52 All of the remedies listed in s. 18(1)(a) are traditional administrative law remedies, including the four prerogative writs -- *certiorari*, prohibition, *mandamus* and *quo warranto* -- and declaratory and injunctive relief in the administrative law context. Section 18 does not include an award of damages. If a claimant seeks compensation, he or she cannot get it on judicial review. By the same token, the plaintiff in a damages action is not entitled to add a supplementary claim for a declaration or injunction to prevent the government from acting on a decision said to be tainted by illegality. That is the domain of the Federal Court.

(iii) Reading the Act as a Whole

53 There is much internal evidence in s. 18 and s. 18.1 of the *Federal Courts Act* to indicate that Parliament could not have intended judicial review to have the gatekeeper function envisaged by *Grenier*.

54 As mentioned, the 30-day limitation period for judicial review applications under s. 18.1(2) of the *Federal Courts Act* is one such indication. Such a short limitation is consistent with a quick and summary judicial review procedure -- but not a damages action. TeleZone's action in Ontario would have a six-year limitation. A 30-day cut off for a damages claimant would be unrealistic. The claimant may not be in a position to apply for judicial review within the limitation period. The facts necessary to ground a civil cause of action may not emerge until after 30 days have passed.

55 The 30-day limit can be extended by order of a Federal Court judge (s. 18.1(2)) but the extension is discretionary, and would subordinate the fate of a civil suit brought in a superior court to the discretion of a Federal Court judge ruling upon a request for an extension of time for reasons that have to do with public law concerns, not civil damages. In practical terms, the effect of the *Grenier* argument would be to impose a discretionary limitation period (determined by the Federal Court) on actions for damages against the Crown in a provincial superior court, an outcome which, in my opinion, Parliament cannot have intended. Apart from anything else, it undermines s. 39 of the *Federal Courts Act*, which provides that, ordinarily, claims against the Crown in the Federal Court are subject to the limitation period applicable "between subject and subject" in the province where the claim arose, or six years in respect of a "cause of action arising otherwise than in a province".

56 As recently affirmed in *Khosa*, the grant of relief on judicial review is in its nature discretionary and may be denied even if the applicant establishes valid grounds for the court's intervention:

... the language of s. 18.1 generally sets out threshold grounds which permit but do not require the court to grant relief. Whether or not the court should exercise its discretion in favour of the application will depend on the court's appreciation of the respective roles of the courts and the administration as well as the "circumstances of each case". [para. 36]

See also *Harekin v. University of Regina*, [1979] 2 S.C.R. 561, at pp. 592-93; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at p. 372. Such an approach does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course. In judicial review, "the discretionary nature of the courts' supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individual" (Brown and Evans, at para. 3:1100).

(iv) The 1990 Amendments to the Federal Courts Act

57 The current version of s. 17 of the *Federal Courts Act*, which only came into force on February 1, 1992, allows parties to institute civil claims against the Federal Crown in the superior courts of the provinces. For ease of reference, I repeat the operative language:

17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

The grant of jurisdiction is thus framed in terms of relief, i.e., "all cases in which relief is claimed" except as otherwise provided. Section 18(1) otherwise provides in relation to the specific forms of relief listed therein. Section 18(3) of the Act expressly provides that *remedies in the nature of judicial review* "may be obtained only on an application for judicial review made under section 18.1". The *Federal Courts Act* lists no other relevant exclusions from s. 17, and we have not been referred to any other Act of Parliament having a bearing on this subject.

58 As the Minister of Justice stated in 1989 before the Legislation Committee examining Bill C-38, which resulted in, among other changes, today's version of s. 17:

[W]e have made provision in the bill whereby ordinary common law and civil law actions for relief against the federal Crown, which are presently the exclusive jurisdiction of the Federal Court, may also be heard by provincial courts. Such provision acknowledges the fact that the Federal Court possesses no unique expertise in areas of ordinary contract and tort law. [The Minister here went on to describe the practical jurisdictional and procedural problems created by the Federal Court's prior exclusive jurisdiction over federal authorities.]

(*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-38*, No. 1, 2nd Sess., 34th Parl., November 23, 1989, at pp. 14-15)



On second reading of the Bill, the Minister again emphasized that the purpose of the amendments was to allow the plaintiffs to sue the federal Crown in either the provincial superior courts or the Federal Court:

For example, a person should be able to sue the Crown in a suitably convenient court for breach of contract to purchase goods or for negligent driving by a Crown employee that causes injuries to another motorist. At the moment, such actions can only be brought in the Federal Court. However, it is not as available as provincial courts.

...

Moreover, for both citizen and lawyer alike, provincial courts, including their procedures and personnel, are much more familiar.

Therefore, the Federal Court is often not the most convenient one for the private litigant. With this in mind, the government has proposed that both the provincial courts and the Federal Court share jurisdiction with respect to such actions, thereby generally giving a plaintiff a choice of forum. [Emphasis added.]

(*House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414)

59 The effect of the argument of the Attorney General, if accepted, would be to undermine the purpose and intended effect of the 1990 amendment by retaining in the Federal Court exclusive jurisdiction over a key element of many causes of action proceeding in the provincial courts despite the promise to give plaintiffs a "choice of forum" and to make available relief in the provincial superior courts that may be more "familiar" to litigants.

#### *F. The Doctrine of Collateral Attack*

60 The Attorney General contends that to permit TeleZone to proceed with its claim in the provincial superior court in the absence of prior judicial review would be to allow an impermissible "collateral attack" on the Minister's decision. The Court has described a collateral attack as

an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

(*Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599)

61 The rule is a judicial creation (which must therefore yield to a contrary legislative enactment) based on general considerations related to the administration of justice, as explained in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 72:

The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid

the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it. [Emphasis added.]

62 In *R. v. Litchfield*, [1993] 4 S.C.R. 333, the criminal case referred to in *Garland*, the Court declined to apply the rule against collateral attack. In *Garland* itself, class action plaintiffs brought a claim against a gas company seeking restitution on the grounds of unjust enrichment of late payment penalties previously approved by the Ontario Energy Board. In its defence, the gas company argued that the claim for restitution was a collateral attack on the Board's order. The defence failed.

63 I do not think the Attorney General's collateral attack argument can succeed on this appeal for three reasons. Firstly, as Borins J.A. pointed out in his scholarly judgment, the doctrine of collateral attack may be raised by the Attorney General in the provincial superior court as a defence if he or she believes that, in the particular circumstances, to do so is appropriate. However, the possible availability of the defence is not an argument against provincial superior court jurisdiction. Nor does it justify inserting the Federal Court into every claim for damages predicated on an allegation that the government's decision that caused the loss was "invalid or unlawful".

64 Secondly, TeleZone is not seeking to "avoid the consequences of [the ministerial] order issued against it" (*Garland*, at para. 72). On the contrary, the ministerial order and the financial losses allegedly consequent on that order constitute the foundation of the damages claim. This was the result in *Garland* itself, where Iacobucci J. held for the Court:

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply. [Emphasis added; para. 71.]

65 Similarly in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. declined to apply the collateral attack doctrine in a case arising out of a grievance arbitration where CUPE sought to challenge the underlying facts of a conviction of one of its members for sexual assault. Arbour J. reasoned that the Union's argument was "an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does" (para. 34).

66 Thirdly, the Attorney General's argument fails even if one takes a more expansive view of the doctrine of collateral attack, as does Professor David Mullan:

The cause of action [in *Garland*] depended necessarily on establishing the invalidity of the Board's order on which the utility was relying in collecting interest. If the order had been valid, there would have been no cause of action. This was in every sense a collateral attack on the Board's orders. Collateral attack is not and never has been confined to situations where the challenge is by way of resistance to the enforcement of an order. It is also implicated in situations where someone, in asserting a civil claim for monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based... [Emphasis added.]

(D. J. Mullan, "Administrative Law Update -- 2008-2009", Continuing Legal Education Conference, *Administrative Law Conference 2009*, October 2009, at p. 1.1.22)

In Professor Mullan's view, the Court in *Garland* should have taken what he sees as the more principled route of applying the factors in *Consolidated Maybrun* to determine whether the collateral attack was of a permissible variety. In that case, as set out in the judgment of L'Heureux-Dubé J., the appropriate factors to apply in determining whether the Court is confronted with an impermissible collateral attack on an administrative order are (1) the wording of the statute from which the power to issue the order derives; (2) the purpose of the legislation; (3) the availability of an appeal; (4) the nature of the collateral attack in light of the tribunal's expertise and *raison d'être*, (including whether "the legislature intended to confer jurisdiction to hear and determine the question raised"), and (5) the penalty on a conviction for failing to comply with the order (paras. 45, 50-51 and 62). These factors have also been applied in the civil context; see, generally, K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at p. 11-9.

67 Judicial doctrine necessarily yields to a contrary statutory enactment. Accepting, as Professor Mullan puts it, at p. 1.1.22, that the rule against collateral attack may be "implicated in situations where someone, in asserting a civil claim for monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based", the s. 17 statutory grant of concurrent jurisdiction again defeats the Attorney General's submission. This is because the claimant's "need to attack a law or order" is essential to its cause of action, and adjudication of that allegation (even if raised by way of reply) is a necessary step in disposing of the claim. Parliament has stated that provincial superior courts possess the concurrent necessary jurisdiction to dispose of the whole of such a claim, not just part of it.

68 In summary, I agree with Borins J.A. that the *Grenier* approach cannot be justified by the rule against collateral attack.

#### G. The Defence of Statutory Authority

69 It would also be open to the Crown, by way of defence to a damages action, to argue that the government decision maker was acting under a statutory authority which precludes compensation for consequent losses. This, again, is a matter of defence, not jurisdiction. It is a hurdle facing any claimant. Governments make discretionary decisions all the time which will inflict losses on people or businesses without conferring any cause of action known to the law.

70 In a case of nuisance, for example, the claimant property owner may have all the elements of a good common law action in nuisance yet be defeated by the defence that the government was authorized to do what it did and that collateral damage to the claimant was an inevitable result of the authority so provided. See, e.g., P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 139, and Horsman and Morley, at p. 6-41.

71 However, as stated earlier, the defence of "statutory authority" will not always provide a complete answer to a damages claim. In some cases, the outcome may depend on whether the statute either explicitly or implicitly authorized the act that caused the harm. In *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, Sopinka J. pointed out, referring to the dictum of Viscount Dunedin in *City of Manchester v. Farnworth*, [1930] A.C. 171 (H.L.), that there may be "alternate methods of carrying out the work [that would have avoided the loss]. The mere fact that one

is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance" (p. 1226). Reference should also be made to the qualifying observation of what is "practically impossible" made by Viscount Dunedin and quoted by Sopinka J., at p. 1224:

The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense. [Emphasis added.]

This caveat, also quoted by Wilson J., at p. 1213 of *Tock*, was the subject of some disagreement on the Court, an issue that need not detain us. The issue of statutory authority does not go to the jurisdiction of the provincial superior courts. That is all that needs to be decided here.

72 It is sufficient to say that it is always open to the Crown to argue the defence of statutory authority; see, e.g., in s. 8 of the *Crown Liability and Proceedings Act*:

Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute.

The defence of statutory authority is regularly interpreted and applied by the provincial superior courts, see, e.g., *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, [2002] 10 W.W.R. 1, leave to appeal refused, [2003] 1 S.C.R. xi, [2002] S.C.C.A. No. 385, (*sub nom. Jones v. Attorney General of Canada*); *Lake v. St. John's City*, 2000 NFCA 48, 192 Nfld. & P.E.I.R. 84; *Neuman v. Parkland (County)*, 2004 ABPC 58, 36 Alta. L.R. (4th) 161; *Danco v. Thunder Bay (City)* (2000), 13 M.P.L.R. (3d) 130 (Ont. S.C.J.); *Landry v. Moncton (City)*, 2008 NBCA 32, 329 N.B.R. (2d) 212.

73 I give an example. In *Ryan v. Victoria (City)*, the "inevitable result" defence was tested in a claim for damages arising out of road works. Mr. Ryan, a motorcyclist, sued the municipality and a railway for negligence and nuisance after he was injured while crossing tracks in an urban area. The front wheel of the plaintiff's motorcycle got caught in the flangeway gap of the rail whose width was at the upper end of the allowed range set by the applicable regulation. The defence argued statutory authority. Writing for a unanimous Court, Major J. noted that "[s]tatutory authority provides, at best, a narrow defence to nuisance" (at para. 54), and rejected it on the facts of the case.

74 For present purposes, we need go no further than to repeat that "statutory authority" is an argument that goes to defence, not jurisdiction. If the provincial superior court (or the Federal Court under s. 17) finds that the government has a good defence based on statutory authority, it will simply dismiss the claimant's action.

#### H. The Concern About "Artful Pleading"

75 The Crown contends that TeleZone's argument would risk putting judicial review of federal decision makers back in the provincial superior courts dressed up as damage claims. On this view

the "artful pleader" will forum-shop by the way the case is framed. Of course, "artful pleaders" exist and they will formulate a claim in a way that best suits their clients' interests. However, no amount of artful pleading in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement. Such relief is not available in the provincial superior court. The claimant must, as here, be content to take its money (if successful) and walk away leaving the order standing.

76 Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.

77 In the U.K., a similar position has been expressed by the House of Lords in *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*, [1992] 1 A.C. 624, *per* Lord Bridge, at pp. 628-29:

[W]here a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.

It is generally true here, as it is in the U.K., that a plaintiff is not required to bring an application for judicial review so long as private rights are legitimately engaged by the action. Under the English authorities, as in Canada, there is a special concern where the availability of judicial review depends on special leave, or is restricted by an abbreviated limitation period, or where the relief available on judicial review is discretionary (*Roy, per* Lord Lowry, at p. 654). See also P. P. Craig, *Administrative Law* (6th ed. 2008), at p. 869. These considerations echo the concerns already canvassed in rejecting the *Grenier* approach.

78 To this discussion, I would add a minor *caveat*. There is always a residual discretion in the inherent jurisdiction of the provincial superior court (as well as in the Federal Court under s. 50(1) of its Act), to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.

#### 1. *Application to the Facts*

79 TeleZone is not attempting to nullify or set aside the Minister's order. Its case is that the Minister, in deciding not to issue a licence to TeleZone, acted in breach of his contractual and equitable duties or in breach of a duty of care. TeleZone does not say that the Minister's decision should be quashed. On the contrary, TeleZone's causes of action in contract, tort and equity are predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby (it says) causing it financial loss. Nor does TeleZone seek to deprive the Minister's decision of any legal effect. It does not challenge the licences issued to its competitors. It does not

seek to undo what was done. It complains about what was *not* done, namely fulfilment by Industry Canada of its alleged contractual and equitable duties and its duty of care towards TeleZone itself.

80 To the extent that TeleZone's claim can be characterized as a collateral attack on the Minister's order (i.e., because the order failed to include TeleZone), I conclude, for the reasons discussed, that the grant of concurrent jurisdiction to determine claims against the Crown to the provincial superior courts negates any inference the Crown seeks to draw that Parliament intended the detour to the Federal Court advocated by *Grenier*. The TeleZone claim as pleaded is dominated by private law considerations. In a different case, on different facts, the Attorney General is free to raise "collateral attack" as a defence and the superior court will consider and deal with it.

#### V. Disposition

81 The Superior Court of Ontario has jurisdiction over the parties and the subject matter, and has the power to grant the remedy of damages. There is nothing in the *Federal Courts Act* to prevent the Ontario Superior Court from adjudicating this claim. I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

#### **Solicitors:**

*Solicitor for the appellant: Attorney General of Canada, Ottawa.*

*Solicitors for the respondent: Stikeman Elliott, Toronto.*

cp/e/qlccl/qljyw/qlcal/qlced/qlhcs

<sup>1</sup> The Attorney General's principal argument was filed in the companion case of *Canada (Attorney General) v. McArthur*, 2010 SCC 63, and references herein are to that factum unless otherwise noted.

*Indexed as:*  
**Canadian Council for Refugees v. Canada (F.C.A.)**

**Her Majesty The Queen (Appellant)**  
**v.**  
**Canadian Council for Refugees, Canadian Council of**  
**Churches, Amnesty International and John Doe**  
**(Respondents)**

[2009] 3 F.C.R. 136

[2009] 3 R.C.F. 136

[2008] F.C.J. No. 1002

[2008] A.C.F. no 1002

2008 FCA 229

No. A-37-08

Federal Court of Appeal

**Richard C.J., Noël and Evans J.J.A.**

Heard: Toronto, May 21, 2008;  
Judgment: Ottawa, June 27, 2008.

(131 paras.)

**Catchwords:**

*Citizenship and Immigration -- Exclusion and Removal -- Removal of Refugees -- Appeal from Federal Court decision declaring invalid Immigration and Refugee Protection Regulations, ss. 159.1-159.7, Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries -- Factors to be considered before designating safe third country under Immigration and Refugee Protection Act (IRPA), s. 102(1) set out in IRPA, s. 102(2) -- Compliance with United Nations Convention Relating to the Status of Refugees, Art. 33, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3 to be assessed on basis of*

*appreciation by Governor in Council (GIC) of country's policies, practices, human rights record -- As GIC giving due consideration to factors, forming opinion U.S. compliant, nothing left to judicially review -- GIC's obligation to review limited to monitoring IRPA, s. 102(2) factors so as to be in position to reassess opportunity of maintaining designation should evolution of factors so require -- Appeal allowed.*

*Constitutional Law -- Charter of Rights -- Whether Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Immigration and Refugee Protection Regulations, ss. 159.1-159.7 (implementing Regulations) violating Charter, ss. 7, 15 -- Respondent organizations' ability to bring Charter challenge depending on John Doe -- As latter never presenting [page137] himself at border, never requesting determination regarding eligibility, no factual basis upon which to assess alleged Charter breaches.*

*Construction of Statutes -- Immigration and Refugee Protection Act (IRPA), s. 102(1) providing broad grant of authority to give effect to Parliament's expressed intent responsibility for consideration of refugee claims be shared with countries respectful of human rights, obligations under United Nations Convention Relating to the Status of Refugees, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment -- Factors to be considered, set out in IRPA, s. 102(2), general in nature, indicative of Parliament's intent matter of compliance be assessed on basis of appreciation by Governor in Council of country's policies, practices, human rights record.*

#### **Summary:**

This was an appeal from a decision of the Federal Court declaring invalid sections 159.1 to 159.7 of the *Immigration and Refugee Protection Regulations* and the *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* (Safe Third Country Agreement).

The Regulations implement into domestic law the Safe Third Country Agreement whereby if a refugee enters Canada from the U.S. at a land border port of entry, Canada will, subject to specified exceptions, send the refugee back to the U.S., and *vice versa*. The applications Judge found that compliance with Article 33 of the *United Nations Convention Relating to the Status of Refugees* and Article 3 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* was a condition precedent to the designation by the Governor in Council (GIC) of the U.S. as a safe third country under section 102 of the *Immigration and Refugee Protection Act* (IRPA), and that since the U.S. did not comply with either, the Safe Third Country Agreement and the implementing provisions of the Regulations were *ultra vires* section 102 of the IRPA, violated sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, and were not saved under section 1 of the Charter.

*Held*, the appeal should be allowed.

*Per* Noël J.A. (Richard C.J. concurring): The matter raised herein was a pure *vires* issue. Therefore the applicable standard of review was that of correctness.

[page138]



The impugned Regulations and the Safe Third Country Agreement are not *ultra vires* the IRPA. Subsection 102(1) of the IRPA gives the GIC the power to promulgate regulations governing the treatment of refugee claims which may include provisions designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture. This is a broad grant of authority intended to give effect to Parliament's expressed intent that responsibility for the consideration of refugee claims be shared with countries that are respectful of their Convention obligations and human rights. The factors to be considered before designating a country are expressly set out in subsection 102(2) of the IRPA. The applications Judge's misapprehended concern that the GIC would have the discretion to designate a country that does not comply with the Conventions led him to transform the statutory objective of designating countries "that comply" into a condition precedent. This error was compounded by the applications Judge's further conclusion that what must be established is "actual" compliance or compliance "in absolute terms". Subsection 102(1) of IRPA does not refer to such compliance, nor does it otherwise specify the type and extent of compliance contemplated. However, Parliament has specified the four factors to be considered in determining whether a country can be designated. These factors are general in nature and are indicative of Parliament's intent that the matter of compliance be assessed on the basis of an appreciation by the GIC of the country's policies, practices and human rights record. Once it is accepted, as it was in this case, that the GIC has given due consideration to these four factors, and formed the opinion that the candidate country is compliant with the relevant articles of the Conventions, there is nothing left to be reviewed judicially. There was no suggestion in this case that the GIC acted in bad faith or for an improper purpose.

The applications Judge erred when he concluded that the GIC failed to ensure the continuing review of the United States as a safe third country as required by subsection 102(2). The obligation to review is not intended to monitor "actual" compliance or compliance "in absolute terms" but is intended to ensure that the GIC continues to monitor the factors identified in subsection 102(2) so as to be in a position to reassess the opportunity of maintaining the designation should the evolution of the factors so require. The GIC was not in breach of this obligation herein.

The applications Judge adopted a hypothetical approach to the respondent organizations' Charter challenge, i.e. that a class of refugees would be treated a certain way if they were to present themselves at a Canadian land border port of entry. This approach went against the well-established principle that a Charter challenge cannot be mounted in the abstract. There was no evidence that a refugee would have to bring a challenge [page 139] from outside Canada. The respondent organizations' ability to bring the Charter challenge depended on John Doe. As the latter never presented himself at the border and therefore never requested a determination regarding his eligibility, there was no factual basis upon which to assess the alleged Charter breaches. The applications Judge thus erred in entertaining the Charter challenge.

*Per Evans J.A. (concurring):* The reasons for concluding that the applications Judge erred in determining the merits of the Charter challenges to the Regulations were, for the most part, equally applicable to the administrative law challenge. To grant the declaratory relief sought by the respondents would have been premature and served little useful purpose. Since the application for judicial review should have been dismissed without a determination of the substantive issues raised, no questions should have been certified, and none should have been answered.

The issues of statutory interpretation and the scope of judicial review raised by the respondents' application were not so clear and incontrovertible that they warranted a departure from the guiding principle of judicial restraint that it is generally better to say less than more.

In any event, a declaration of invalidity of the impugned Regulations is not required in order to ensure that they are not applied to claimants in breach of Canada's international obligations not to refoule, or the Charter.

### **Statutes and Regulations Judicially Considered**

*Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, 5 December 2002, [2004] Can. T.S. No. 2, Art. 8(3).

*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 7, 15.

*Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, [1987] Can. T.S. No. 36, Art. 3.

*Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community*, 15 June 1990, Dublin. (Dublin Convention).

[page140]

*Federal Courts Act*, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 2(2) (as enacted by S.C. 1990, c. 8, s. 1; 2006 c. 9, s. 38), 18 (as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26).

*Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 (as am. by SOR/2005-339, s. 1).

*Immigration Act*, R.S.C., 1985, c. I-2.

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 3, 5 (as am. by S.C. 2004, c. 15, s. 70), 101, 102.

*Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 159.1 to 159.7 (as enacted by SOR/2004-217, s. 2).

*United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6, Art. 33.

### **Cases Judicially Considered**

Applied:

*Sunshine Village Corp. v. Canada (Parks)*, [2004] 3 F.C.R. 600; (2004), 238 D.L.R. (4th) 647; 16 Admin. L.R. (4th) 242; 2004 FCA 166.

*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190; (2008), 329 N.B.R. (2d) 1; 291 D.L.R. (4th) 577; 2008 SCC 9.

Distinguished:

*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 2002 SCC 1.

**Considered:**

*Canadian Council of Churches v. Canada*, [1990] 2 F.C. 534; (1990), 68 D.L.R. (4th) 197; 44 Admin. L.R. 56; affd [1992] 1 S.C.R. 236; (1992), 88 D.L.R. (4th) 193; 2 Admin. L.R. (2d) 229.

*Canadian Council for Refugees v. Canada* (2008), 373 N.R. 387; 2008 FCA 40.

*Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; (1985), 17 D.L.R. (4th) 422; 12 Admin. L.R. 137.

*Thorne's Hardware Ltd. et al. v. The Queen et al.*, [1983] 1 S.C.R. 106; (1983), 143 D.L.R. (3d) 577; 46 N.R. 91.

*Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595; (1995), 125 D.L.R. (4th) 141; 30 Imm. L.R. (2d) 139.

*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; (1998), 36 O.R. (3d) 418; 154 D.L.R. (4th) 193.

*Regina (Yogathas) v. Secretary of State for the Home Department*, [2003] 1 A.C. 920; 2002 UKHL 36.

**Referred to:**

*United States v. Burns*, [2001] 1 S.C.R. 283; (2001), 195 D.L.R. (4th) 1; [2001] 3 W.W.R. 193; 2001 SCC 7.

[page141]

*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; (1999), 170 D.L.R. (4th) 1; 43 C.C.E.L. (2d) 49.

*Saskatchewan Wheat Pool v. Canada (Attorney General)* (1993), 107 D.L.R. (4th) 190; 17 Admin. L.R. (2d) 243; 67 F.T.R. 98 (F.C.T.D.).

*Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission*, [2004] 2 F.C.R. 3; (2003), 233 D.L.R. (4th) 298; 312 N.R. 128; 2003 FCA 381.

*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; (1998), 160 D.L.R. (4th) 193; 11 Admin. L.R. (3d) 1; amended reasons [1998] 1 S.C.R. 1222; (1998), 11 Admin. L.R. (3d) 130.

*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173.

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### **History and Disposition:**

APPEAL from a decision of the Federal Court ( [2008] 3 F.C.R. 606; (2007), 74 Admin. L.R. (4th) 176; 164 C.R.R. (2d) 130; 2007 FC 1262) declaring invalid the *Immigration and Refugee Protection Regulations*, sections 159.1 to 159.7, and the *Agreement between the Government of Canada and the Government of the United [page 142] States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*. Appeal allowed.

### **Appearances:**

David Lucas, Gregory G. George and Matina Karvellas for appellant.

Barbara L. Jackman, Andrew Brouwer and Leigh Salsberg for respondents Canadian Council for Refugees and Canadian Council of Churches.

Lorne Waldman for respondent Amnesty International.

### **Solicitors of record:**

Deputy Attorney General of Canada for appellant.

Jackman & Associates, Toronto, for respondents Canadian Council for Refugees and Canadian Council of Churches.

Waldman & Associates, Toronto, for respondent Amnesty International.

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*The following are the reasons for judgment rendered in English by*

**1 NOËL J.A.:**-- This is an appeal from a decision of Phelan J. [[2008] 3 F.C.R. 606 (F.C.)) (the applications Judge), granting an application for judicial review by the Canadian Council for Refugees, the Canadian Council of Churches, Amnesty International and John Doe (the respondents),

declaring invalid sections 159.1 to 159.7 [as enacted by SOR/2004-217, s. 2] of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), and the *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* [5 December 2002, [2004] Can. T.S. No. 2] (otherwise known as the Safe Third Country Agreement).

2 In particular the applications Judge found that compliance with Article 33 of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (entered into force April 22, 1954) (the [page143] Refugee Convention) and Article 3 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, [1987] Can. T.S. No. 36 (entered into force June 26, 1987) (the Convention against Torture, together the Conventions [or Refugee and Torture Conventions]), was a condition precedent to the Governor in Council's (the GIC) exercise of its delegated authority under section 102 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA) to designate the United States of America (the U.S.) as a safe third country and that, on the evidence before him, the U.S. did not comply with either. Accordingly, he held that the Safe Third Country Agreement and the implementing provisions of the Regulations were *ultra vires* the enabling legislation, section 102 of the IRPA; violated sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (the Charter) and were not saved by section 1 of the Charter.

3 On appeal, Her Majesty the Queen (the appellant) argues that the applications Judge erred in law by reviewing the Regulations as an administrative decision and that he erred in fact and in law in concluding that there was a real risk of refoulement where a refugee is returned to the U.S. Further, the appellant argues that the applications Judge erred in law in concluding that the Regulations violate the Charter.

## RELEVANT FACTS

### Background

4 The Regulations at issue implement into domestic law a Safe Third Country Agreement between Canada and the U.S. whereby if a refugee enters Canada from the U.S. at a land border port of entry, Canada will, subject to specified exceptions, send the refugee back to the U.S. The same applies for refugees crossing by land from Canada into the U.S.

[page144]

5 A "safe third country" clause first appeared in Canadian law in the 1988 amendments to the *Immigration Act*, R.S.C., 1985, c. I-2, as amended by R.S.C., 1985 (4th Supp.), c. 28 and c. 29 (the *Immigration Act*). The provision allowed for the designation of another country as a "safe third country" such that refugee claimants seeking to enter Canada via such a country would not be permitted to claim protection in Canada.

6 In 1989, the Canadian Council of Churches challenged the constitutionality of this clause, among others, however, the Federal Court of Appeal in *Canadian Council of Churches v. Canada*, [1990] 2 F.C. 534 (C.A.), held that the challenge was premature as no country had yet been desig-

nated under the clause. The Supreme Court of Canada in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at page 253 (*Canadian Council of Churches*) also disallowed the challenge, however, on the ground that the Canadian Council of Churches lacked standing to bring the challenge as there was a more reasonable and effective way to bring it, i.e., by a refugee.

7 Through the 1990s, the Government of Canada continued to negotiate with the U.S. regarding a Safe Third Country Agreement. On December 12, 2001, the U.S.-Canada *Smart Border Declaration: Building a Smart Border for the 21st Century on the Foundation of a North American Zone of Confidence* was issued, setting out a 30-Point Action Plan that included a new commitment to negotiate an agreement.

8 On June 28, 2002, the IRPA came into effect and as part of the IRPA, Parliament granted the GIC authority to designate a country as "safe" that, based on its laws, practices and human rights record, complies with Article 33 of the Refugee Convention and Article 3 of the Convention against Torture. These provide:

[page145]

#### Refugee Convention

##### Article 33

##### *Prohibition of Expulsion or Return ("Refoulement")*

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

#### Convention against Torture

##### Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

9 Section 5 [as am. by S.C. 2004, c. 15, s. 70] of the IRPA requires that a certain class of regulations involving matters of public interest be laid before the House of Parliament prior to promulgation. The Regulations in issue in the present proceeding come within that class and were placed before the House prior to promulgation.

10 Further, the GIC's authority to enter into a safe third country agreement is found at sections 101 and 102 of the IRPA:

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

...

[page146]

(e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence....

...

102. (1) The regulations may govern matters relating to the application of sections 100 and 101, may, for the purposes of this Act, define the terms used in those sections and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions

(a) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;

(b) making a list of those countries and amending it as necessary; and

(c) respecting the circumstances and criteria for the application of paragraph 101(1)(e).

(2) The following factors are to be considered in designating a country under paragraph (1)(a):

(a) whether the country is a party to the Refugee Convention and to the Convention Against Torture;

(b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;

(c) its human rights record; and

(d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

(3) The Governor in Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country. [My emphasis.]

11 The final text of the Safe Third Country Agreement with the U.S. was signed on December 5, 2002. The GIC formally designated the U.S. two years later, on October 12, 2004, by promulgating section 159.3 of the Regulations, which came into force December 29, 2004:

**159.3** The United States is designated under paragraph 102(1)(a) of the Act as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention [page 147] Against Torture, and is a designated country for the purpose of the application of paragraph 101(1)(e) of the Act.

12 Also promulgated on the same occasion were sections 159.1 to 159.7 of the Regulations, (these are reproduced as Appendix I to these reasons) according to which refugee claimants who request protection at the U.S.-Canada border by land are denied access to the refugee determination process in Canada unless they meet one of the enumerated exceptions in the Regulations (section 159.5):

- family member[s] of Canadian citizens [...] permanent residents [or] protected persons;
- unaccompanied minors;
- holders of Canadian travel documents;
- persons who do not need visas to enter Canada but need visas to enter the U.S.;
- persons who were refused entry to the U.S. without having their claim adjudicated or permanent residents of Canada being removed from the U.S.;
- persons who are subject to the death penalty; and
- persons who are nationals of countries to which the relevant Minister has imposed a stay on removal orders.

13 Throughout the negotiations leading to the execution of the Safe Third Country Agreement and its implementation by the promulgation of the Regulations, the United Nations High Commissioner for Refugees (the UNHCR) monitored the process in order to ensure that persons seeking protection from persecution would have access to a full and fair procedure to assess their claims (see Scofield affidavit, appeal book, Vol. 11, Tab 33, Exhibit B4, at page 3126; Scofield affidavit, appeal book, Vol. 11, Tab 33, Exhibit B5, at page 3135). Its monitoring role was formally recog-



nized in Article 8, paragraph 3 of the Safe Third Country Agreement, and extends to the ongoing review of the operation of the Agreement.

[page148]

#### Leave and judicial review application

14 On December 29, 2005, the respondents launched an application for leave and judicial review seeking a declaration that the designation of the U.S. under section 102 of the IRPA was *ultra vires*, that the GIC erred in concluding that the U.S. complied with Article 33 of the Refugee Convention and Article 3 of the Convention against Torture and further, that the designation breached sections 7 and 15 of the Charter. For purposes of clarity, it is useful to set out in full the issues set out in the judicial review application filed before the Court:

- (1) The designation, under Paragraph 159.3 of the *Regulations Amending the Immigration and Refugee Protection Regulations* and Sections 5(1) and 102 of the *Immigration and Refugee Protection Act*, of the United States of America as a country that complies with Article 33 of the 1951 *Convention relating to the Status of Refugees* and Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* is an error of fact and law.
- (2) The designation, under Paragraph 159.3 of the *Regulations Amending the Immigration and Refugee Protection Regulations* and Sections 5(1) and 102 of the *Immigration and Refugee Protection Act*, of the United States of America, and the resulting application of the ineligibility provision under Section 101(1)(e) to such persons who do not meet one of the exceptions specified under Paragraphs 159.4, 159.5 or 159.6 of the *Regulations*:
  - a. is patently unreasonable and is an error of fact and law;
  - b. is contrary to the obligation set out in Section 3(3)(f) of the *Immigration and Refugee Protection Act* to apply the legislation in a manner that complies with international human rights instruments to which Canada is a signatory, and is therefore *ultra vires* the Governor-in-Council;
  - c. is in breach of the rights to life, liberty, and/or security of the person of those subject to it and is not in accordance with the principles of fundamental justice, contrary to Section 7 of the Charter, and is not justified under Section 1 of the Charter; and

[page149]

- d. is in breach of the rights to equality before and under the law and to equal protection and benefit of the law without discrimination, contrary to Section 15 of the Charter, and is not justified under Section 1 of the Charter.

15 The remedies sought were a declaration that the designation of the U.S. is *ultra vires* the GIC and in breach of sections 7 and 15 of the Charter; that the delegation of authority to determine eligibility under paragraph 101(1)(e) of the IRPA to officers at ports of entry, and the failure to provide access to counsel during such eligibility determinations are contrary to the principles of natural justice and are in breach of section 7 of the Charter -- the second aspect of this remedy (access to counsel) was denied by the applications Judge (reasons, at paragraphs 288 and 289) and is no longer in issue -- and any other relief as the applicants may advise and that the Court may permit (appeal book, application for leave and for judicial review, Vol. 1, at page 133).

16 Leave to proceed with the application was granted on June 29, 2006.

17 In the supplementary memorandum of fact and law, which the respondents filed in support of their judicial review application, after leave was granted, they also argued that the GIC had, since the time of promulgation, breached its obligation to ensure a continuing review pursuant to subsection 102(3) of the IRPA (respondents' supplementary memorandum of fact and law, appeal book, Vol. 1, at page 200, paragraphs 89 to 97).

#### Standing

18 The respondent organizations argued for public interest standing as organizations that advocate for refugee rights. In the context of this generalized attack on the Regulations, the involvement of John Doe, whose identity is protected by a confidentiality order, becomes relevant. John Doe is a U.S. refugee claimant who was denied refugee status in the U.S. and claimed that he would have sought asylum in Canada but for the Regulations (John [page 150] Doe affidavit, appeal book, Vol. 2, at page 390, paragraph 25).

19 John Doe was initially denied refugee status in the U.S. after arriving with his wife from Colombia on June 18, 2000, on a tourist visa. Approximately 14 months later, on August 9, 2001, the U.S. commenced removal proceedings against John Doe and his wife. On December 14, 2001, John Doe submitted an application for asylum and, in the alternative, a withholding of removal based on a fear of persecution. His application was denied as a result of having failed to apply for refugee status within one year of arriving in the U.S. and his application for withholding removal was refused because he failed to establish his claim on the standard of "a clear probability of persecution" required for withholding to be granted (John Doe affidavit, appeal book, Vol. 2, at page 389, paragraphs 23 and 24). He did not appeal this decision and continued to live illegally in the U.S. He never approached the Canadian border as he had been informed (from an unknown source) that he was ineligible to make a claim in Canada (John Doe affidavit, appeal book, Vol. 2, at page 390, paragraph 25).

20 During the course of the proceedings before the Federal Court, counsel for the respondent organizations also represented John Doe as he had no independent counsel. On February 1, 2007, John Doe was arrested by U.S. authorities and faced imminent deportation. The respondents filed a motion for an injunction before the Federal Court to compel the appellant "to allow John Doe and his wife to enter Canada" pending the disposition of the judicial review application which they had brought, or in the alternative, an order "restraining the [appellant] from denying him and his wife entry to Canada" (appeal book, Vol. 15, at page 4588). Accompanying this motion were renewed

allegations of threats by the Revolutionary Armed Forces of Colombia (the FARC) directed against John Doe.

21 On February 7, 2007, the applications Judge issued a conditional order providing that if John Doe were to arrive at a Canadian port of entry, he was not to be removed by Canadian authorities (appeal book, Vol. [page151] 15, at page 4586). The applications Judge declined to provide any other relief until John Doe had exhausted all his remedies before the U.S. courts (appeal book, Vol. 15, at page 4588). In the meantime, the U.S. Board of Immigration Appeals reopened John Doe's claim and remanded it to an immigration judge for reconsideration and John Doe was eventually released from custody. Consequently, Phelan J. dismissed the remaining aspects of the respondents' motion which he had kept in abeyance (appeal book, Vol. 15, at page 4610).

#### The evidence

22 In support of their application for judicial review, the respondents filed a series of affidavits from U.S. academics and practitioners (reasons [of the applications Judge], at paragraph 106 [subsequent references to reasons also refer to those of the applications Judge]), covering various aspects of U.S. asylum law and policy until the filing of the application. These affidavits attempt to establish the current state of U.S. asylum law and policy and generally allege an erosion of U.S. institutions, laws and practices including an expansion of exclusions from protection, the use of detention, restrictions on appeals and codification of questionable asylum laws. In particular, the affidavit evidence was adduced by the respondents to demonstrate:

That persons who fail to make a claim within one year of their arrival in the U.S. are improperly barred from consideration for asylum contrary to the Refugee Convention and although a claimant would still be eligible for a withholding removal, the U.S. law imposes a higher risk standard in relation to withholding removals, being -- more likely than not (supplementary memorandum, appeal book, Vol. 1, page 200, at paragraphs 48-55);

The U.S. exclusion from consideration for asylum or withholding of removal of serious criminals, those who are a danger to security or terrorists goes further than what is permitted by the Conventions (*idem*, at paragraphs 56-57);

That the U.S. interprets too narrowly certain of the criteria under the Convention for granting protection. In particular, they contend that the U.S. fails to interpret the definition of refugee [page152] and that the U.S. errs in the risk standard for torture (*idem*, at paragraphs 67-73);

That the U.S. practices impeded the successful advancement of a protection claim, more particularly by the detention of persons who are without valid status in the U.S. and those who arrive without proper documents (expedited removal) as well as by the failure to provide state-funded legal representation at all stages of the refugee determination process (*idem*, at paragraph 74 and Martin affidavit, appeal book, Vol. V, page 1210, at paragraphs 37, 38 and 191).

23 The appellant also adduced expert affidavit evidence (reasons, at paragraph 106) covering the history and development of the safe third country concept in the European Union (the EU) member

states, including the United Kingdom (the U.K.), information on the background, negotiations and terms of the Safe Third Country Agreement, the process leading to the designation of the U.S. as a safe third country and the adoption of the implementing Regulations, the compatibility of responsibility sharing agreements with the Refugee and Torture Conventions, a description of the U.S. refugee determination system and analysis of the specific areas of U.S. refugee laws and practices and human rights record attacked by the respondents, comparisons of the U.S. approach with the various approaches taken in the EU, U.K. and Canada in the specific areas impugned by the respondents and the implementation of the Safe Third Country Agreement at the Canada-U.S. border.

24 In addition, on cross-examination of Bruce Scoffield, lead Citizenship and Immigration Canada official in the negotiation of the Safe Third Country Agreement with the U.S., the appellant provided a copy of the "advice" that Cabinet had received regarding U.S. compliance with the factors set out in subsection 102(2) of the IRPA, dated September 24, 2002.

25 The parties confirmed that the witnesses adduced their evidence by way of sworn statements and that all cross-examinations thereon took place outside the presence of the applications Judge.

[page153]

#### The outcome

26 In a lengthy decision comprising 340 paragraphs, the applications Judge allowed the application for judicial review, declaring that: the Safe Third Country Agreement and sections 159.1 to 159.7 of the Regulations were *ultra vires*; the GIC acted unreasonably in concluding that the U.S. was compliant with its Convention obligations; the GIC had failed to ensure continuing review of the designation of the U.S. as a safe third country as required by subsection 102(2) of the IRPA; and sections 159.1 to 159.7 of the Regulations violated sections 7 and 15 of the Charter.

27 The formal judgment delivered on January 17, 2008, certifies the following three questions for consideration by this Court:

- (1) What is the appropriate standard of review in respect of the Governor-in-Council's decision to designate the United States of America as a "safe third country" pursuant to s. 102 of the *Immigration and Refugee Protection Act*?
- (2) Are paragraphs 159.1 to 159.7 (inclusive) of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement between Canada and the United States of America *ultra vires* and of no legal force and effect?
- (3) Does the designation of the United States of America as a "safe third country" alone or in combination with the ineligibility provision of clause 101(1)(e) of the *Immigration and Refugee Protection Act* violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and is such violation justified under section 1?

28 Although also asked to certify a question about whether the respondents had standing to bring forth the application for the judicial review, the applications Judge declined to do so (appeal book, Vol. 15, at page 4616).

29 The present appeal ensued and by order dated January 31, 2008 [(2008), 373 N.R. 387 (F.C.)], the Chief Justice stayed the operation of the judgment until the present pronouncement.

[page154]

#### FEDERAL COURT DECISION

30 The applications Judge first determined that the three respondent organizations had standing to bring the judicial review application. In particular, he held that they had successfully established the third prong of the standing test, i.e. the absence of any other reasonable and effective manner to have this matter brought before a court. The applications Judge noted that no refugee from within Canada, seeking entry, can bring the claim. Only a refugee from outside Canada, an already vulnerable individual, could bring the challenge (reasons, at paragraphs 43, 44 and 45). The applications Judge distinguished the decision of the Supreme Court in *Canadian Council of Churches* on that basis (reasons, at paragraph 40). He went on to conclude that even without John Doe, these organizations bear recognition as legitimate applicants (reasons, at paragraph 51).

31 In addressing John Doe's standing, the applications Judge reasoned that it is of no import that John Doe never approached the Canadian border as such a requirement would be wasteful, delaying and unfair (reasons, at paragraph 47). While the applications Judge acknowledged that the U.S. agreed to reconsider John Doe's claim, he did not accept that this was done in good faith. According to the applications Judge, this development can only be explained by the litigation undertaken before him (reasons, at paragraph 53). The applications Judge therefore reasoned that even though John Doe never showed up, he was to be considered as having presented himself at the border and as having been denied entry.

32 The applications Judge begins his substantive analysis by referring to the promulgation on October 12, 2004, of section 159.3 of the Regulations designating the U.S. as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention against Torture (reasons, at paragraph 26). He describes "this designation" as "the central point of contention in this judicial review" (*idem*).

[page155]

33 He later repeats (reasons, at paragraph 55) that the central issue is whether section 159.3 is *ultra vires* the power given by Parliament to make such regulations (hereinafter the *vires* issue). That in turn depends on whether the conditions precedent for the exercise of the delegated authority by the GIC were present when the designation was made.

34 The applications Judge then begins exploring these conditions. He acknowledges that subsection 102(2) of the IRPA sets out several factors which must be considered before designating a country and that the GIC considered these factors before designating the U.S. as a safe third country (reasons, at paragraph 78):

The wording of the [Regulatory Impact Analysis Statement] establishes that the GIC considered the application of the four factors. Furthermore, the [respondents] set out in detail the content of a memorandum to the GIC created on September 24, 2002, and signed by the relevant Minister at the time. This memorandum appears to be the basis upon which the GIC entered into the STCA. In reviewing the points the [respondents] extract from that memorandum, it is clear that the GIC, in reading and reviewing the Minister's memorandum would have turned their mind to the four factors in the legislation, including the U.S. human rights record in general.

35 However, beyond the conditions set out in subsection 102(2) of the IRPA, the applications Judge holds that the main condition is paragraph 102(1)(a) of the IRPA, which provides that the GIC is authorized to promulgate regulations "designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention against Torture" (reasons, at paragraph 79). According to the applications Judge compliance with the Conventions is a condition precedent to the exercise by the GIC of its delegated authority (*idem*). Although the issue whether the U.S. complies is, to some extent, a matter of opinion (reasons, at paragraph 80), the question to be decided is objective "compliance or not" (reasons, at paragraph 83).

36 The applications Judge then addresses the standard of review. Later in his reasons he acknowledges that determining whether the conditions precedent to the [page 156] exercise of the delegated authority are present is a simple matter that stands to be reviewed on a standard of correctness (reasons, at paragraph 75). However, the respondents also take issue with the "decision" of the GIC which led to the designation, "an argument involving the standard of review and its application" (reasons, at paragraph 54). After conducting a pragmatic and functional analysis (reasons, at paragraphs 88 to 105), the applications Judge holds that the applicable standard of review is reasonableness *simpliciter* (as it was then known).

37 He then embarks on an extensive analysis to determine both whether the designation was *ultra vires*, and whether the GIC had failed to perform its statutory duty to review the designation thereafter as contemplated by subsection 102(2) of the IRPA. The applications Judge does not explain how this second issue came to be part of the judicial review application.

38 With respect to the extensive expert evidence filed by the parties (he highlights six affidavits filed on behalf of the respondents and three on behalf of the appellant) expressing contradictory opinion on the issue whether the U.S. was compliant with the relevant articles of the Conventions, the applications Judge rules in two swift paragraphs that the respondents' evidence is to be preferred whenever there is a conflict in views (reasons, at paragraphs 108 and 109):

I find the [respondents'] experts to be more credible, both in terms of their expertise and the sufficiency, directness and logic of their reports and their cross-examination thereon. I also recognized and have given the appropriate weight to the fact that some of the [respondents'] experts could be said to speak for or have "constituencies" which means that their evidence may lean in a direction more favourably to the constituency. The same can be said for the [appellant's] experts who testify in support of either a process in which they have been engaged from the beginning or in support of a system they have worked in. Taking account of

these subjective factors, I find the [respondents'] experts to be more objective and dispassionate in their analysis and report.

Therefore, I have been persuaded that, where in conflict, the [respondents'] evidence is to be preferred.

[page157]

39 The applications Judge then proceeds to review what he describes as "legal facts" to ascertain whether the U.S. protects refugees from refoulement. He notes that the issue is whether the U.S. offers "actual" protection (reasons, at paragraph 136). The applications Judge collapses into one his analysis of whether the designation was validly made and whether the GIC had subsequently failed to conduct an ongoing review as required by subsection 102(3) of the IRPA. He indiscriminately reviews evidence which precedes and follows the effective date of the designation before concluding both that the designation was *ultra vires* and that the GIC had thereafter failed to conduct the ongoing review as required by subsection 102(3) of the IRPA (reasons, at paragraph 240). The formal judgment gives effect to both of these conclusions. (Although this is not said anywhere in the formal judgment or the reasons, both conclusions cannot stand at once. If the designation of the U.S. was *ultra vires* as was found, the GIC could not have breached its ongoing obligation to review it.)

40 In addressing the Charter challenge, the applications Judge first determines that the applicable standard of review for determining whether the designation of the U.S. as a safe third country violates the Charter is correctness (reasons, at paragraph 276). According to the applications Judge, if Canadian officials return a refugee claimant to the U.S., pursuant to the Safe Third Country Agreement, this action must be in compliance with the Charter (reasons, at paragraph 281; relying on *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 and *United States v. Burns*, [2001] 1 S.C.R. 283). He then proceeds to address the Charter challenge based on his earlier finding that the U.S. is not compliant with the Conventions.

41 According to the applications Judge, a refugee's right to life, liberty and security is clearly put at risk when he or she is returned to the U.S. under the Safe Third Country Agreement, if the U.S. does not comply with the Conventions (reasons, at paragraph 285). In considering whether the deprivation of a person's right to life, liberty and security is nevertheless in accordance with the fundamental principles of justice, he finds that [page158] the lack of discretion for a Canadian immigration officer to allow a claimant to remain in Canada after determining that the claimant does not fall within the enumerated exceptions to the Safe Third Country Agreement, violates the principles of fundamental justice (reasons, at paragraphs 304 and 307).

42 While recognizing that his conclusion is based on his findings under the *vires* analysis that the U.S. is not a safe country, the applications Judge suggests that the Regulations may violate the Charter even if the U.S. was a safe country (reasons, at paragraphs 311 and 312).

43 Turning to the section 15 Charter challenge, the applications Judge finds, following an examination of the relevant factors (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at paragraph 51), that there is discrimination. According to the applications Judge,

women and Colombian nationals have suffered a pre-existing disadvantage and the use of limited exceptions to the Safe Third Country Agreement does not address the specific needs of these individuals (reasons, at paragraphs 325 to 333). Furthermore, this unequal treatment cannot be justified under section 1 of the Charter (reasons, at paragraphs 335 and 336).

#### POSITION OF THE PARTIES

44 Dealing with the *vires* issue, the appellant contends that the applications Judge erred by reviewing the promulgation of section 159.3 of the Regulations, which designates the U.S. as a safe third country, as if it was an administrative decision to be assessed on a standard of reasonableness. According to the appellant the matter before the applications Judge was a pure *vires* issue, and his only task was to verify whether the conditions precedent for the exercise of the delegated authority were present at the time of the promulgation.

45 The appellant contends that the applications Judge erred in finding that compliance with the relevant articles of the Conventions in an absolutist sense is a condition precedent to the exercise of the delegated authority. [page159] Paragraph 102(1)(a) of the IRPA sets out the statutory objective which is to designate countries that comply with the Conventions and the means of ascertaining compliance are set out in subsection 102(2) of the IRPA. By finding that "compliance" in an absolutist sense is a condition precedent, the applications Judge second guessed the promulgation of the designation. As such he usurped the authority which Parliament had expressly delegated to the GIC.

46 In the alternative, the evidence establishes that the U.S. complies with the relevant articles of the Conventions. The conclusion reached by the applications Judge that the U.S. is not compliant is based on a "perverse" approach to the evidence as revealed by his one-sided assessment of the expert evidence, and his failure to confront the position of the UNHCR that the U.S., like Canada, is a "safe" country (Scofield affidavit, appeal book, Vol. 11, Tab 33, Exhibit B-10, at page 3247).

47 Finally, with respect to the Charter violations found to have taken place, the appellant argues that Charter litigation does not involve administrative law standards of judicial review. Rather, a person alleging Charter violations has the burden of demonstrating infringement on a balance of probabilities. The appellant submits that the applications Judge ignored these fundamental principles and erred in undertaking a Charter analysis in the context of a purely hypothetical situation.

48 The respondents, for their part, contend that the applications Judge came to the correct conclusion for the reasons that he gave with respect to all the issues that he was called upon to decide. They further submit that it would be "absurd" to construe the relevant provisions of the IRPA as allowing the GIC to designate a country that does not "actually" comply with the relevant articles of the Conventions.

49 The respondents add that this appeal is an attempt to relitigate factual issues. The findings made by the applications Judge on the U.S. protection system and [page160] human rights record cannot be reviewed in the absence of a palpable or overriding error, none of which has been established.

50 At the hearing of the appeal, counsel for the respondents indicated that, rather than striking down sections 159.1 to 159.7 of the Regulations, the applications Judge could have limited his Charter remedy to a declaration that the Regulations were in breach of the Charter only to the extent that they fail to give border officers the discretion to allow a refugee claimant to remain in Canada on grounds other than those enumerated in section 159.5 of the Regulations (see paragraph 12



above). According to counsel, this absence of discretion is what creates a real risk of refoulement for a class of refugees, contrary to section 7 of the Charter.

## ANALYSIS AND DECISION

### First certified question: Standard of review

51 The first question certified by the applications Judge deals with the *vires* issue and seeks to identify the appropriate standard of review in respect of the GIC's "decision" to designate the U.S. as a safe third country. In this respect, a preliminary issue arises as to whether the promulgation of the designation is a "decision" subject to judicial review pursuant to section 18 [as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. *idem*, s. 14)] (the *Federal Courts Act*).

52 When served with the application for judicial review, the GIC had the obligation pursuant to the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 [as am. by SOR/2005-339, s. 1] to forward to the Federal Court Registry the reasons for the "decision" to promulgate the designation. The position taken by the GIC in this regard is set out in a letter forwarded to the Registry on February 4, 2006, the body of which reads:

[page161]

This is in response to a request pursuant to Rule 9 of the *Federal Court Immigration and Refugee Protection Rules*, 1993.

While there is no decision as such in this case, the *Regulations Amending the Immigration and Refugee Protection Regulations*, S.O.R./2004-217, constitute the decision and reasons.

Pursuant to Rule 9(2)(a) of the *Federal Court Immigration and Refugee Protection Rules*, 1993, I certify the enclosed two copies as correct copies of the original.

53 This response with which the respondents do not take issue (notice of application, appeal book, Vol. I, at pages 133 to 135) conforms with the generally accepted view that the "decision" of the GIC to promulgate regulations, just like the "decision" by members of Parliament to enact legislation, is not subject to review by the courts (as to the latter, note subsection 2(2) of the *Federal Courts Act* (originally introduced by S.C. 1990, c. 8, s. 1 [and am. by S.C. 2006, c. 9, s. 38]) which provides that "[f]or greater certainty," the House of Commons is not a federal board and therefore not subject to judicial review). That said, the legality or *vires* of a regulation promulgated under the authority of Parliament has always been open to challenge before the courts and to that extent, the actions of the GIC are subject to judicial review. This distinction between what can be reviewed and what falls outside the purview of the courts is highlighted by the Supreme Court in *Thorne's Hardware Ltd. et al. v. The Queen et al.*, [1983] 1 S.C.R. 106, at page 111:

The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond judicial review: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at p. 748. I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and where there is therefore fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with: *R. v. National Fish Co.*, [1931] Ex. C.R. 75; *Minister of Health v. The King (on the Prosecution of Yaffe)*, [1931] A.C. 494 at p. 533. Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an order in council on jurisdictional or other [page 162] compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case.

54 The dividing line was succinctly identified by Strayer J.A. in *Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 (C.A.), at page 602:

It goes without saying that it is not for a court to determine the wisdom of delegated legislation or to assess its validity on the basis of the court's policy preferences. The essential question for the court always is: does the statutory grant of authority permit this particular delegated legislation? [Footnote omitted.]

55 Until 1990, the procedure for attacking the *vires* of a regulation promulgated under the authority of Parliament was by way of declaratory action initiated by way of a statement of claim (David Sgayas *et al.*, *Federal Court Practice, 1991-92* (Scarborough: Thomson Professional Publishing Canada, 1991), at page 89). Since then (see the amendment of the *Federal Courts Act* brought by S.C. 1990, c. 8, s. 4), the procedure for controlling the legality of subordinate legislation has been streamlined, and judicial review under section 18 of the *Federal Courts Act* became the means of controlling decisions of administrative bodies as well as the *vires* of subordinate legislation (*Saskatchewan Wheat Pool v. Canada (Attorney General)* (1993), 107 D.L.R. (4th) 190 (F.C.T.D.), at paragraphs 11 to 15).

56 This modification was procedural in nature. An attack on the legality of subordinate legislation, on the ground that the conditions precedent prescribed by Parliament were not met at the time of the promulgation, remains what it has always been; an attack on the impugned regulation *per se* and not on the "decision" to promulgate it.

57 Understanding precisely what is in issue in a judicial review application is important when it comes time to determine the standard of review as well as the scope of the review that can be conducted by the Court. An attack aimed at the *vires* of a regulation involves the narrow question of whether the conditions precedent set [page 163] out by Parliament for the exercise of the delegated authority are present at the time of the promulgation, an issue that invariably calls for a standard of correctness. As was stated by this Court in *Sunshine Village Corp. v. Canada (Parks)*, [2004] 3 F.C.R. 600, at paragraph 10:

Reviewing whether subordinate legislation is authorized by its enabling statute does not require application of the pragmatic and functional approach. Rather,

the *vires* of subordinate legislation is always to be reviewed on a correctness standard. See, for analogous circumstances in respect of municipal by-laws, *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, at paragraph 5.

58 The Supreme Court recently reiterated in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 59, that "true questions of *vires*", such as the one here in issue, always call for a standard of correctness without the need to conduct a pragmatic and functional analysis.

59 In this case, there was confusion as to whether the issue raised by the application for judicial review is one of *vires* or whether the subject-matter of the application is a challenge of the GIC's "decision" to promulgate the designation. The confusion appears to have arisen from the manner in which the respondents presented their case (reasons, at paragraph 54):

This judicial review has been argued from two perspectives. The first is an attack on the legitimacy of the Regulations -- an argument as to "*vires*." The second is an attack on the GIC decision which led to the Regulation -- an argument involving the standard of review and its application.

The applications Judge in his reasons refers at times to a review of "the GIC's determination" (reasons, at paragraph 88); a review of the "initial conclusions leading to" the promulgation of the Regulations (reasons, at paragraph 105) and his certified question seeks to identify the standard of review applicable to the GIC's "decision" to designate the U.S.

60 Despite this language, the matter raised by the application is a pure *vires* issue (see the relevant part of the application for judicial review quoted at paragraph [page 164] 15 above). This is not controversial as counsel for the respondents (Mr. Waldman) acknowledged that they were out of time to challenge the "decision" to promulgate the Regulations even if they had wanted to. Nevertheless, the applications Judge chose to conduct a pragmatic and functional analysis in order to identify the standard of review. He said (reasons, at paragraph 88):

Unlike many cases of review of the *vires* of a regulation, the parties had access to some of the material before the GIC in its consideration of the relevant factors. Therefore, there is a record upon which the Court can apply a standard of review to the GIC's determination.

Applying the framework of analysis developed by the Supreme Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 -- because "*Suresh* ... most closely approximates the contextual circumstances of this case" (reasons, at paragraph 92) -- the applications Judge concluded that reasonableness was the appropriate standard (reasons, at paragraph 105).

61 With respect, the applications Judge did not need to conduct a pragmatic and functional analysis and he identified the wrong standard. Having access to part of the record before the GIC has no impact on the standard since there is in this case no decision to review. In *Suresh*, the Supreme Court was confronted with the judicial review of a decision of an immigration official to issue a deportation order. Hence the Supreme Court began its analysis stating (*Suresh*, at paragraph 29):

The first question is what standard should be adopted with respect to the Minister's decision that a refugee constitutes a danger to the security of Canada.

62 No such issue arises here again because there is no decision to review.

63 The applications Judge therefore misspoke when he directed his question to the standard of review applicable to the "decision" of the GIC. In my respectful view, the first certified question should have been directed at the standard of review applicable to the review of the [page165] *vires* issue, and the standard applicable in such a case is correctness.

Second certified question: The *vires* of the designation

64 The second certified question should therefore be read as asking whether -- applying a standard of correctness -- the impugned Regulations and the Safe Third Country Agreement are *ultra vires* the IRPA. This requires the Court to identify the conditions precedent to the GIC's exercise of its delegated authority and determine whether these conditions were satisfied at the time of promulgation.

65 If I have correctly stated the issue to be decided, the Court has before it all the elements required to address it, and I do not see how I could avoid dealing with the question certified by the applications Judge on this point. As we have seen, the respondents have raised *vires* as a self-standing issue and the applications Judge dealt with it on that basis (reasons, at paragraphs 61 to 87, 106 to 236 and 241 to 263). Contrary to the Charter challenge (see discussion below), the question whether the GIC has in this case acted in conformity with the conditions precedent prescribed by law is neither hypothetical nor theoretical.

66 On a plain reading of sections 101 and 102 of the IRPA, the conditions precedent for the exercise of the delegated authority are those set out in subsection 102(2) of the IRPA. The reasoning of the applications Judge for concluding that beyond those, the country must "comply" with the relevant articles of the Conventions is as follows (reasons, at paragraphs 78 and 79):

With respect to what is authorized in terms of regulation making, there are several conditions precedent that accompany the authority of the GIC to designate the U.S. a safe third country. First, subsection 102(2) sets out several factors which must be considered before designating a country. There are no strict standards established for the consideration of the four factors but their consideration is phrased in mandatory language.

The main condition at issue in this case is paragraph 102(1)(a), which states that the GIC is authorized to enact [page166] regulations that include provisions "designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture" (underlining added). The provision requires that compliance with the non-refoulement provisions of the Refugee Convention and the CAT is a necessary precondition to designation. It was my conclusion earlier that if a country did not comply with the relevant articles of the two Conventions, the GIC had no power to designate the country as "safe." It is my further conclusion that in reaching this determination, the GIC must base its decision on the practices and policies of that government in respect

of claims under the Refugee Convention and the obligations under the Convention Against Torture.

67 The earlier conclusion to which he refers is the following (reasons, at paragraphs 56 and 57):

However, read as a whole, section 102 gives to the GIC the discretion to enter into an STCA only upon specific conditions, a fundamental condition is compliance with the specific articles of the Refugee Convention and Convention Against Torture. I do not interpret the provision as giving the GIC the power to enter into an STCA where the country does not comply with those preconditions. It simply gives the GIC the discretion to set up a regulation to designate a country as "safe" if the country meets the conditions of compliance.

To interpret subsection 102(1) as giving the GIC discretion to enter into such agreements with countries that did not comply with the Refugee Convention and Convention Against Torture would make a mockery of Canada's international commitments, of the very purpose of our domestic laws and even of the internal logic of subsection 102(1). There would be no need to consider whether the country is a party to the Refugee Convention and Convention Against Torture (paragraph 102(2)(a)), nor that country's policies and practices with respect to claims under the Refugee Convention or its obligations under the Convention Against Torture -- both factors are compulsory factors to be considered. Nor would there be any merit in requiring an ongoing review of these factors (subsection 102(3)) which is a requirement phrased in directory terms "must ensure the continuing review." [My emphasis.]

68 In so saying, the applications Judge accepted the respondents' submission that "actual" compliance was a [page 167] condition precedent to the exercise of the delegated authority. According to the applications Judge, what had to be shown is "actual" protection from refoulement (reasons, at paragraph 136). He puts the matter this way earlier in his reasons (reasons, at paragraph 60):

In my view, the issue is whether the conditions for passing the Regulations have been met on an objective basis. The conditions are framed in terms of legal criteria and address the matter in absolute terms of compliance with international law [my emphasis]; not [emphasis in original] in terms of the GIC's opinion or reasonable belief in such compliance.

69 His lengthy analysis of the evidence focuses on whether "actual" compliance or compliance "in absolute terms" with the respective conventions had been demonstrated (reasons, at paragraphs 106 to 236 and 241 to 263). With respect to Article 33 of the Refugee Convention, he held that the "instances of non-compliance" were such that the U.S. could not be said to comply (reasons, at paragraph 240). With respect to the Convention against Torture, he finds that the respondents' evidence that the U.S. does not comply with Article 3 "more credible" than the appellant's since it was supported by "real life examples" that the U.S. does not comply (reasons, at paragraph 262). The applications Judge, applying a standard of reasonableness to what he perceives as a "decision", con-

cludes that the U.S. does not comply with either Conventions, and that the designation of the U.S. as a safe country, was *ultra vires* the IRPA.

70 I note in passing that in reaching this conclusion the applications Judge did not concern himself with the fact that much of the evidence that he reviewed was not in existence when the GIC designated the U.S. since it relates to cases, events and legislative modifications, which are subsequent to the date of the promulgation. More is said about this later.

71 I agree with counsel for the respondents that the question whether the applications Judge properly construed [page168] the conditions precedent to the exercise of the delegated authority raises a pure issue of statutory construction (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraph 21):

... the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

72 Paragraph 101(1)(e) of the IRPA provides that a person entering Canada from a "designated country" is ineligible to have his or her claim for refugee protection considered by the Immigration and Refugee Board. For the purpose of giving effect to this provision, subsection 102(1) of the IRPA gives the GIC the power to promulgate regulations governing the treatment of such claims which may include provisions designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention against Torture; and respecting the circumstances and criteria applicable to a claimant who comes to Canada from such a country. This is a broad grant of authority intended to give effect to Parliament's clearly expressed intent that responsibility for the consideration of refugee claims be shared with countries that are respectful of their Convention obligations and human rights.

73 In this respect, subsection 102(2) of the IRPA requires that the GIC consider, prior to designating a country, the country's policies and practices with respect to the Refugee Convention and the Convention against Torture as well as its human rights record. In recognition of the fact that such policies, practices and record can evolve over time, subsection 102(3) of the IRPA requires the GIC to conduct an ongoing review of these factors once a country has been designated. Where the GIC concludes by reasons of the evolution of those factors that the designation is no longer warranted, section 159.7 of the Regulations allows the Government of Canada to unilaterally suspend or terminate the Safe Third Country Agreement.

74 Significantly, subsection 102(1) of the IRPA provides that a designation may be made "for the purposes of this Act" and section 3 of the IRPA provides amongst others the following two:

[page169]

3....

(2) The objectives of this Act with respect to refugees are

...

(b) to fulfill Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

...

(d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;

Also relevant is paragraph 3(3)(f) of the IRPA which sets out Parliament's requirement that the Act be construed in a manner which "complies with international human rights instruments to which Canada is signatory."

75 As I read the relevant provisions, the scheme implemented by Parliament has, as its objective, the sharing of responsibility for the consideration of refugee claims with countries that are signatory to and comply with the relevant articles of the Conventions and have an acceptable human rights record. The factors to be considered before designating a country are expressly set out in subsection 102(2) of the IRPA. The consideration of these factors is framed as a condition precedent to the designation of a country as the introductory words make clear: "[t]he following factors are to be considered"; "*[i]l est tenu compte des facteurs suivants*".

76 Keeping in mind that the statutory objective is to designate countries that comply with the relevant articles of the Conventions and are respectful of human rights, the GIC could not designate a country if it was not satisfied that the country's policies, practices and record indicate compliance. I take issue with the applications Judge's suggestion that unless "compliance" is made a condition precedent, the GIC would have discretion to designate a country that does not comply (reasons, at paragraph 56). It seems clear that the GIC would be acting for an improper purpose if it was to designate a country which it considers not to be compliant.

[page170]

77 This misapprehended concern that the GIC would have the discretion to designate a country that does not comply appears to be what led the applications Judge to transform the statutory objective of designating countries "that comply" with the respective Conventions, into a condition precedent (reasons, at paragraph 57). The error is compounded by the applications Judge's further conclusion that what must be established is "actual" compliance or compliance "in absolute terms".

78 Subsection [102(1)] does not refer to "actual" compliance or compliance "in absolute terms" nor does it otherwise specify the type and extent of compliance contemplated. However, Parliament has specified the four factors to be considered in determining whether a country can be designated. These factors are general in nature and are indicative of Parliament's intent that the matter of compliance be assessed on the basis of an appreciation by the GIC of the country's policies, practices and human rights record. Once it is accepted, as it must be in this case, that the GIC has given due

consideration to these four factors, and formed the opinion that the candidate country is compliant with the relevant articles of the Conventions, there is nothing left to be reviewed judicially. I stress that there is no suggestion in this case that the GIC acted in bad faith or for an improper purpose.

79 Indeed, no such suggestion could be made based on this record. The Regulatory Impact Analysis Statement (the RIAS) [C. Gaz. 2004.II.1622], published 60 days prior to the effective date of the promulgation, indicates that the GIC consulted with a number of non-governmental organizations who felt that the U.S. did not meet its Convention obligations. These views were considered together with those of others. In particular, the RIAS notes that the UNHCR expressed the view that the U.S. (like Canada), meets its international obligations (appeal book, Vol. 11, at page 3160). Two weeks before the effective date of the promulgation, Mr. Assadi, the UNHCR representative in Canada, reiterated before the House of Commons Standing Committee on Citizenship and Immigration that "we consider the U.S. to be a safe [page171] country" (appeal book, Vol. 11, at page 3247). Given the position of the UNHCR, the main supervisory body in relation to refugee protection, it cannot be suggested that the GIC was not acting in good faith, when it designated the U.S. as a country that complies with its Convention obligations.

80 It follows that the fact that the respondents believe, and that the applications Judge agreed, that the U.S. does not "actually" comply is irrelevant since this was not the issue that the applications Judge was called upon to decide (compare *Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission*, [2004] 2 F.C.R. 3 (F.C.A.), at paragraphs 39 to 43). What is relevant is that the GIC considered the subsection 102(2) factors and, acting in good faith, designated the U.S. as a country that complies with the relevant articles of the Conventions and was respectful of human rights.

81 I should add as an aside that even if "actual compliance" was a condition precedent, the conclusion reached by the applications Judge to the effect that the U.S. did not meet that requirement at the time of promulgation could not stand since it is largely based on evidence which postdates the time of the designation (see paragraphs 87 and 88 below).

82 In short, it was not open to the applications Judge to hold on any of the alleged grounds that the designation of the U.S. as a safe third country and the related Regulations were outside the authority of the GIC or that the Safe Third Country Agreement between Canada and the U.S. was illegal. I would therefore answer the second certified question in the negative.

#### The failure to conduct the ongoing review

83 In their memorandum, at paragraph 95, the respondents state that they "originally sought a declaration that both the original and the ongoing designation of the [page172] U.S. as a safe third country *via* the continuing operation of the Regulations was unconstitutional and *ultra vires*" (emphasis by the respondents). They assert earlier in their memorandum (at paragraph 12) that they sought a declaration that the appellant had erred by failing to meet "her statutory continuing review obligation". The record does not bear this out. The application filed by the respondents is aimed at the alleged illegal designation of the U.S. and nothing else. No mention is made of the alleged failure to review and no declaratory relief (or any other type of relief) is sought in that regard. This is how the applications Judge saw the application based on his own description of the matter before him (reasons, at paragraphs 1 and 2), and there is no indication that an amendment to the application brought by the respondents was sought or obtained in the course of the proceedings. I note, however, that both the respondents and the appellant made submissions on this issue, although there is



no discussion as to the remedy which would flow from the alleged failure to review (see the parties' respective supplementary submissions, appeal book, Vol. 1, at pages 242 to 245 and 357 to 358).

84 In his reasons, the applications Judge conducts a judicial review of this issue (reasons, at paragraphs 264 to 275) and the formal judgment that he gives declares "that the Governor-in-Council failed to ensure the continuing review of the United States as a 'safe third Country' as required by subsection 102(2) of IRPA".

85 It is not clear how this discrete issue became part of the judicial review application. When asked whether an amendment was obtained, counsel for the respondents (Ms. Jackman) could not point to one but gave a stern response about how things are done by the immigration bar. She suggested that an amendment can in effect be made without anyone speaking to it (by "osmosis" is the description that I used), and that a notice to the profession would be required, if this Court was to find that the amendment which took place in this case was somehow inappropriate.

86 I do not believe that I am advocating a return to procedural formalism if I suggest that an amendment of [page173] the type here in question required, at the very least, that the matter be brought to the attention of the applications Judge so that he could put his mind to the distinct issues which flowed from it. The failure to do so in this case has given rise to significant difficulties, which do not assist anyone.

87 First, the applications Judge never alludes to the fact that this additional issue becomes relevant only if the designation was validly promulgated in the first place. His conclusion was that the designation was void *ab initio*. Second, the applications Judge reviews the matter of the alleged failure to perform the ongoing review as a decision subject to a standard of reasonableness (reasons, at paragraph 105). There was, on the record before the applications Judge, no suggestion that the GIC was asked to perform this duty and refused to do so. Absent a decision, the remedy which flows from a failure to perform a statutory duty is a *mandamus* compelling the government actor to perform the duty.

88 More importantly, the issue raised by the purported amendment allowed the applications Judge to have regard to an extensive body of evidence, adduced by both sides, which postdates the designation. The applications Judge relied on this evidence indiscriminately to support both his conclusion that the GIC had failed to conduct the ongoing review and that the designation was *ultra vires*. (This is evident throughout the reasons, but see for example paragraphs 7, and 260 to 262 where the applications Judge relies on the Maher Arar Report [*Report of the Events Relating to Maher Arar*] to support his view that the designation was illegal when made in 2004 although the report was only released in 2006.)

89 There is one key date that the applications Judge had to be mindful of: December 29, 2004, when the Regulations came into force, the last relevant date for the assessment of the *vires* issue. Regardless of the conditions precedent which one wishes to apply, the *vires* of the Regulations could not be assessed on the basis of facts, events or developments that are subsequent to the date of the promulgation. The applications Judge seems to recognize so much at paragraph 273 of his reasons, where [page174] he says that the third country must be shown to have complied with the relevant articles of the Conventions before the Regulations are passed. However, he reviewed the evidence without regard to this date (Appendix II to these reasons sets out, from a cursory review, the body of evidence before the applications Judge which postdates the date of promulgation as well as

that which he specifically considered in support of his conclusion that the Regulations were *ultra vires*).

90 In my respectful view, the applications Judge's failure to focus on the relevant date (as well as the other issues which went unaddressed) can only be attributed to the fact that the purported amendment to include the alleged failure to conduct the ongoing review was never spoken to. The respondents' contention that an amendment of the type here in issue can take place without being spoken to is ill advised and serves no one. If the respondents wanted to enlarge their judicial review application, it was incumbent upon them to bring the appropriate motion.

91 That said, because the parties conducted their case on the basis that some form of amendment took place, I will nevertheless address the applications Judge's conclusion that the GIC failed to conduct the ongoing review.

92 In my respectful view, the conclusion reached by the applications Judge suffers from the same fundamental flaw as his initial conclusion: it assumes that the GIC had an ongoing obligation to monitor "actual" compliance or compliance "in absolute terms". That is not how the obligation to review is framed. The obligation is directed at the review of the four factors identified in subsection 102(2) of the IRPA, and is intended to ensure that the GIC continues to monitor these factors so as to be in a position to reassess the opportunity of maintaining the designation should the evolution of the factors so require.

93 In this respect, the record shows that directives were adopted as early as October 12, 2004, to ensure "a continuing review of factors set out in subsection 102(2) of the *Immigration and Refugee Protection Act* with respect to countries designated under paragraph 102(1)(a) [page 175] of that Act" (Scofield affidavit, appeal book, Vol. 11, Tab 33, at paragraph 42 and Exhibit B-11). These directives require the Minister of Citizenship and Immigration to undertake a review "on a continuous basis" of those factors and report to the GIC on a regular basis, or more often should circumstances warrant.

94 The record reveals that on May 29, 2006, the UNHCR's representative in Canada again appeared before the House of Commons Standing Committee on Citizenship and Immigration regarding the UNHCR's one year review of the Safe Third Country Agreement and expressed the view that both countries continue to qualify as safe third countries (see Scofield affidavit, appeal book, Vol. 11, Tab 33, at page 3101, paragraph 36 and Exhibit B10, at page 3247).

95 Further, in June 2006, pursuant to Article 8, paragraph 3 of the Safe Third Country Agreement, the UNHCR released a report [*Monitoring Report: Canada-United States "Safe Third Country" Agreement, 29 December 2004-28 December 2005*], assessing the first 12 months of the Safe Third Country Agreement's operation (Tom Heinze affidavit, appeal book, Vol. 12, Tab 34, Exhibit TH2, at page 3382). The crux of the report's conclusions is as follows (Tom Heinze affidavit, appeal book, Vol. 12, Tab 34, Exhibit TH2, at page 3387) [at page 6]:

It is the UNHCR's overall assessment that the Agreement has generally been implemented by the Parties according to its terms, and, with regard to those terms, international refugee law. The Agreement appears to be functioning relatively smoothly. Individuals who request protection are generally given an adequate opportunity to lodge refugee claims at the ports of entry and eligibility determination decisions under the Agreement have generally been made correctly.

UNHCR notes, however, particular concern with respect to the Parties' continued use of the direct back policy. This has been especially problematic for asylum-seekers directed back from Canada to the United States, as a number were detained in the United States and unable to attend their scheduled interviews. [Footnote omitted.]

"The direct back policy" refers to the process whereby an asylum seeker approaches a port of entry at a time when border officials are unable to process his or her claim and is returned [page 176] to the U.S. after having been given a scheduled time for an interview. The UNHCR criticism was that many claimants were not allowed to re-enter Canada to attend their scheduled interviews.

96 The Canadian government, in conjunction with the U.S. and the UNHCR, released a further report in November 2006 [*A Partnership for Protection: Year One Review*]. As part of this report, the Canadian authorities indicated that they had phased out the use of "direct back policies" as of August 31, 2006 (Canada-United States Safe Third Agreement, Year One Review, appeal book, Vol. 12, at page 3337).

97 In my respectful view, the record does not support the applications Judge's conclusion that the GIC is in breach of its obligation to conduct the ongoing review mandated by subsection 102(3) of the IRPA.

Third certified question: The Charter challenge

98 At the hearing, counsel for the respondent organizations insisted on the fact that their public interest standing was not being challenged in this appeal. As previously noted, the applications Judge refused to certify the question proposed by the appellant challenging their standing. However, the applications Judge's refusal to certify a question with respect to standing does not immunize this issue from review on appeal. Once a question has been certified, and an appeal is launched, the Court's appellate jurisdiction is not limited by the certified question(s) (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paragraph 25; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 12).

99 Relying on their public interest standing, the respondent organizations successfully challenged the validity of the Regulations on Charter grounds, based on evidence (the same evidence that formed the basis of the *vires* challenge) that a class of refugees would be subject to a real risk of refoulement as a result of the Safe Third Country Agreement and that therefore, their section 7 and section 15 Charter rights were violated. To this end, [page 177] they maintained, and the applications Judge agreed, that their challenge is not dependent on John Doe's (reasons, at paragraph 51), but concerns a class of refugees, which they say would be treated in a certain way if they were to present themselves at a Canadian land border port of entry (*idem*).

100 In my respectful view, this hypothetical approach, which the applications Judge entertained, goes against the well-established principle that a Charter challenge cannot be mounted in the abstract. The only exception is where it can be shown that the impugned legislation would otherwise be immune from challenge (*Canadian Council of Churches (S.C.C)*, at pages 255-256):

From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the Court. On this ground the applicant Council must fail. I would hasten to add that this should not be interpreted as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Here there is no such immunization as plaintiff refugee claimants are challenging the legislation. Thus the very rationale for the public interest litigation party disappears. [My emphasis.]

The applications Judge distinguishes the present situation from the one confronting the Supreme Court in the above case on the basis that in the matter before him, a refugee would have to bring the challenge from outside of Canada (reasons, at paragraph 43).

101 With respect, there is no evidence that a refugee would have to bring a challenge from outside Canada. Refugees must present themselves at a Canadian land border port of entry in order for an officer to determine whether, on the balance of probabilities, they fall within one of the enumerated exceptions and whether the claim should be referred to the Immigration and Refugee Board. During this time, the refugee claimant remains in Canada, as according to the Canadian government's one-year report alluded to earlier (at paragraph 96), Canadian authorities phased out the "direct send back policy" as [page178] of August 31, 2006. During this time, the refugee claimant can be represented by counsel (reasons, at paragraph 288). Furthermore, in its one-year report, the Canadian government encourages non-governmental organizations to assist in maintaining the well-being of refugees throughout the process (affidavit of Tom Heinze, appeal book, Vol. 12, Tab 34, Exhibit TH2, at page 3336). It follows that once it is determined that a claimant cannot remain in Canada by reason of the Safe Third Country Agreement, nothing prevents the claimant from challenging this determination on Charter grounds.

102 Consequently, in this case, the ability of the respondent organizations to bring the Charter challenge depends on John Doe. However, John Doe never presented himself at the Canadian border and therefore never requested a determination regarding his eligibility. Following the renewed evidence regarding the threat that the FARC poses to his life, U.S. immigration authorities agreed to reconsider his claim and he remains in the U.S. The applications Judge's conclusion that John Doe should nevertheless be considered as having come to the border and as having been denied entry runs directly against the established principle that Charter challenges cannot be mounted on the basis of hypothetical situations.

103 There is, in this case, no factual basis upon which to assess the alleged Charter breaches. The respondent organizations' main contention is directed at a border officer's lack of discretion to forgo returning a claimant to the U.S. for reasons other than the enumerated exceptions set out in section 159.5 of the Regulations. This challenge, however, should be assessed in a proper factual context -- that is, when advanced by a refugee who has been denied asylum in Canada pursuant to the Regulations and faces a real risk of refoulement in being sent back to the U.S. pursuant to the Safe Third Country Agreement.

[page179]

104 It follows that the Charter challenge should not have been entertained by the applications Judge. I would therefore decline answering the third certified question.

105 For these reasons, I would allow the appeal, set aside the decision of the applications Judge and answer the certified questions as follows:

- (1) What is the appropriate standard of review in respect of the Governor-in-Council's decision to designate the United States of America as a "safe third country" pursuant to s. 102 of the *Immigration and Refugee Protection Act*?

Answer: correctness;

- (2) Are paragraphs 159.1 to 159.7 (inclusive) of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement between Canada and the United States of America *ultra vires* and of no legal force and effect?

Answer: no;

- (3) Does the designation of the United States of America as a "safe third country" alone or in combination with the ineligibility provision of clause 101(1)(e) of the *Immigration and Refugee Protection Act* violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and is such violation justified under section 1?

Answer: no answer can be given at this stage.

By agreement, the parties will assume their respective costs.

RICHARD C.J.:-- I agree.

\* \* \*

*The following are the reasons for judgment rendered in English by*  
EVANS J.A.:--

[page180]

## A. INTRODUCTION

106 I have had the advantage of reading the reasons of my colleague, Noël J.A., and gratefully adopt his careful review of the facts. I agree that the appeal should be allowed. I agree also that the applications Judge should not have entertained the respondents' request for declarations that the Regulations are invalid because they are in breach of sections 7 and 15 of the Charter.

107 However, in my opinion, the reasons for concluding that the applications Judge erred in determining the merits of the Charter challenges to the Regulations are, for the most part, equally applicable to the administrative law challenge. To grant the declaratory relief sought by the respon-

dents would be premature and serve little useful purpose. Since the application for judicial review should have been dismissed without a determination of the substantive issues raised, no questions should have been certified, and none should be answered by this Court.

108 I would only add that my colleague's reasons do not persuade me that the issues of statutory interpretation and the scope of judicial review raised by the respondents' application are so clear and incontrovertible that they warrant a departure from the guiding principle of judicial restraint that it is generally better to say less than more.

#### B. LIMITS ON THE AWARD OF DECLARATORY RELIEF

109 The declaration is a flexible public and private law remedy, unencumbered with historical and technical baggage. Nonetheless, a declaration that the exercise of a statutory power is invalid will not be granted before the issues have ripened sufficiently to make them appropriate for adjudication. It may serve little useful purpose to grant a declaration prematurely, in the absence of concrete facts about an individual whose rights are or may be at stake.

[page181]

110 While courts have entertained requests for declarations in respect of questions which may arise and affect individuals in the future, they must be satisfied that the benefits of making a legal determination outweigh the disadvantages of pronouncing in the abstract. In my opinion, the balance in this case clearly favours judicial restraint.

111 Litigants seeking declaratory relief have also sometimes been barred by a lack of standing. Before the applications Judge, the appellant had argued that the application should be dismissed on this ground. However, the Judge exercised his discretion to confer public interest standing on the respondents in part because he found that there was no effective alternative method of bringing the validity of the Regulations before the Court. Claimants, he said, could not realistically be expected to make a claim at the Canadian border, only to be sent back to the United States to face the possibility of refoulement. Accordingly, the applications Judge distinguished *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, on the ground that the potential refugee claimants in that case had an effective alternative remedy because they would be within Canada.

112 Counsel for the appellant did not pursue before us the question of standing. However, the fact that the respondent organizations are not affected by the outcome of the litigation cannot be altogether separated from the issues of prematurity and utility. The inclusion of John Doe as an applicant does not cure the latter difficulties, even though, having been denied asylum and a withholding of removal from the United States, he may wish to come to Canada to claim refugee protection. I note that, at the time of this litigation, John Doe's claim not to be removed from the United States was being reassessed and he had not applied at the border for refugee protection in Canada.

113 True, a declaration of invalidity of the Regulations on Charter or administrative law grounds might well assist people like John Doe, who believe that they [page182] have a better chance of establishing their claim for protection in Canada than in the United States, but are reluctant to come to the border for fear that they will be summarily turned back, and then promptly removed by United

States' authorities. If the Regulations were declared to be invalid, of course, they would be assured of access to Canada's refugee determination system.

**114** However, Canadian law respecting refugee protection is only engaged when claimants seek protection from Canadian officials in Canada, including a port of entry. The provisions of neither the international Conventions relied on in this litigation, nor the Charter, require Canada to abstain from enacting regulations which may deter nationals of third countries in the United States from coming to the Canadian border to claim refugee protection or protection from torture. Article 33 of the Refugee Convention (RC) and Article 3 of the Convention against Torture ([hereinafter] CAT) impose a negative obligation not to refoule, not a positive obligation to receive potential claimants: James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), at page 301.

### C. BARS TO RELIEF IN THE PRESENT CASE

**115** There are two essential problems with the declarations of invalidity sought in the respondents' application for judicial review with respect to the validity of the Safe Third Country Agreement ([hereinafter] STCA) Regulations. First, they do not match the allegations that, with respect to some categories of claimants, the policy and practice of the United States concerning refugee protection do not comply with international law. Second, they are not tailored to meet the proper concern of Canadian law, namely that claimants for refugee protection in Canada are not returned to a country to face a real risk of removal in contravention of Article 33 of the RC and Article 3 of the CAT. In short, to grant the declarations sought would serve no legitimate purpose and would require the Court to embark on inadequately focussed and abstract inquiries.

[page183]

#### (i) Declarations of invalidity too broad

**116** The respondents allege that the policy and practice of the United States are non-compliant with Article 33 of the RC and Article 3 of the CAT only with respect to certain categories of claimants. However, to declare the Regulations implementing the STCA to be invalid in their entirety, as the applications Judge did, seriously overshoots the mark.

**117** It is not a satisfactory solution of this difficulty to limit the scope of a declaration of invalidity to the categories of claimants for whom it is alleged that the United States is not a safe third country. The respondents' evidence does not purport to show that there is a real risk that every member of these categories, or significant numbers of them, are, in fact, at real risk of being refouled.

#### (ii) Timing

**118** Whether a country complies with its international obligations may change over time. If, as the respondents allege, the validity of the Regulations depends on the reasonableness of findings made by the Governor in Council about compliance at the time of their promulgation, it would seem very odd to declare them to be invalid, if, at the time of the litigation, the situation had changed and

the United States was in compliance. On the other hand, delegated legislation surely cannot be invalid one day and valid the next, or *vice versa*.

119 For the purpose of ensuring that Canada is not implicated in a refoulement, the only relevant time for determining compliance by the United States is when an individual claims refugee status or protection from torture at the Canadian border and alleges that, if sent back, [page184] there is a real risk that she will be refouled by the United States.

(iii) Unwieldy nature of the inquiry

120 The inquiry that the respondents say is required by this application for judicial review is another indication that it is misconceived. The Court is asked to examine, at large, wide swaths of U.S. refugee policy and practice in order to determine whether it was reasonable for the Governor in Council to conclude that it complied with international law.

121 The nature and breadth of this inquiry is unlike the more focussed inquiries typically undertaken through the judicial process. Its inherently problematic nature strongly suggests that a court should only be prepared to embark upon it if necessary to protect individuals from being indirectly refouled by officers of the Canadian Border Services Agency in breach of the Charter and Canada's international obligations. As I now seek to demonstrate, it is not necessary.

(iv) Alternative avenue of recourse

122 I start with two premises. First, unless clearly inconsistent with the statutory text, the IRPA and any regulations made pursuant to it must be construed and applied so as to be consistent with Canada's international obligations in Article 33 of the RC and Article 3 of the CAT. IRPA, paragraph 3(3)(f) expressly says so. Second, regulations cannot be applied to an individual at Canada's border in a manner that breaches their Charter rights.

123 Article 33 of the RC and Article 3 of the CAT proscribe indirect as well as direct refoulement. Hence, refugee claimants at the Canadian land border may not be turned back to the United States pursuant to the STCA Regulations if they can establish that, if returned, they would face a real risk of their removal by the United States to a country where they have a well-founded fear [page185] of torture, or persecution on a Convention ground. Such a risk assessment must be made in respect of individual claimants, in light of the United States' law and practice at that time as it pertains to them. A denial of access to Canada's refugee determination system would be subject to an application for leave and for judicial review. These propositions would seem to flow inexorably from *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

124 Claimants for refugee status at the Canadian land border must already be examined to determine if they are eligible for access to Canada's refugee determination system as falling within one of the categories excluded from the STCA: the presence of a close relative in Canada, for example. The two-level administrative process established for enabling a person claiming a statutory exemption from the STCA is, according to the applications Judge, generally completed within a day. This process could equally well be used to determine whether a person was eligible for a refugee determination in Canada, on the ground that, as a person facing a real risk of refoulement if returned to the United States, the Regulations may not validly be applied to her.

125 Of course, adding a risk assessment in some cases may increase the time and resources needed to make a decision on eligibility, even though, until a risk of refoulement was established, a



full refugee determination would not be required. Nor could a claimant be returned to the United States pending an eligibility determination, unless the United States' authorities provided an assurance that the claimant would not be removed until the eligibility decision had been made. However, I see no viable alternative if refugee claimants are not to be subject to indirect refoulement in violation of their Charter rights and IRPA. No doubt guidelines will be developed to assist officers in making these eligibility determinations.

[page186]

**126** In this context, the decision of the House of Lords in *Regina (Yogathas) v. Secretary of State for the Home Department*, [2003] 1 A.C. 920 is illuminating. Pursuant to the Dublin Convention [*Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member State of the European Community*, 15 June 1990, Dublin], an agreement among members of the European Union with broadly similar principles and objectives as the STCA, the Secretary of State had decided to return the applicants, nationals of Sri Lanka, to Germany, their country of first arrival in the European Union, without a determination in the United Kingdom of their refugee claims. The applicants argued that, contrary to Article 33 of the RC, German law did not recognize refugee claims based on persecution by non-state agents and that consequently it would be unlawful for the Secretary of State to return them to Germany to face refoulement.

**127** The House of Lords recognized the existence of a tension between the need to ensure the efficient implementation of international "burden sharing" arrangements for the accelerated return of refugee claimants, and the need to protect fundamental human rights, including those created by Article 33: see paragraphs 58 and 74 [of *Yogathas* ].

**128** Thus, it was said, there is a heavy burden on claimants to establish that they face a real risk of refoulement from a country which was considered safe by the Secretary of State and was a party to the relevant international human rights instruments: at paragraph 74. The fact that the law of the "safe country" may not in theory comply with Article 33 of the RC is not in itself sufficient to prevent a lawful return to that country. The question, rather, is a practical one: is there in fact a real risk that the claimant would be refouled if returned: at paragraph 47.

[page187]

**129** The House of Lords also made it clear that, if satisfied that there were substantial grounds for believing that a claimant would be at risk of refoulement if sent back to the country of first arrival, the Secretary of State could not simply return the claimant to that country because of the existence of the "country of first arrival" agreement: at paragraphs 11 and 74. A claimant who establishes a risk of refoulement would then be eligible for a refugee determination in the United Kingdom.

**130** In short, a declaration of invalidity of the STCA Regulations is not required in order to ensure that they are not applied to claimants for protection at the land border in breach of either Canada's international obligations not to refoule, or the Charter.

## D. CONCLUSIONS

131 For these reasons I would allow the appeal.

\* \* \* \* \*

## APPENDIX I

### Impugned Regulations

**159.1** The following definitions apply in this section and sections 159.2 to 159.7.

"Agreement" means the Agreement dated December 5, 2002 between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries.

"claimant" means a claimant referred to in paragraph 101(1)(e) of the Act.

"designated country" means a country designated by section 159.3.

"family member", in respect of a claimant, means their spouse or common-law partner, their legal guardian, and any of the following persons, namely, their child, father, mother, brother, sister, grandfather, grandmother, grandchild, uncle, aunt, nephew or niece.

"legal guardian", in respect of a claimant who has not attained the age of 18 years, means a person who has custody of the claimant or who is empowered to act on the claimant's [page188] behalf by virtue of a court order or written agreement or by operation of law.

"United States" means the United States of America, but does not include Puerto Rico, the Virgin Islands, Guam or any other United States of America possession or territory.

**159.2** Paragraph 101(1)(e) of the Act does not apply to a claimant who is a stateless person who comes directly or indirectly to Canada from a designated country that is their country of former habitual residence.

**159.3** The United States is designated under paragraph 102(1)(a) of the Act as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture, and is a designated country for the purpose of the application of paragraph 101(1)(e) of the Act.

**159.4** (1) Paragraph 101(1)(e) of the Act does not apply to a claimant who seeks to enter Canada at

(a) a location that is not a port of entry;

(b) a port of entry that is a harbour port, including a ferry landing; or

(c) subject to subsection (2), a port of entry that is an airport.

(2) Paragraph 101(1)(e) of the Act applies to a claimant who has been ordered removed from the United States and who seeks to enter Canada at a port of entry that is an airport while they are in transit through Canada from the United States in the course of the enforcement of that order.

**159.5** Paragraph 101(1)(e) of the Act does not apply if a claimant who seeks to enter Canada at a location other than one identified in paragraphs 159.4(1)(a) to (c) establishes, in accordance with subsection 100(4) of the Act, that

- (a) a family member of the claimant is in Canada and is a Canadian citizen;
- (b) a family member of the claimant is in Canada and is
  - (i) a protected person within the meaning of subsection 95(2) of the Act,
  - (ii) a permanent resident under the Act, or
  - (iii) a person in favour of whom a removal order has been stayed in accordance with section 233;

[page189]

(c) a family member of the claimant who has attained the age of 18 years is in Canada and has made a claim for refugee protection that has been referred to the Board for determination, unless

- (i) the claim has been withdrawn by the family member,
- (ii) the claim has been abandoned by the family member,
- (iii) the claim has been rejected, or
- (iv) any pending proceedings or proceedings respecting the claim have been terminated under subsection 104(2) of the Act or any decision respecting the claim has been nullified under that subsection;

(d) a family member of the claimant who has attained the age of 18 years is in Canada and is the holder of a work permit or study permit other than

- (i) a work permit that was issued under paragraph 206(b) or that has become invalid as a result of the application of section 209, or
- (ii) a study permit that has become invalid as a result of the application of section 222;

(e) the claimant is a person who

- (i) has not attained the age of 18 years and is not accompanied by their mother, father or legal guardian,
- (ii) has neither a spouse nor a common-law partner, and
- (iii) has neither a mother or father nor a legal guardian in Canada or the United States;

(f) the claimant is the holder of any of the following documents, excluding any document issued for the sole purpose of transit through Canada, namely,

- (i) a permanent resident visa or a temporary resident visa referred to in section 6 and subsection 7(1), respectively,

- (ii) a temporary resident permit issued under subsection 24(1) of the Act,
- (iii) a status document referred to in subsection 31(3) of the Act,
- (iv) refugee travel papers issued by the Minister of Foreign Affairs, or
- (v) a temporary travel document referred to in section 151;

[page190]

(g) the claimant is a person

- (i) who may, under the Act or these Regulations, enter Canada without being required to hold a visa, and
- (ii) who would, if the claimant were entering the United States, be required to hold a visa; or

(h) the claimant is

- (i) a foreign national who is seeking to re-enter Canada in circumstances where they have been refused entry to the United States without having a refugee claim adjudicated there, or
- (ii) a permanent resident who has been ordered removed from the United States and is being returned to Canada.

**159.6** Paragraph 101(1)(e) of the Act does not apply if a claimant establishes, in accordance with subsection 100(4) of the Act, that the claimant

(a) is charged in the United States with, or has been convicted there of, an offence that is punishable with the death penalty in the United States;

(b) is charged in a country other than the United States with, or has been convicted there of, an offence that is punishable with the death penalty in that country; or

(c) is a national of a country with respect to which the Minister has imposed a stay on removal orders under subsection 230(1) or a stateless person who is a former habitual resident of a country or place with respect to which such a stay has been imposed, and if

- (i) the stay has not been cancelled under subsection 230(2), and
- (ii) the claimant is not identified in subsection 230(3).

**159.7** (1) For the purposes of paragraph 101(1)(e) of the Act, the application of all or part of sections 159.1 to 159.6 and this section is discontinued, in accordance with subsections (2) to (6), if

(a) a notice of suspension of the Agreement setting out the period of suspension is publicized broadly in the various regions of Canada by the Minister via information media and on the website of the Department;

(b) a notice of renewal of the suspension of the Agreement setting out the period of renewal of suspension is published in accordance with subsection (6);

[page191]

(c) a notice of suspension of a part of the Agreement is issued by the Government of Canada and the Government of the United States; or

(d) a notice of termination of the Agreement is issued by the Government of Canada or the Government of the United States.

(2) Subject to subsection (3), if a notice of suspension of the Agreement is publicized under paragraph (1)(a), sections 159.2 to 159.6 are rendered inoperative for a period of up to three months that shall be set out in the notice, which period shall begin on the day after the day on which the notice is publicized.

(3) If a notice of renewal of the suspension of the Agreement is published under paragraph (1)(b), sections 159.2 to 159.6 are rendered inoperative for the further period of up to three months set out in the notice.

(4) If a notice of suspension of part of the Agreement is issued under paragraph (1)(c), those provisions of these Regulations relating to the application of the Agreement that are referred to in the notice are rendered inoperative for a period that shall be set out in the notice. All other provisions of these Regulations continue to apply.

(5) If a notice of termination of the Agreement is issued under paragraph (1)(d), sections 159.1 to 159.6 and this section cease to have effect on the day set out in the notice

(6) Any notice referred to in paragraph (1)(b), (c) or (d) shall be published in the *Canada Gazette*, Part I, not less than seven days before the day on which the renewal, suspension in part or termination provided for in the notice is effective.

## APPENDIX II

Evidence cited in respondents' supplementary memorandum of fact and law that post-dates the designation of the U.S. as a safe third country (appeal book, Vol. 1, at page 210 and following)

- Situation of Detainees at Guantanamo Bay, Report of the Rapporteurs, UN Commission on Human Rights E/CN.4/2006.120, February 15, 2006 (paras. 27, 86)

- Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (April 2005) (para. 27)

[page192]

- *de Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 655 (F.C.A.) (para. 31)
- L. Khandwala, K. Musalo, S. Knight and M. A. K. Hreschyshyn, "The One-Year Bar: Denying protection to *bona fide* refugees, contrary to congressional intent and violative of international law", *Immigration Briefings* (August 2005) (paras. 49, 50, 55)
- *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 239 (F.C.A.), affirming the difference in standards between the U.S. and Canada regarding the risk of persecution (para. 53, No. (a))
- *Executive Office of Immigration Review Statistical Yearbook 2005*, cited for statistics on acceptance rates in the U.S (para. 53, No. (b))
- *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005), cited for the proposition that the U.S. adjudication of refugee cases at the administrative level has fallen below the minimum standards of legal justice (para. 53, No. (e))
- *Arias v. Ashcroft* 143 Fed.Appx. 464 (August 2, 2005)
- *Bermudez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 286 (para. No. 56(c))
- *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006), for the proposition that the REAL ID Act (May 2005), diverges from previous adopted standards regarding credibility (para. 63)
- Conclusions and recommendations from the Committee against Torture: Canada, July 7, 2005 (para. 76)
- European Parliament, *Interim Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners 2006/2027* (INI) Final A6-9999/2006, June 2006 (para. 79).
- Parry, Hohin T., "The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees" (2005) *Melbourne JIL* 516 (paras. 79, 86)

[page193]

- 2006 American Civil Liberties Union Documents (para. 81)
- *Detainee Treatment Act of 2005* (para. 81)
- Title X: *Military Commissions Act*, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) (para. 81)

Respondents' affidants considered by the applications Judge

\*\* All the affidavits seek to establish the state of U.S. law as of when they were filed -- e.g. on or after December 29, 2005

Georgetown affidavits

- Covers the period from October 1999 to June 2005 (appellant's compendium, Tab 3, para. 19; most articles and case law covered relates to 2005, including the REAL ID Act)
- *Diaware v. Gonzales*, 2006 WL 37047 (S. Ct. Jan. 9, 2006); *Sukwanputra v. Gonzales*, 2006 U.S. App. Lexis 1178 (3rd Cir. January 19, 2006)
- *In re Rudy Santoso*, A 79 494 698 at 1 (BIA, May 23, 2005) (footnote 31)

Karen Musalo, supplementary affidavit

- BIA decision in *Matter of Kasinga* (June 2006) (appellant's compendium)

Morton Sklar

- Refers to *Auguste v. Ridge*, 395 F.3d 123 (3rd Cir. 2005), for narrow conception of torture for purposes of intent analysis in U.S. law (para. 7)
  - Nina Bernstein, "Deportation Case Focuses on Definition of Torture", *N.Y. Times*, March 11, 2005 (para. 9)
- REAL ID Act (May 2005)

[page194]

Deborah Anker, (affidavit & supplementary affidavit)

- Bill Freelick, "US Detention of Asylum Seekers: What's the Problem? What's the solution?" 10 *Bender's Immigration Bulletin* 564, p. 570 (April 1, 2005).
- Department of Homeland Security, *Homeland Secretary Michael Chertoff Announces Six-Point Agenda for Department of Homeland Security* (July 13, 2005) to support present lack of general counsel with jurisdiction over all aspects of

asylum law and policy in the U.S.; Marcia Coyle, "A swamped DOJ farms out immigration cases; The Workload spread to other divisions and U.S. attorneys nationally" (*National Law Journal*, February 28, 2005); *Tomas v. Ashcroft*, 409 F.3d 1177 (9th Cir. 2005); Jonathan Nelson, "Staking the Pillars of Asylum Law", 83 *Interpreters Releases* 1 (2006); Ralph Blumenthal, "Chinese Boy Asks for Stay of Deportation, Citing Fear", *N.Y. Times*, June 7, 2005 (forced return) (para. 4)

- Border Protection, *Antiterrorism, and Illegal Immigration Control Act of 2005* (para. 5)

- Adam Liptak, "Courts Criticize Immigrations Judges' Handling of Asylum Cases", *N.Y. Times*, Dec. 26, 2005; *Pasha v. Gonzales*, 2005 U.S. App. LEXIS 28899, 1 (7th Cir. December 29, 2005) in support of jurisprudential problems (para 5)

- REAL ID Act, (May 2005) (para. 15)

- *Zhen Li Iao v. Gonzales*, 400 F.3d 530, 533-535 (7th Cir. 2005), dealing with challenges of establishing credibility (para. 20)

- *Kanchaaveli v. Gonzales*, 2005 U.S. App. LEXIS 11122 (3rd Cir. 2005) (para. 20)

- *Bocova v. Gonzales*, 412 F.3d 257 (1st Cir. 2005) (para. 26)

- See para. 28, footnote 61 for extensive references to case law in 2005 regarding discretionary nature of persecution analysis

[page195]

#### Eleanor Acer

- United States Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (February 2005) (paras. 3, 13)

- Bill Frelick, U.S. Detention of Asylum Seekers and Human Rights, March 1, 2005 (para. 8), for statistics on detention and 2006 President's fiscal budget, which includes a 19 percent increase for the Detention and Removal Office of Department of Homeland Security (para. 13)

#### Victoria Neilson

- REAL ID Act (May 2005) (para. 8)

#### Susan Akram



- REAL ID Act (para. 5)

- Susan Akram and Maritza Karmely, "Immigration and Constitutional Consequences of Post 9/11 Policies Involving Arabs and Muslims in the United States: Is 'lienage a Distinction without a Difference?'" 38 *U.C. Davis L. Rev.* 609 (2005)

Evidence cited in appellant's supplementary memorandum of fact and law, countering the respondents' contention that the U.S. does not comply with the relevant articles of the Conventions, that post-dates the designation of the U.S. as a safe third country (appeal book, Vol. 1, at page 311 and following)

- Senate Report 109-273 -- Department of Homeland Security Appropriations Bill, 2007 (report issued June 29, 2006) (bill ultimately enacted as Pub. L. 109-295 (October 4, 2006) regarding immigration detentions) (para. 120)

- *Gao v. Gonzales*, C.A. 2nd Cir, Docket No. 04-1874-ag (March 3, 2006), recognizing that forced marriage in China is persecution (para. 131)

[page196]

- *Roozbahani v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1524; *Quevedo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1264; *P.K. v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 103, for criticisms of Canada's administrative decision makers (para. 134)

- *Aslam v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 189; *El Balazi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 38, in support of the proposition that filing delay in Canada is a significant factor in the assessment of a claimant's well-founded fear of persecution if there is no justification for the delay (para. 167)

- *Herrera v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1233; *Laszlo v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 456; *Ortiz Juarez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 288; *Lubega v. Canada (Minister of Citizenship and Immigration)* 2006 FC 303; *Sy v. Canada (Minister of Citizenship and Immigration)*, (2005), 271 F.T.R. 242 (F.C.); *Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 839; *Karanja v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 574; *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1168; *Allafzadeh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1173; *C.P.H. v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 367; *Jara v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 973, in support of the propo-

sition that in Canada, the Immigration and Refugee Board, the Federal Court and Federal Court of Appeal have addressed in a similar, if not identical manner as in the U.S., the issues of credibility, documentary corroboration, nexus, persecution and gender persecution (para. 176).

Appellant's affiants

David Martin

- REAL ID Act, May 11, 2005

[page197]

- Principal U.S. Regulations Relevant to Asylum, Withholding and CAT protection, From Title 8, Code of Federal Regulations (2006) (appellant's compendium, Tab 8)
  - Asylum Officer Basic Training Course Manual, draft dated March 3, 2005 (appellant's compendium, Tab 10)
- *Immigration and Nationality Act of 1952*, as amended through July 24, 2006 (appellant's compendium, Tab 19)
- *In re A-H- Respondent*, decided January 26, 2005 (appellant's compendium, Tab 21)
- *Matter of S-K-, Respondent* (March 11, 2008) BIA Tab 25(c)
- *Interpretation of the Convention Refugee Definition in the Case Law*, December 31, 2005 (appellant's compendium, Tab 32) -- draws on case law up to December 31, 2005
- *Comprehensive statistics on U.S. Protection Decisions FY 2001-2005* (Martin affidavit, appeal book, Vol. 6, Tab A)
- *Detainee Treatment Act of 2005*, published December 30, 2005
- Supplementary affidavit, Exhibit U -- unpublished BIA decisions reversing an immigration judge's determination regarding corroboration (2005)
- Supplementary affidavit, Exhibit V -- unpublished BIA decisions reversing an immigration judge's determination in mixed motive cases (2005)
- Supplementary affidavit, Exhibit X -- UNHCR, Asylum Levels and Trends in Industrialized Countries, Second Quarter, 2006

- Asylum Officer Basic Training Course Manual, May 2006 (appeal book, p. 1665)

Evidence referred to by the applications Judge postdating the designation of the U.S. as a safe third country

[page198]

The Safe Third Country Agreement was executed in 2002 and it was given effect by the promulgation of sections 159.1-159.7 of the Regulations, which were published on November 3, 2004, with an effective date of December 29, 2004.

(I) One-year time bar & withholding removal

- David Martin affidavit -- 2005 statistics (reasons, para. 147)
- *El Balazi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 38, for the proposition that Canadian judges have discretion to look at the reasons for the delay in determining whether it will be a factor (reasons, para. 156)
- Anker and Musalo anecdotal evidence -- no date (reasons, para. 164)

(II) Categorical exceptions for criminality and terrorism

- *Re A.H.*, 23 I&N Dec 774 (A.G. 2005) January 26, 2005, whereby the Court concluded that it was clear that a person could be refouled if there was a potential belief that a person may pose a danger and interprets broadly the exclusions for terrorist activities (reasons, para. 174)
- *Matter of S-K-*, 23 I&N Dec. 936 (BIA June 8, 2006), affirms the fact that the intent to contribute to a terrorist organization is unnecessary to qualify as providing material support to terrorist activity (reasons, paras. 177, 178)
- *Arias v. Ashcroft*, 143 Fed.Appx. 464 (August 2, 2005), standing for the proposition that duress is not a defence (reasons, para. 180)
- *Kathirgamu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 300, lower bar in Canada for exclusions due to criminality (reasons, para. 189)

[page199]

(III) Interpretation of term "persecution" and claims based on particular social group

- Department of Homeland Security briefs filed in *Matter RA*, February 2004 and February 22, 2005 (reasons, paras. 200-201) (from Musalo affidavit -- although Phelan J. concludes insufficient citation to verify this)

- *Bocova v. Gonzales*, 412 F.3d 257 (June 24, 2005), recognizing that persecution is not defined and held that it had to look to the Board of Immigration Appeal decisions to determine the true meaning (reasons, para. 210). This, however, does not support unreasonableness of the decision

- REAL ID Act, May 11, 2005 (reasons, para. 214)

(IV) Corroboration and credibility

- REAL ID Act, May 11, 2005 (reasons, para. 219)

(V) Torture under the CAT

- *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 (reasons, para. 243)

- *Immigration Law and Practice*, 2nd ed., looseleaf (Toronto: Butterworths, 2006)

- Maher Arar Report, 2006 (reasons, para. 260)

NOTE

*USA Patriot Act 115* Stat. 272 (October 26, 2001) -- broadened the scope of the definition of "terrorist activities", however, many of the Act's provisions were to sunset beginning December 31, 2005, approximately 4 years after its passage. In addition, the Act has since been amended, the most recent amendments having passed Congress on March 2, 2006 and having been signed into law on March 9, 2006.

cp/e/qllls

*Indexed as:*  
**Gwala v. Canada (Minister of Citizenship and Immigration)**  
**(C.A.)**

**Peter Ndebele Gwala (Appellant)**  
**v.**  
**The Minister of Citizenship and Immigration (Respondent)**

[1999] 3 F.C. 404

[1999] F.C.J. No. 792

Court File No. A-375-98

Federal Court of Canada - Court of Appeal

**Strayer, Décary and Robertson JJ.A.**

Heard: Vancouver, May 21, 1999.

Judgment: Vancouver, May 21, 1999.

*Citizenship and Immigration -- Judicial review -- Federal Court jurisdiction -- Certified question -- Senior immigration officer not having implied jurisdiction to decide questions of law for reasons given by F.C.T.D. Judge reported at [1998] 4 F.C. 43.*

*Federal Court jurisdiction -- Trial Division -- Certified question -- Contrary to Trial Judge's finding, reported at [1998] 4 F.C. 43, F.C.T.D., when hearing application for judicial review, having jurisdiction to decide constitutional challenge to validity of section of Immigration Act although tribunal lacking jurisdiction to decide question -- Relevant provisions of Federal Court Act amended since cases upon which Trial Judge relied -- Tribunal basing decision on constitutionally invalid provision committing jurisdictional error -- To determine whether tribunal acting within jurisdiction, constitutionality of conferring provision must be assessed.*

**Statutes and Regulations Judicially Considered**

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 7, 12.

Federal Court Act, R.S.C., 1985, c. F-7, s. 18.1 (as enacted by S.C. 1990, c. 8, s. 5).

Immigration Act, R.S.C., 1985, c. I-2, ss. 46.4 (as enacted by S.C. 1995, c. 15, s. 11), 83(1) (as am. by S.C. 1992, c. 49, s. 73).

### Cases judicially considered

#### Applied:

Gwala v. Canada (Minister of Citizenship and Immigration), [1998] 4 F.C. 43; (1998), 147 F.T.R. 246 [page405]; 44 Imm. L.R. (2d) 1 (F.C.T.D.) (as to SIO's lacking jurisdiction to decide question of law).

Raza v. Canada (Minister of Citizenship and Immigration) (1998), 157 F.T.R. 161 (F.C.T.D.).

#### Not followed:

Gwala v. Canada (Minister of Citizenship and Immigration), [1998] 4 F.C. 43; (1998), 147 F.T.R. 246; 44 Imm. L.R. (2d) 1 (F.C.T.D.) (as to jurisdiction of F.C.T.D. to decide, on judicial review, constitutional question where tribunal lacking such jurisdiction).

#### Referred to:

Tétreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22; (1991), 81 D.L.R. (4th) 358; 91 CLLC 14,023; 126 N.R. 1.

Canada (Attorney General) v. Sirois (1988), 90 N.R. 39 (F.C.A.).

APPEAL with respect to certified questions in Gwala v. Canada (Minister of Citizenship and Immigration), [1998] 4 F.C. 43; (1998), 147 F.T.R. 246; 44 Imm. L.R. (2d) 1 (T.D.). Questions answered and appeal dismissed.

### Appearances:

Carolyn McCool, for the appellant.

Brenda Carbonnell, for the respondent.

### Solicitors of Record:

Legal Services Society, Immigration & Refugee Law Clinic, Vancouver, for the appellant.

Deputy Attorney General of Canada, for the respondent.

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The following are the reasons for judgment of the Court delivered orally in English by

**1 DÉCARY J.A.:**-- This is an appeal with respect to the following question certified by Madam Justice Tremblay-Lamer<sup>1</sup> pursuant to subsection 83(1) of the Immigration Act [R.S.C., 1985, c. I-2 (as am. by S.C. 1992, c. 49, s. 73)] (the Act):

Whether SIOs [senior immigration officers] have the implied jurisdiction to decide questions of law? If not, whether the [page406] Trial Division, when hearing an application for judicial review under section 18.1 of the Federal Court Act, has the jurisdiction to decide a constitutional challenge to the validity of a section of the Immigration Act?

The Trial Judge decided that senior immigration officers do not have the implied jurisdiction to decide questions of law. As a result, relying on the decision of the Supreme Court of Canada in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*,<sup>2</sup> and of this Court in *Canada (Attorney General) v. Sirois*,<sup>3</sup> she decided that the Trial Division of the Federal Court was itself without jurisdiction in judicial review proceedings to decide constitutional questions which a senior immigration officer could not have entertained.

2 The learned Judge went on, in case she had wrongly declined jurisdiction, to consider the arguments submitted by the parties with respect to the constitutionality of section 46.4 [as enacted by S.C. 1995, c. 15, s. 11] of the Act. She concluded that section 46.4 did not offend sections 7 and 12 of the Canadian Charter of Rights and Freedoms [being Part I of the Constitution Act, 1982, Schedule B, Canada Act, 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (the Charter) and she dismissed the application for judicial review.

3 We agree with the Trial Judge that the senior immigration officer does not have jurisdiction to decide questions of law for the very reasons she gave. The first part of the certified question will therefore be answered in the negative.

4 We respectfully disagree, however, with her conclusion to the effect that the Federal Court of Canada is therefore without jurisdiction, in judicial review proceedings, to decide constitutional questions. In that regard, we are in general agreement with the reasons for judgment of Mr. Justice Muldoon in paragraphs 18 to 31 (at pages 168-170) of his recent decision in *Raza v. Canada (Minister of Citizenship and Immigration)*,<sup>4</sup> which he summarized as follows [page 407] in paragraph 18 (at page 168):

With respect, however, it seems that Gwala was, as the learned judge herself seemed to suspect, incorrectly decided on the issue of whether this court has jurisdiction to hear constitutional challenges in the circumstances at bar. There are two reasons: the expanded provisions of the Federal Court Act which were not in place when *Poirier v. Canada (Minister of Veterans Affairs)*, [1989] 3 F.C. 233; 96 N.R. 34 (F.C.A.) or *Tétreault-Gadoury* were decided (but referred to by Nadon, J. in *Mobarakizadeh*, above); and second, that a tribunal which bases its decision on a constitutionally invalid provision commits a jurisdictional error. Thus, by implication, in order to determine whether a decision-maker acted within its jurisdiction, the constitutionality of the conferring provision must be assessed.

The second part of the certified question will therefore be answered in the affirmative.

5 The Trial Judge could then, as she effectively did, go on to examine whether section 46.4 of the Act offended sections 7 and 12 of the Charter. As she declined to certify a question with respect to her conclusion on that issue, we shall refrain from expressing any view on it.

6 The certified question will be answered as follows:

Whether SIOs [senior immigration officers] have the implied jurisdiction to decide questions of law?

Answer: No

If not, whether the Trial Division, when hearing an application for judicial review under section 18.1 of the Federal Court Act [R.S.C., 1985, c. F-7 (as enacted by S.C. 1990, c. 8, s. 5)], has the jurisdiction to decide a constitutional challenge to the validity of a section of the Immigration Act?

Answer: Yes

[page408]

and the appeal will be dismissed.

cp/d/qlndn

1 Gwala v. Canada (Minister of Citizenship and Immigration), [1998] 4 F.C. 43 (T.D.), at p. 63.

2 [1991] 2 S.C.R. 22.

3 (1988), 90 N.R. 39 (F.C.A.), at p. 42.

4 (1998), 157 F.T.R. 161 (F.C.T.D.).



*Indexed as:*  
**Moktari v. Canada (Minister of Citizenship and Immigration)**  
**(C.A.)**

**Ali Reza Moktari (Appellant)**  
**v.**  
**The Minister of Citizenship and Immigration (Respondent)**

[2000] 2 F.C. 341

[1999] F.C.J. No. 1864

Court File No. A-198-98

Federal Court of Canada - Court of Appeal

**Robertson, Rothstein and McDonald JJ.A.**

Heard: Edmonton, November 30, 1999.  
Judgment: Edmonton, November 30, 1999.

*Administrative law -- Judicial review -- Declarations -- Jurisdiction in Federal Court to grant declaratory relief in judicial review proceedings brought pursuant to Federal Court Act, s. 18 -- Where action seeking declaration paralleling judicial review application seeking same relief, statement of claim should be struck as disclosing no reasonable cause of action.*

*Federal Court jurisdiction -- Trial Division -- Jurisdiction in Federal Court to grant declaratory relief in judicial review proceedings brought pursuant to Federal Court Act, s. 18 -- Where action seeking declaration paralleling judicial review application seeking same relief, statement of claim should be struck as disclosing no reasonable cause of action -- To permit parallel proceedings arising from single decision would diminish capacity of Court to dispense justice in expedient, efficient manner.*

*Citizenship and Immigration -- Judicial review -- Action for declarations Immigration Act, s. 52 unconstitutional and Charter rights infringed paralleling application for judicial review seeking same relief -- Statement of claim should be struck as disclosing no reasonable cause of action -- Availability of declaratory relief upon judicial review as much matter of statutory interpretation as of practical necessity in immigration law field -- Given number of judicial review applications in immigration matters, initiation of parallel but unnecessary proceedings not in best interests of justice.*

[page342]

The appellant, an Iranian army deserter, was admitted to Canada as a Convention refugee but was subsequently convicted of trafficking in narcotics. A ministerial danger opinion was issued and a removal order made. The appellant sought to be removed to a country other than Iran, his country of citizenship, where he feared he would be in danger. A senior immigration officer denied that request. The appellant filed an application for leave to seek judicial review of that decision in the Federal Court. He also commenced an action by filing, with the same Court, a statement of claim seeking various declarations, including a declaration that section 52 of the Immigration Act was unconstitutional and that some of his Charter rights had been infringed. A Motions Judge allowed a motion to dismiss the action and dismissed a cross-application to stay the judicial review proceedings pending the outcome of the action. This was an appeal from that decision.

Held, the appeal should be dismissed.

The true issue underlying this appeal was whether the declaratory relief sought could be obtained only by way of action and not judicial review. The Court has jurisdiction to grant declaratory relief in judicial review proceedings brought pursuant to section 18 of the Federal Court Act. While there have been differing views expressed on this issue in the Trial Division, statements of claim should be struck for disclosing no reasonable cause of action where the relief being sought in the action is a declaration and a parallel judicial review application has been brought seeking the same result. More often than not, the constitutional issues raised in immigration proceedings can be conveniently dealt with in a judicial review proceeding.

While the 1992 amendments to the Federal Court Act were aimed at effecting significant changes in the law governing judicial review in this Court, to permit parallel proceedings arising from a single decision would diminish the capacity of this Court to dispense justice in an expedient and efficient manner. The right to obtain declaratory relief in judicial review proceedings is as much a matter of statutory interpretation as it is a matter of practical necessity especially in the field of immigration law. One need only look at the thousands of judicial review applications processed by the Trial Division of this Court in any one year to appreciate that the initiation of parallel but unnecessary proceedings can only work against the best interests of justice.

[page343]

### **Statutes and Regulations Judicially Considered**

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].

Federal Court Act, R.S.C., 1985, c. F-7, ss. 18 (as am. by S.C. 1990, c. 8, s. 4), 18.4(2) (as enacted *idem*, s. 5).

Immigration Act, R.S.C., 1985, c. I-2, ss. 52 (as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 7; S.C. 1992, c. 49, s. 42), 53(1)(d) (as am. *idem*, s. 43; 1995, c. 15, s. 12).

### **Cases Judicially Considered**

**Applied:**

Gwala v. Canada (Minister of Citizenship and Immigration), [1999] 3 F.C. 404; (1999), 157 F.T.R. 161; 242 N.R. 173 (C.A.).

Chan v. Canada (Minister of Employment and Immigration), [1994] 2 F.C. 612; (1994), 22 Imm. L.R. (2d) 105; 73 F.T.R. 279 (T.D.).

Gowrinathan v. Canada (Minister of Citizenship and Immigration), [1996] F.C.J. No. 702 (C.A.) (QL).

**Referred to:**

Macinnis v. Canada (Attorney General), [1994] 2 F.C. 464; (1994), 113 D.L.R. (4th) 529; 166 N.R. 57 (C.A.).

Suresh v. Canada (Minister of Citizenship and Immigration), [1999] 4 F.C. 206; (1999), 176 D.L.R. (4th) 296 (C.A.).

APPEAL from a Trial Division decision allowing a motion to dismiss the appellant's action for declaratory relief, which paralleled an application for judicial review seeking the same result. Appeal dismissed.

**Appearances:**

Wendy A. Danson, for the appellant.

William B. Hardstaff, for the respondent.

**Solicitors of Record:**

McCuaig Desrochers, Edmonton, for the appellant.

Deputy Attorney General of Canada, for the respondent.

[page344]

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The following are the reasons for judgment of the Court delivered orally in English by

**1 ROBERTSON J.A.:**-- After deserting the Iranian army, the appellant gained admission to Canada as a Convention refugee in April of 1990. In June of 1994 he was convicted of trafficking in narcotics. On May 13, 1996 the Minister of Citizenship and Immigration issued an opinion letter under paragraph 53(1)(d) of the Immigration Act [R.S.C., 1985, c. I-2 (as am. by S.C. 1992, c. 49, s. 43; 1995, c. 15, s. 12)] that the appellant constitutes a "danger to the public". As a result of that opinion letter, the appellant lost the right not to be "refouled" to Iran. On September 5, 1996 a removal order was made against the appellant. No attempt to execute the removal order was made until November of 1997 when the appellant had completed his sentence for the trafficking offence. On November 18, 1997 the appellant's solicitor requested that the appellant be entitled to be removed to a country other than Iran, under section 52 [as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 7; S.C. 1992, c. 49, s. 42] of the Act. That request was denied by a senior immigration officer (SIO) who confirmed the appellant's removal from Canada to Iran.

2 On November 18, 1997 the appellant filed an application for leave to seek judicial review of the SIO's decision denying his request and, as well, a statement of claim. In his statement of claim, the appellant sought various declarations, including a declaration that section 52 is unconstitutional and that the appellant's rights under the Canadian Charter of Rights and Freedoms [being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] had been infringed (in reality two of the declarations amount to an application for an order of prohibition and mandamus respectively).

3 By motion filed January 6, 1998 the respondent herein sought an order dismissing the appellant's [page345] action on the ground that it disclosed no reasonable cause of action and amounted to an abuse of process. The latter allegation was premised on the belief that the relief being sought could be obtained in the judicial review application. By cross-application the appellant sought a stay of his judicial review application pending determination of his action for a declaration of constitutional invalidity. On March 3, 1998 the respondent's motion to dismiss the action was granted. The cross-application to stay the judicial review proceedings pending the outcome of the action was dismissed. Both orders were issued without written reasons.

4 The jurisprudence of this Court makes it clear that we possess the jurisdiction to hear constitutional challenges to legislation in judicial review proceedings: see *Gwala v. Canada (Minister of Citizenship and Immigration)*, [1999] 3 F.C. 404 (C.A.). This is true whether or not the decision-maker (e.g. a SIO) possesses the jurisdiction to make constitutional rulings. To hold otherwise would mean that the Federal Court would be prevented from acting in circumstances where a tribunal commits a jurisdictional error or error of law by basing its decision on a provision which is not constitutionally valid. The true issue underlying this appeal is whether the declaratory relief sought by the appellant can be obtained only by way of action and not judicial review. In our view, this Court possesses the jurisdiction to grant declaratory relief in judicial review proceedings brought pursuant to section 18 of the Federal Court Act [R.S.C., 1985, c. F-7 (as am. by S.C. 1990, c. 8, s. 4)]. We acknowledge that there have been differing views expressed on this issue in the Trial Division. However, we are all of the view that the cases in which statements of claim have been struck for disclosing no reasonable cause of action where the relief being sought in the action was by declaration and a parallel judicial review application has been brought seeking the same result are to be followed.

[page346]

5 For example, in *Chan v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 612 (T.D.), at page 622 the Motions Judge held that "any doubt as to how challenges against federal boards, commissions or other tribunals should be brought to this Court was clarified [with the 1992 amendments to section 18]. This includes claims for declaratory relief. The proper procedure is an application for judicial review." As well, this Court in *Gowrinathan v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 702 (C.A.) (QL) upheld a Motions Judge's decision to strike a statement of claim on the basis that injunctive and declaratory relief should be pursued in judicial review proceedings as opposed to an action. This is not to deny that in a proper case the judicial review proceeding may be converted to an action as provided for in subsection 18.4(2) [as enacted by S.C. 1990, c. 8, s. 5] of the Federal Court Act. As to the relevant criteria see *Macinnis v.*

Canada (Attorney General), [1994] 2 F.C. 464 (C.A.). More often than not the constitutional issues raised in immigration proceedings can be conveniently dealt with in a judicial review proceeding.

6 We hasten to add that while the 1992 amendments to the Federal Court Act were aimed at effecting significant changes in the law governing judicial review in this Court, it is equally obvious that to permit parallel proceedings arising from a single decision would diminish the capacity of this Court to dispense justice in an expedient and efficient manner. The confusion over whether declaratory relief is available in judicial review proceedings has caused some litigants to initiate a judicial review application in this Court and then commence an action, for example, in the superior court of a province for the purpose of challenging the constitutional validity of the applicable legislation: the complexities of the situation are outlined fully in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [1999] 4 F.C. 206 (C.A.). In our view the right to seek and obtain declaratory relief in judicial review proceedings [page347] is as much a matter of statutory interpretation as it is a matter of practical necessity especially in the field of immigration law. One need only look at the thousands of judicial review applications processed by the Trial Division of this Court in any one year to appreciate that the initiation of parallel but unnecessary proceedings can only work against the best interests of justice.

7 For these reasons the appeal must be dismissed. There will be no award as to costs.

cp/d/qlcvd

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

Respondents

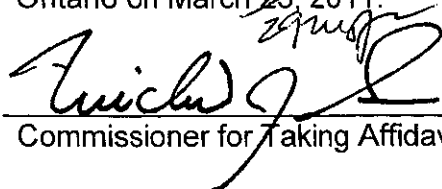
**AFFIDAVIT OF SERVICE**

I, Diane Dyke, Legal Assistant, of the City of Toronto, in the Province of Ontario

**SWEAR THAT:**

1. I served Anthony Bratschitsch with the Respondents' Motion Record for the motion returnable April 4, 2011, by sending a copy by priority post on Tuesday, March 29, 2011 to 163 Governors Road, Dundas, Ontario L9H 6L6.
2. Annexed and marked as Exhibit "A" is a copy of the ship request with Canada Post tracking number as evidence thereof.

SWORN before me at the City of  
Toronto in the in the Province of  
Ontario on March 25, 2011.

  
Commissioner for Taking Affidavits

  
Diane Dyke

Michael J. Sims

This is Exhibit "A" mentioned and  
referred to in the affidavit of  
**DIANE DYKE**  
Sworn before me this **29th** day of  
**MARCH** A.D. 20 **11**

Page 1 of 1

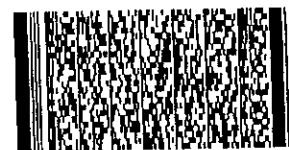
NeoPost Ship2



A Commissioner for taking affidavits

*Wickie Jz*

## Ship Request



TxnID: NEO000053797



Code  
Name **ANTHONY BRATSCHITSCH**  
Address **163 GOVERNORS ROAD**  
  
City **DUNDAS**  
Prov/State **ON** Postal Code **L9H6L6**  
Country **CANADA**  
Attention  
eMail

File Number **2-595438**  
Date **3/29/11**  
Service **P-POST**  
Portfolio **REG**  
Pieces **1**  
Dangerous Goods **None**  
Coll/Prepaid **Prepaid**

### Client

Department of Environment

### Requestor Information:

Name **DIANE DYKE** User Name **ddyke**  
eMail  
Telephone  
Location **2323C**

### Notes

**PRIORITY POST**

Serving Applicant with:  
1. Respondents' Motion Record  
(Applicant's Motion in writing)  
2. Respondents' Motion Record for the  
motion returnable April 4, 2011, *Box of Authorities*

**PRIORITE DEMAIN MATIN**  
**PRIORITY NEXT A.M.**



**CANADA POST / POSTES CANADA**

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Exp: **DEPARTMENT OF JUSTICE**  
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PIN/NIP **386873700048660**  
Ref/Ref 1: **NEO000053797**

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**ANTHONY BRATSCHITSCH**  
**163 GOVERNORS ROAD**  
**DUNDAS ON L9H 6L6**

UFMS V5.2  
Mailer/Exp:  
**3868737**

Ref/Ref 2:  
**2-595438**  
Method of Payment/  
Mode de paiement:  
Account/Compte  
Weight/Poids:  
**1.36 KG**

Size/Dim:  
**0.00x0.00x0.00cm**

CPC Tracking Number/Numero de reperage de la SCP

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**L9H 6L6**



Sender warrants that this item does not contain dangerous goods  
L'expéditeur garantit que cet envoi ne contient pas de matières dangereuses

Mar 25 11 06:33a

Tony Bratschitsch

1-905-628-2532

p. 2

Court File No.: T-2112-10

## **FEDERAL COURT**

Between:

**Anthony Bratschitsch**

Applicant

And

**The Chief Enforcement Officer, Environmental Enforcement, Environment  
Canada and The Attorney General of Canada**

Respondents

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## **MOTION RECORD**

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### **Contents**

<b>NOTICE OF MOTION</b>	<b>2</b>
<b>WRITTEN REPRESENTATIONS</b>	<b>4</b>



Mar 25 11 06:34a

Tony Bratschitsch

1-905-628-2532

p. 3

2

**FORM 359 - Rule 359**

**Court File No.: T-2112-10**

## **FEDERAL COURT**

**Between:**

**Anthony Bratschitsch**

**Applicant**

**And**

**The Chief Enforcement Officer, Environmental Enforcement, Environment  
Canada and The Attorney General of Canada**

**Respondents**

## **NOTICE OF MOTION**

**TAKE NOTICE THAT** the Applicant will make a motion to the Court in writing  
under Rule 369 of the Federal Courts Rules.

**THE MOTION IS FOR** an Order:

- a) Striking out the Respondents' Notice of Motion served and filed on  
February 18, 2011, without leave to amend; or
- b) in the alternative, this proceeding be submitted for case management; and
- c) the costs of this motion.

**THE GROUNDS FOR THE MOTION ARE** that:

- a) the Respondents failed to comply with Rule 364.(3) of the Federal Court  
Rules and, thereby, did not serve and file their Motion Record causing a  
Hearing scheduled for March 28, 2011 to be cancelled;
- b) the Respondents had 33 days to comply with Rule 364.(3) which allowed  
for adequate time to serve and file the record;
- c) the Applicant faxed a "reminder" to the Respondents' counsel in advance  
of their deadline to submit the Record;
- d) this failure to comply with the Rules has caused unnecessary delay in  
what the Applicant submits is an urgent matter for the Court's review.;

Mar 25 11 06:34a

Tony Bratschitsch

1-905-628-2532

p. 4

3

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of  
the motion:

Written Representation of Anthony Bratschitsch

Date:



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario L9H 6L6  
Tel: (289) 260-1153  
Fax: (905) 662-3828

TO:

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario M5X 1K6  
Tel: (416) 952-7117  
Fax: (416) 973-4323

SOR/2004-283, s. 35

Mar 25 11 06:34a

Tony Bratschitsch

1-905-628-2532

p. 5

4

Court File No. T-2112-10

## FEDERAL COURT

Between:

Anthony Bratschitsch

Applicant

And

The Chief Enforcement Officer, Environmental Enforcement, Environment  
Canada and The Attorney General of Canada

Respondents

### WRITTEN REPRESENTATIONS OF THE APPLICANT

1. This motion arises in the context of the Respondents' Notice of Motion served and filed on February 18, 2011. This is recorded as Document No. 6 on the Court File's Recorded Entries for T-2112-10.
2. The Respondents' Notice of Motion was made returnable March 28, 2011.
3. On March 24, 2011, the Hearing was removed from the General Sitting because the Respondents did not file their Motion Record.
- ④ 4. Counsel for the Respondents, Mr. Michael J. Sims, phoned me at 10:33 AM, March 24, 2011 to inform me that the Hearing was removed from the list.
5. In respect for Mr. Sims, I do not wish to risk mis-quoting the reasons for the delay in their filing of the Motion Record.
- ⑥ 6. Mr. Sims requested my availability for a Hearing on April 4, 2011 subject to being placed on the Hearing List. I did acknowledge that I was available for that date.
- ⑦ 7. However, I did ask of Mr. Sims on "*what my options where?*". According to my notes, he replied "*None. This must go ahead.*"
- ⑧ 8. I also stated during the same telephone conversation that I had faxed him a letter on Monday, March 21, 2011 regarding the service of his Motion Record in preparation of the Hearing. Mr. Sims acknowledged receiving this letter. For whatever the value of this document, I am submitting it as part of my Written Representation.

No evidence -  
unsupported.

Mar 25 11 06:34a

Tony Bratschitsch

1-905-628-2532

p. 6

5

9. I am very concerned about the Respondents' causing the cancellation of the Hearing of March 28, 2011 for the following reasons :

- b) They had 33 days since the filing of their Notice to prepare and file their Motion Record;
- c) My letter of March 24, 2011 to Mr. Sims served as a reminder about the upcoming service of their Motion Record;
- d) The Respondents' counsels are officers of the Court who are familiar with the Rules of the Court;
- e) That this failure to abide by the Rules will cause me, and others, unnecessary further delay and grief in the process of my Application.

Who?

10. I respectfully submit that it is imperative to dismiss the Respondents' Motion for an Order to strike out my Notice of Application for the following reasons :

- a) As an "agent" described under Section 280(1) of the Canadian Environmental Protection Act, 1999 ("CEPA 1999"), I am vulnerable to being charged at any time.

Section 280(1) of CEPA 1999 states:

*"Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted."*

- b) My rights to freedom under Section 7 of the Canadian Charter of Rights and Freedoms ("Charter") is threatened due to the provisions of Section 272 of CEPA 1999, as follows:

Section 272. (2) of "CEPA 1999" states:

*"Every person who commits an offence under subsection (1) is liable*

- (a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both; and*
- (b) on summary conviction, to a fine of not more than \$300,000 or to imprisonment for a term of not more than six months, or to both."*

- c) At least one Canadian has been already charged under the conditions that I have identified in my Application, i.e. "Section 36" of the "EIHWRRM" involving an administrative issue controlled by Americans outside of Canadian jurisdiction.

Mar 25 11 06:34a

Tony Bratschitsch

1-905-628-2532

p. 7

6

11. On behalf of myself and other Canadians who are similarly vulnerable, I ask the Court to dismiss the Respondents' Motion to Strike because my Application presents an urgent matter that should be reviewed by the Court without further delay caused by the Respondents and that the Respondents' have not abided by the Rules of the Court.

Respectfully submitted by the Applicant on March 25, 2011.



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel: (289) 260-1153

Mar 25 11 06:35a

Tony Bratschitsch

1-905-628-2532

p. 8

7

March 21, 2011

**Sent by Fax**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Tel: (416) 952-7117  
Fax: (416) 973-4323


Re: Your File No. 2-595438  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10

Dear Mr. Sims,

In preparation for the hearing on March 28, 2011, I would be grateful if you would fax (if convenient) your Motion Record to (905) 662-3828 or, otherwise, please courier it to my below address.

If needed, I can be contacted at (289) 260-1153.

Yours truly,



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Court File No. T-2112-10

**FEDERAL COURT**

Between:

**Anthony Bratschitsch**

Applicant

And

**The Chief Enforcement Officer, Environmental Enforcement,  
Environment Canada and The Attorney General of Canada**

Respondents

**WRITTEN REPRESENTATIONS OF THE APPLICANT**  
(Motion in Writing Moved by the Applicant)

1. This written representation is presented in response to the respondents' Motion Record received March 30, 2011.
2. The applicant's main contention will be that he wished to ensure that the application for judicial review would proceed in a fair and timely manner as is the intention of the summary court.
3. The applicant contends that his movement of his Notice of Motion to strike the respondents' notice was not made out of opportunism or pettiness on his part.
4. In fact, the applicant went as far as to fax a reminder letter to the respondents on March 21, 2011, as stated in his Motion Record.
5. Rather, the applicant contends that the respondents made a "miscalculation" and did not suffer from "oversight".
6. The "calculation" was made, in the applicant's belief, to present their motion record to the applicant at the last possible moment, which is fair and within the rules.
7. The applicant understands and appreciates that such things are done for "advantage".
8. Unfortunately for all parties, the miscalculation did occur and is strictly the responsibility of the respondents who should bear the consequences.

9. The applicant was prepared to appear at the March 28, 2011 hearing and was dismayed when he received the news of its cancellation from the respondents in the morning of March 24, 2011, as stated in his motion record.
10. As also stated in the applicant's motion record, the respondents had over one month to prepare, serve and file their motion record before the hearing.
11. During that one month, the applicant has established his work and living schedule around the March 28, 2011 hearing. This included various business presentations, customer visits and an assortment of travel plans.
12. Some of the March 24, 2011 telephone conversation was, the applicant believes, accurately stated in his motion record. However, there were two other significant items discussed that the applicant states for the first time but in a truthful manner. The applicant asked the respondent about the certainty of the April 4, 2011 hearing and the reply was "if the court can accommodate us". Although the actual phrase spoken may not be exact, it had the same effect. Most importantly, however, was the use of the word "if".
13. The word "if" is a very powerful word and does not provide any certainty. It only provided more uncertainty to the applicant who was facing a further, uncontrolled and, in his opinion, unfair delay of his application process.
14. The applicant waited the balance of the day on March 24, 2011 without word or confirmation from the respondents. This may or may not be the fault of any one.
15. Nevertheless, the applicant believed that it was important to his application and to the essence of the judicial review process to put the proceedings back on track.
16. Please note that the respondents' next motion was served and filed after the applicant's own notice was done so, the next day.
17. The second additional item of discussion referred to in above item no. 11 during the telephone conversation was the matter of the new motion record for the potential April 4, 2011 hearing. The applicant inquired if the same one for March 28, 2011 would be used and the respondents' reply was "no". This indicated to the applicant that his new business and living schedule would be based on waiting, most likely, until the last possible moment, again on receiving the new motion record. The respondents, if they had chosen to do so, could have made the applicant's difficulties less and not more.



18. The applicant only now raises this issue of the applicant's schedule because the respondents made it an issue in their motion record. The applicant had, originally, no desire to trouble the court or the respondents with the difficulties imposed upon him by the respondents' error.
19. The respondents claim that the applicant's motion is an unfair attack on their motion and they cite some case law. The applicant has a simple response to that claim in that the application for judicial review, itself, and not their motion, is the most important part of this summary process. In fact, in the applicant's opinion, the respondents' argument on this particular matter serves to feed the justification to dismiss their motion in favour of proceeding with the application, as per:

*Amnesty International* itemized the following "Legal Principles Governing Motions to Strike" by citing various case law:

- a) *"Applications for judicial review are intended to be summary proceedings, and motions to strike Notices of Application add greatly to the cost and time required to deal with such matters."*<sup>1</sup>
- b) *"...the striking out process is more feasible in actions than in applications for judicial review" and "There are no comparable rules governing Notices of Application for Judicial Review."*<sup>2</sup>
- c) *"...that applications for judicial review should not be struck out prior to a hearing on the merits of the application, unless the application is "so clearly improper as to be bereft of any possibility of success"."*<sup>3</sup>

For expediency and efficiency, the above citations are taken from the respondents Book of Authorities filed for the April 4, 2011 hearing.

- Separate motion.

20. The applicant understands that all his statements, whether by affidavit or by written representation, must be truthful and capable of being proven.

No - require actual evidence.

<sup>1</sup> *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147 at para. 22 Respondents' Motion "Hearing" Book of Authorities, Tab 1, pg. 5.

<sup>2</sup> *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147 at para. 23 Respondents' Motion "Hearing" Book Authorities, Tab 1, pg. 5.

<sup>3</sup> *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147 at para. 26 Respondents' Motion "Hearing" Book Authorities, Tab 1, pg. 6.

### Summary

21. The learned respondents made a miscalculation for the purpose of obtaining advantage and are out of compliance with the *Federal Court Rules*.
22. Their error has further delayed the intent of the Federal Court to provide summary reviews.
23. The applicant even sent a "reminder" letter to the respondents beforehand.
24. The applicant believes that he is rightfully entitled to do everything possible to ensure that his application proceeds in a timely manner.
25. The applicant also believes that, by requesting the respondents' motion be dismissed, it serves the purpose of the Court to provide a summary review of the application, which is the essence of the process. No.

Respectfully submitted by the Applicant on March 25, 2011.



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel: (289) 260-1153

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

AND TO: Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6  
Tel: (416) 952-7117  
Fax: (416) 973-4323

Solicitor for the Respondent to the Application

Michael J. Sims

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

Respondents

**RESPONDENTS' MOTION RECORD  
(APPLICANT'S MOTION IN WRITING)**

Michael J. Sims  
Department of Justice  
Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323

Counsel for the Respondents

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

AND TO: Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Tel. (289) 260-1153

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

Respondents

**TABLE OF CONTENTS**

<b>TAB</b>		<b>Page #</b>
1.	Affidavit of Diane Dyke	1 - 2
A.	Affidavit of Service	3 - 5
2.	Written Representations of the Respondents	6 - 13
3.	<i>Greens At Tam O'Shanter Inc. v. Canada</i> , 163 F.T.R. 311 (T.D.)	14 -16
4.	<i>Borowski v. Canada (Attorney General)</i> , [1989] 1 S.C.R. 342	17 - 33
5.	<i>Laliberté v. Canada</i> , 2004 FC 208	34 - 35
6.	<i>Pfeiffer &amp; Pfeiffer Inc. v. Canada (Deputy Superintendent of Bankruptcy)</i> , 2003 FCA 391	36 - 37
7.	<i>Jones v. Canada (Minister of Citizenship and Immigration)</i> , 2006 FCA 279	38 - 43

T-2112-10

001

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

Respondents

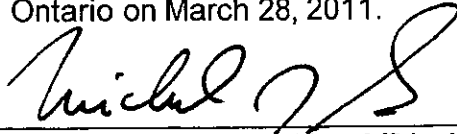
**AFFIDAVIT OF DIANE DYKE**

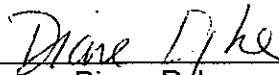
I, Diane Dyke, of the City of Toronto, SWEAR THAT:

1. I am a legal assistant with the Department of Justice, Ontario Regional Office, and I am assisting Mr. Michael J. Sims, the lawyer with carriage of this matter. As such, I have personal knowledge of the matters which are hereinafter deposed to, except those based on information and belief, in which case I indicate the source of the information and believe it to be true
2. I swear this affidavit in support of the respondents' response to the applicant's motion to strike their notice of motion, and for no other or improper purpose.
3. The respondents to this application for judicial review served and filed a notice of motion, dated February 18, 2011, to strike the application. The motion was returnable on March 28, 2011.
4. I am told by Mr. Sims that he misread the date requirements in Rule 364(3) of the *Federal Courts Rules*, and served the applicant with the respondents' motion record one day late. Attached hereto as Exhibit "A" is a copy of my affidavit of service, showing service of that motion record on March 24, 2011.
5. As a result of Mr. Sims' oversight, the court removed the respondents' motion the docket for March 28, 2011.

6. The respondents served and filed a new notice of motion on March 25, 2011, for a motion returnable at a general sitting of the Court on Monday, April 4, 2011.

SWORN before me at the City of  
Toronto in the in the Province of  
Ontario on March 28, 2011.

  
Commissioner for Taking Affidavits

  
Diane Dyke

Michael A. Sims



T-2112-10<sup>7</sup> 003

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

Respondents

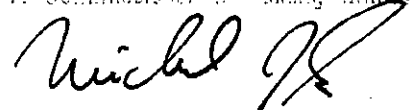
**AFFIDAVIT OF SERVICE**

I, Diane Dyke, Legal Assistant, of the City of Toronto, in the Province of  
Ontario SWEAR THAT:

1. I served Anthony Bratschitsch with the Respondents' Motion Record  
(Motion returnable March 28, 2011) of the Attorney General of Canada  
by sending a copy by priority post on Wednesday, March 23, 2011 to  
163 Governors Road, Dundas, Ontario L9H 6L6.

This is Exhibit "A" mentioned and  
referred to in the affidavit of  
DIANE DYKE  
Sworn before me this 28<sup>th</sup> day of  
MARCH A.D. 2011

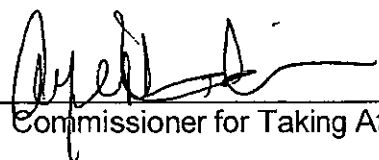
A Commissioner for taking affidavits



004

2. Annexed and marked as Exhibit "A" is a copy of the ship request with  
Canada Post tracking number as evidence thereof.

SWORN before me at the City of  
Toronto in the in the Province of  
Ontario on March 23, 2011.



Commissioner for Taking Affidavits



Diane Dyke

# Ship Request

MAY 23 A.D. 2011

A Commissioner for taking affidavits

*[Signature]*



Code  
Name ANTHONY BRATSC  
Address 163 GOVERNORS

City DUNDAS  
Prov/State ON Postal Code L  
Country  
Attention  
eMail

**PRIORITE DEMAIN MATIN  
PRIORITY NEXT A.M.**



CANADA POST / POSTES CANADA

From  
Exp: DEPARTMENT OF JUSTICE  
3400-130 KING STREET W  
TORONTO, ON M5X1K6

UFMS V5.2  
Mailer/Exp:  
3868737

PIN/NIP 3868737000048370  
Ref/Ref 1: NE0000053490

Ref/Ref 2:  
2-595438

Method of Payment/  
Mode de paiement:  
Account/Compte

Weight/Poids:  
1.81 KG

Size/Dim:  
0.00x0.00x0.00cm

## Client

Dept. of Environment

## Requestor Infor

Name DIANE DYKE User  
eMail  
Telephone  
Location 2323C

## Notes

Priority Post  
Respondents' Motion Record

To/Dest: Tel./Tel:

ANTHONY BRATSCCHITSCH  
163 GOVERNORS ROAD  
DUNDAS ON L9H 6L6

CPC Tracking Number/Numero de repérage de la SCP

3868 7370 0004 8370

**L9H 6L6**



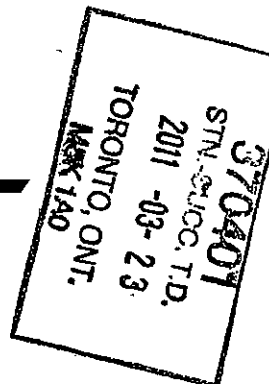
Sender warrants that this item does not contain dangerous goods  
L'expéditeur garantit que cet envoi ne contient pas de matières dangereuses

ATTENTION

SIGNATURE REQUIRED  
SIGNATURE REQUISE



38-088-84031-17



T-2112-10

006

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

Respondents

**WRITTEN REPRESENTATIONS OF THE RESPONDENTS  
(Applicant's motion in writing)**

**OVERVIEW**

1. In what borders on sharp practice, the applicant seeks to take advantage of an oversight by counsel for the respondents by moving to strike out their notice of motion.
2. The applicant's motion is moot, as the notice of motion he hopes to strike is spent, and his motion should be dismissed with costs.
3. As the parties will appear before the Court on April 4, 2011 on a related motion, the respondents request that this matter be dealt with orally at that time.

## PART I – STATEMENT OF FACTS

4. The respondents to this application for judicial review served and filed a notice of motion, dated February 18, 2011, to strike the application (the "February Notice"). The motion was returnable on Monday, March 28, 2011.<sup>1</sup>

5. Due to an oversight, counsel for the respondents served and sought to file the respondents' motion record one day late. As a result, the motion was removed from the docket for March 28, 2011, and the February Notice is spent.<sup>2</sup>

6. The applicant seeks to take advantage of counsel's oversight by moving to strike that spent notice of motion.<sup>3</sup>

7. The respondents served and filed a new notice of motion on March 25, 2011, for the same relief, returnable at a general sitting of the Court on Monday, April 4, 2011.<sup>4</sup>

8. The basis of the applicant's motion is that counsel's oversight has caused unnecessary delay in the determination of what he says is an urgent matter.<sup>5</sup>

---

<sup>1</sup> Affidavit of Diane Dyke, para. 3, Respondents' Record, Tab 1.

<sup>2</sup> Affidavit of Diane Dyke, paras. 4-5, Respondents' Record, Tab 1.

<sup>3</sup> The applicant's motion record was served by fax on March 25, 2011.

<sup>4</sup> Affidavit of Diane Dyke, para. 6, Respondents' Record, Tab 1.

9. The applicant makes a number of factual assertions in his written representations, but does not include an affidavit in his motion record. There is no evidence of any prejudice to him from the brief delay in having the respondents' motion heard.

## **PART II – POINTS IN ISSUE**

10. The issues on this motion are:
- (a) is the applicant's motion moot, given that the February Notice is spent?; and
  - (b) should this matter be disposed of at the hearing of the motion returnable on April 4, 2011?

11. The respondents respectfully submit that the above questions should be answered in the affirmative.

## **PART III – SUBMISSIONS**

### **A. MOTION VERSUS MOTION**

12. The applicant seeks by this motion to attack the respondents' motion to strike his application, rather than to respond to it on its merits.

13. As Hugessen J. held in *Greens at Tam O'Shanter Inc. v. Canada*,<sup>6</sup> such practice is inappropriate and should be discouraged:

---

<sup>6</sup> Notice of Motion, Applicant's Record, pg. 2.

<sup>6</sup> *Greens At Tam O'Shanter Inc. v. Canada*, 163 F.T.R. 311 at para. 8 (T.D.), Respondents' Record, Tab 3.

Motions should be opposed on their merits and should not be made the subject matter of further procedural motions. We risk building endless pyramids of motion materials if we do not enforce such a rule.

14. By moving to strike the spent February Notice, the applicant has doubled the number of preliminary matters requiring the Court's attention and caused the respondents to waste time and incur unnecessary costs.

#### **B. THIS MOTION IS MOOT**

15. The applicant seeks to strike out a notice of motion that is spent and of no effect. His motion cannot, therefore, resolve any controversy which affects the rights of the parties. It is moot as a result.<sup>7</sup>

16. Nor is this an appropriate case for the exercise of judicial discretion to decide the matter, notwithstanding its mootness. This motion to strike a spent notice of motion does not present any issue of larger importance, such that the legal system would benefit from guidance from the Court.

#### **C. NO EVIDENCE OF PREJUDICE**

17. The applicant has not demonstrated any evidence of prejudice resulting from the brief delay in hearing the respondents' motion to strike.

---

<sup>7</sup> *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353, Respondents' Record, Tab 4.

18. As noted, the applicant has not included an affidavit in his motion record, as required by Rule 363 of the *Federal Courts Rules*:

363. A party to a motion shall set out in an affidavit any facts to be relied on by that party in the motion that do not appear on the Court file.

19. Where a motion is brought without supporting evidence, it is vitiated *prima facie* and should be dismissed on that basis.<sup>8</sup>

20. The only basis for the applicant's motion to strike the February Notice is that counsel's oversight has caused unnecessary delay in the determination of what he says is an urgent matter.<sup>9</sup> That oversight, while regrettable, has caused a delay of only one week in the hearing of the respondents' motion.

21. There is no evidence, in either the applicant's motion record or the Court file, which supports the applicant's suggestion that he has suffered any harm. The only facts alleged which are supported by the Court file are <sup>that</sup> the applicant is a consultant in the waste disposal industry, and the dates upon which various documents were served and filed.

---

<sup>8</sup> *Laliberté v. Canada*, 2004 FC 208 at para. 5, Respondents' Record, Tab 5; *Pfeiffer & Pfeiffer Inc. v. Canada (Deputy Superintendent of Bankruptcy)*, 2003 FCA 391 at paras. 5, 8, Respondents' Record, Tab 6.

<sup>9</sup> Notice of Motion, Written Representations, para. 11, Applicant's Record, pp. 2, 6.



22. Even supposing that liability to potential criminal prosecution constitutes an injury, as the applicant suggests in his written representations, there is no evidence that the applicant is in any jeopardy of prosecution.

#### **D. THE RESPONDENTS REQUEST AN ORAL HEARING**

23. The respondents object to the disposition of this motion in writing and request an oral hearing of the matter, pursuant to Rule 369(2) of the *Federal Courts Rules*.

24. As noted, the only basis for the applicant's motion to strike the February Notice is that counsel's oversight is said to have caused unnecessary delay in the determination of his application.

25. The fastest and most efficient means of disposing of this motion is to have it heard on April 4, 2011, together with the respondents' motion to strike the application.

26. In deciding whether to exercise its discretion to allow an oral hearing, the Court will ask whether, under the circumstances, it can fairly dispose of a motion without the delay and additional expense typical of an oral hearing.<sup>10</sup> The respondents submit that this is a rare case where an oral hearing is the cheapest and least disruptive option.

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<sup>10</sup> *Jones v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 279 at para. 12, Respondents' Record, Tab 7.

27. Disposing of the motion at the hearing of the respondents' motion is also the most efficient use of the Court's resources.

#### **PART IV – ORDER SOUGHT**

28. The respondents respectfully request an order dismissing the applicant's motion, with costs.

29. Regardless of the outcome of the applicant's motion, as a self-represented litigant he is not entitled to costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at Toronto this March 29, 2011.

  
Michael J. Sims  
Of Counsel for the Respondents

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
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M5V 3L6

AND TO: Anthony Bratschitsch  
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## PART V – LIST OF AUTHORITIES

1. *Greens At Tam O'Shanter Inc. v. Canada*, 163 F.T.R. 311 (T.D.)
2. *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342
3. *Laliberté v. Canada*, 2004 FC 208
4. *Pfeiffer & Pfeiffer Inc. v. Canada (Deputy Superintendent of Bankruptcy)*, 2003 FCA 391
5. *Jones v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 279

*Indexed as:*  
**Greens At Tam O'Shanter Inc. v. Canada**

**Between**  
**The Greens At Tam O'Shanter Inc., plaintiff, and**  
**Her Majesty The Queen, defendant**

[1999] F.C.J. No. 260

[1999] A.C.F. no 260

163 F.T.R. 311

99 G.T.C. 7100

86 A.C.W.S. (3d) 1037

Court File No. T-2946-92

Federal Court of Canada - Trial Division  
Ottawa and Toronto, Ontario\*

**Hugessen J.**

Heard: February 24, 1999  
Oral judgment: February 24, 1999

(4 pp.)

*Practice -- Discovery -- Court, jurisdiction to make directions -- Applications and motions --  
Avoidance of multiplicity of proceedings -- Motions.*

Motion by the defendant, the Crown, for directions with respect to a motion brought by the plaintiff, Greens At Tam O'Shanter, which sought to compel answers to questions refused on an examination for discovery. The Crown argued that the written representations filed by Greens to support its motion were inadequate.

HELD: Motion dismissed. This judge was not in the proper position to determine whether Greens's written representations adequately informed the Crown or the court of the basis of the motion. Further, parties should be discouraged from bringing motions with respect to other motions at the risk

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of building endless pyramids of motion materials. If the motion materials filed were, in fact, inadequate, there were other remedies available to the Crown upon the return of Greens' motion.

**Statutes, Regulations and Rules Cited:**

Federal Court Rules, Rules 364(2)(e), 401.

Court Note:

\* Via teleconference.

**Counsel:**

Paul H. Starkman, for the plaintiff.

Jan Brongers, for the defendant.

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**1 HUGESSEN J.** (Reasons for Order, orally):-- The defendant has moved for directions with respect to a motion brought by the plaintiff seeking to compel answers to a number of questions which were refused on an examination for discovery and to compel as well the production of certain documents which was equally refused.

**2** The basis for the defendant's motion is the inadequacy of the written representations which were filed with the plaintiff's motion as required by Rule 364(2)(e) of the Federal Court Rules, 1998.

**3** Let me say at the outset that it is, in my view, clear that the purpose of requiring written representations to accompany motions, a new requirement of the Federal Court Rules, 1998, is double.

**4** First, it is intended that the moving party should fairly inform the opposite party of the legal and factual basis of the motion that is being brought. Such information is not only a requirement of fairness but may also in fact contribute to a saving of the Court's time, in that the motion may well be agreed to by the party responding thereto. There may be a substantial saving of costs as well. The Rules also make special provision for the awarding of costs against a party who opposes a motion that should not have been opposed.'

**5** The other, I think, obvious purpose of written representations is to inform the Court and to assist it in the disposition of the motion. These points are both taken by the defendant in the presentation of the motion this morning and I think they are well taken.

**6** Let me also say that the written representations filed by the plaintiff in connection with its motion to compel answers are certainly sparse in the extreme. I also think that, in the exchange of correspondence between the solicitors for the two parties which preceded the bringing of the present motion, the plaintiff's solicitor was wrong to assert that he is justified in refusing to make a fuller disclosure of his argument because to do so would be, so to speak, to give his opponent advance notice of the argument. Trial by ambush is not part of a sensible modern procedure.

7 That said, however, it is my view that I am not the proper person to decide the adequacy of the written representations which have been filed by the plaintiff. In the first place, I do not have before me the plaintiff's motion to compel answers and while, as I have already said, I think the written representations are sparse, I really am not in a position to determine whether they adequately inform either the defendant or the Court of the basis of the motion.

8 In the second place, and in the same interests of a sensible modern procedure, I think parties should be discouraged from bringing motions with respect to other motions. Motions should be opposed on their merits and should not be made the subject matter of further procedural motions. We risk building endless pyramids of motion materials if we do not enforce such a rule.

9 Indeed, in this very case, it seems to me that, if the defendant is right in its suggestion that the plaintiff's motion materials are inadequate, and in particular that the written representations are inadequate, there are a number of remedies which are available that the defendant may seek at the return of the plaintiff's motion. The Court which hears the motion will be able to do any one of a number of things if it finds that the plaintiff's motion materials were inadequate and unhelpful. It may, of course, as Mr. Prothonotary Hargrave suggested he might have done in the recent and unreported case of *The Wuskwi Sipihk Cree Nation*<sup>2</sup> simply dismiss the motion which is not properly supported. It may, alternatively as was done in a number of cases which have been cited to me that arose prior to the coming into force of the Federal Court Rules, 1998, require that fuller written representations be filed and adjourn the case for that purpose to be decided on the basis of those representations. Thirdly and this remedy may, of course, be in addition to either of the other two, it may make an award of costs either on column 5 or on a solicitor and client basis against the party who has offended against the requirement of Rule 364(2)(e) by filing inadequate written representations.

10 Any or all of those remedies are, it seems to me, adequate to meet any but the most extraordinary circumstances. I do not see extraordinary circumstances existing in the present case.

11 Accordingly, I am going to dismiss the motion for directions. The matter of the adequacy of the written representations may be spoken to again upon the return of the plaintiff's motion. The remedies that I have suggested may be sought and may, if the Court so decides, be imposed. I will make no order as to costs with respect to today's motion.

HUGESSEN J.

cp/d/pny/qltl

1 See Rule 401.

2 *The Wuskwi Sipihk Cree Nation v. Canada* (Minister of National Health and Welfare), [1999] F.C.J. No. 82, (January 21, 1999), (F.C.T.D.) T-383-98.

*Indexed as:*  
**Borowski v. Canada (Attorney General)**

**Joseph Borowski, appellant;**  
**v.**  
**The Attorney General of Canada, respondent;**  
**and**  
**Interfaith Coalition on the Rights and Wellbeing of Women and**  
**Children, R.E.A.L. Women of Canada, and Women's Legal**  
**Education and Action Fund (LEAF), interveners.**

[1989] 1 S.C.R. 342

[1989] S.C.J. No. 14

File No.: 20411.

Supreme Court of Canada

1988: October 3, 4 / 1989: March 9.

**Present: Dickson C.J. and McIntyre, Lamer, Wilson, La**  
**Forest, L'Heureux-Dubé and Sopinka JJ.**

**ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN**

*Appeal -- Mootness -- Abortion provisions of Criminal Code -- Provisions under challenge already found invalid -- Ancillary questions relating to Charter rights of the foetus -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case -- Criminal Code, R.S.C. 1970, c. C-34, s. 251 -- Canadian Charter of Rights and Freedoms, ss. 7, 15.*

*Criminal law -- Abortion -- Provisions under challenge already found invalid -- Ancillary questions relating to Charter rights of the foetus -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case.*

*Constitutional law -- Charter of Rights -- Right to life, liberty and security of the person -- Right to equality before and under the law -- Whether or not Charter rights extending to foetus -- Charter issues ancillary to question of validity of abortion provisions of Criminal Code -- Provisions under challenge already found invalid -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case.*

*Civil procedure -- Standing -- Standing originally found because action seeking declaration as to legislation's validity -- Provisions under challenge already found invalid -- Whether or not standing as originally [page343] determined -- Whether or not s. 24(1) of the Charter and s. 52(1) of the Constitution Act, 1982 able to support claim for standing.*

Appellant attacked the validity of s. 251(4), (5) and (6) of the Criminal Code relating to abortion on the ground that they contravened the life and security and the equality rights of the foetus, as a person, protected by ss. 7 and 15 of the Canadian Charter of Rights and Freedoms. Appellant's standing had been found on the basis that he was seeking a declaration that legislation is invalid, that there was a serious issue as to its invalidity, that he had a genuine interest as a citizen in the validity of the legislation and that there was no other reasonable and effective manner in which the issue could be brought before the Court.

The Court of Queen's Bench found s. 251(4), (5) and (6) did not violate the Charter as a foetus was not protected by either s. 7 or s. 15 of the Charter and also held that the s. 1 of Canadian Bill of Rights did not give the courts the right to assess the substantive content or wisdom of legislation. The Court of Appeal concluded that neither s. 7 nor s. 15 of the Charter applied to a foetus. The constitutional questions stated in this Court queried: (1) if a foetus had the right to life as guaranteed by s. 7 of the Charter; (2) if so, whether s. 251(4), (5) and (6) of the Criminal Code violated the principles of fundamental justice contrary to s. 7 of the Charter; (3) whether a foetus had the right to equal protection and equal benefit of the law without discrimination because of age or mental or physical disability as guaranteed by s. 15 of the Charter; (4) if so, whether s. 251(4), (5) and (6) of the Criminal Code violated s. 15; and (5) if questions (2) and (4) were answered affirmatively, whether s. 251(4), (5) and (6) of the Criminal Code were justified by s. 1 of the Charter. All of s. 251, however, was struck down subsequent to the Court of Appeal's decision but before the appeal reached this Court as a result of this Court's decision in *R. v. Morgentaler* (No. 2).

A serious issue existed at the commencement of the appeal as to whether the appeal was moot. Questions also existed as to whether the appellant had lost his standing and, indeed, whether the matter was justiciable. These issues were addressed as a preliminary matter and decision on them was reserved. The Court then heard argument on the merits of the appeal so that the whole appeal could be decided without recalling the parties for argument should it decide that the appeal should proceed notwithstanding the preliminary issues.

[page344]

Held: The appeal should be dismissed.

The appeal is moot and the Court should not exercise its discretion to hear it. Moreover, appellant no longer has standing to pursue the appeal as the circumstances upon which his standing was originally premised have disappeared.



The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.

The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)

This appeal is moot as there is no longer a concrete legal dispute. The live controversy underlying this appeal -- the challenge to the constitutionality of s. 251(4), (5) and (6) of the Criminal Code -- disappeared when s. 251 was struck down in *R. v. Morgentaler* (No. 2). None of the relief sought in the statement of claim was relevant. Three of the five constitutional questions that were set explicitly concerned s. 251 and were no longer applicable. The remaining two questions addressed the scope of ss. 7 and 15 of the Charter and were not severable from the context of the original challenge to s. 251.

A constitutional question cannot bind this Court and may not be used to transform an appeal into a reference. Constitutional questions are stated to define with precision the constitutional points at issue, not to introduce new issues, and accordingly, cannot be used as an independent basis for supporting an otherwise moot appeal.

The second stage in the analysis requires that a court consider whether it should exercise its discretion to decide the merits of the case, despite the absence of a live controversy. Courts may be guided in the exercise of [page345] their discretion by considering the underlying rationale of the mootness doctrine.

The first rationale for the policy with respect to mootness is that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

The Court should decline to exercise its discretion to decide this appeal on its merits because of concerns for judicial economy and for the Court's role in the law-making process. The absence of an adversarial relationship was of little concern: the appeal was argued as fully as if it were not moot.

With respect to judicial economy, none of the factors justifying the application of judicial resources applied. The decision would not have practical side effects on the rights of the parties. The case was not one that was capable of repetition, yet evasive of review: it will almost certainly be brought be-

fore the Court within a specific legislative context or possibly in review of specific governmental action. An abstract pronouncement on foetal rights here would not necessarily obviate future repetitious litigation. It was not in the public interest, notwithstanding the great public importance of the question involved, to address the merits in order to settle the state of the law. A decision as to whether ss. 7 and 15 of the Charter protect the rights of the foetus is not in the public interest due to the potential uncertainty that could result from such a decision absent a legislative context.

A proper awareness of the Court's law-making function dictated against the Court's exercising its discretion to decide this appeal. The question posed here was not [page346] the question raised in the original action. Indeed, what was sought -- a Charter interpretation in the absence of legislation or other governmental action bringing it into play -- would turn this appeal into a private reference. The Court, if it were to exercise its discretion, would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the Court's traditional role.

The appellant also lacked standing to pursue this appeal given the fact that the original basis for his standing no longer existed. Two significant changes in the nature of this action occurred since standing was granted by this Court in 1981. Firstly, the claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the Charter. Secondly, the legislative context of original claim disappeared when s. 251 of the Criminal Code was struck down. Standing could not be based on s. 24(1) of the Charter for an infringement or denial of a person's own Charter-based right was required. Here, the rights allegedly violated were those of a foetus. Standing could not be based on s. 52(1) of the Constitution Act, 1982 as this is restricted to litigants challenging a law or governmental action pursuant to power granted by law.

#### Cases Cited

Referred to: *R. v. Morgentaler* (No. 2), [1988] 1 S.C.R. 30; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Morgentaler v. The Queen* (No. 1), [1976] 1 S.C.R. 616; *Dehler v. Ottawa Civic Hospital* (1980), 29 O.R. (2d) 677 (C.A.), leave to appeal refused [1981] 1 S.C.R. viii; *The King ex rel. Tolfree v. Clark*, [1944] S.C.R. 69; *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117; *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944] S.C.R. 385; *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111; *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.R. 628; *Re Cadeddu and The Queen* (1983), 41 O.R. (2d) 481; *R. v. Mercure*, [1988] 1 S.C.R. 234; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Re Maltby and Attorney-General* [page347] of Saskatchewan (1984), 10 D.L.R. (4th) 745; *Hall v. Beals*, 396 U.S. 45 (1969); *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953); *Sibron v. New York*, 392 U.S. 40 (1968); *Vadeboncoeur v. Landry*, [1977] 2 S.C.R. 179; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911); *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, [1970] S.C.R. 713; *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, [1973] S.C.R. 756; *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470; *Re Opposition by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90; *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265.

### Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1.  
Canadian Charter of Rights and Freedoms, ss. 1, 7, 15, 24(1).  
Constitution Act, 1982, s. 52(1).  
Constitution of the United States of America, Art. III, s. 2(1).  
Criminal Code, R.S.C. 1970, c. C-34, s. 251(4), (5), (6).  
Rules of the Supreme Court of Canada, SOR/83-74, s. 32.

### Authors Cited

Kates, Don B., Jr. and William T. Barker. "Mootness in Judicial Proceedings: Toward a Coherent Theory" (1974), 62 Calif. L.R. 1385.  
Macklem, Patrick and Eric Gartner. "Re Skapinker and Mootness Doctrine" (1984), 6 Sup. Ct. L. Rev. 369.  
Sharpe, Robert J. "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide." In Robert J. Sharpe, ed., Charter Litigation. Toronto: Butterworths, 1987.  
"The Mootness Doctrine in the Supreme Court" (1974), 88 Harvard L.R. 373.  
Tribe, Laurence H. American Constitutional Law, 2nd ed. Mineola, N.Y.: Foundation Press, 1988.

APPEAL from a judgment of the Saskatchewan Court of Appeal (1987), 56 Sask. R. 129, 39 D.L.R. (4th) 731, [1987] 4 W.W.R. 385, 33 C.C.C. (3d) 402, 59 C.R. (3d) 223, dismissing an appeal from a judgment of Matheson J. (1983), 29 Sask. R. 16, 4 D.L.R. (4th) 112, [1984] 1 W.W.R. [page348] 15, 8 C.C.C. (3d) 392, 36 C.R. (3d) 259. Appeal dismissed.

Morris C. Shumiatcher, Q.C., and R. Bradley Hunter, for the appellant.  
Claude R. Thomson, Q.C., and Robert W. Staley, for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children.  
Angela M. Costigan and Karla Gower, for the intervener R.E.A.L. Women of Canada.  
Edward Sojonky, Q.C., for the respondent.  
Mary Eberts and Helena Orton, for the intervener Women's Legal Education and Action Fund (LEAF).

Solicitors for the appellant: Shumiatcher - Fox, Regina.  
Solicitors for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children: Campbell, Godfrey & Lewtas, Toronto.  
Solicitor for the intervener R.E.A.L. Women of Canada: Angela M. Costigan, Toronto.  
Solicitor for the respondent: Frank Iacobucci, Ottawa.  
Solicitors for the intervener Women's Legal Education and Action Fund (LEAF): Tory, Tory, DesLauriers & Binnington, Toronto.

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The judgment of the Court was delivered by

**1** **SOPINKA J.**--- This appeal by leave of this Court is from the Saskatchewan Court of Appeal, [1987] 4 W.W.R. 385, which affirmed the judgment at trial of Matheson J. of the Saskatchewan Court of Queen's Bench, [1984] 1 W.W.R. 15, dismissing the action of the plaintiff (appellant in this Court). In the courts below, the plaintiff attacked the validity of subss. (4), (5) and (6) of s. 251 of the Criminal Code, R.S.C. 1970, c. C-34, relating to abortion on the ground that they contravened protected rights of the foetus. Subsequent to the decision of the Saskatchewan Court of Appeal but by the time the appeal reached this Court, s. 251, including the subsections under attack in this action, had been struck down in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (hereinafter *R. v. Morgentaler* (No. 2)).

**2** From this state of the proceedings it was apparent at the commencement of this appeal that a serious issue existed as to whether the appeal was moot. As well, it appeared questionable whether the appellant had lost his standing and, indeed, whether the matter was justiciable. The Court therefore called upon counsel to address these issues as a preliminary matter. Upon completion of these submissions, we reserved decision on these issues and heard the argument of the merits of the [page349] appeal so that we could dispose of the whole appeal without recalling the parties for argument should we decide that, notwithstanding the preliminary issues, the appeal should proceed.

**3** In view of the conclusion that I have reached, it is necessary to deal with the issues of mootness and standing only. Since it is a change in the nature of these proceedings which gives rise to these issues, a review of the history of the action is necessary.

#### History of the Action

**4** Mr. Borowski commenced an action in the Court of Queen's Bench of Saskatchewan by filing a statement of claim on September 5, 1978, which asked for the following relief:

- (a) An Order of this Honourable Court declaring section 251, subsections (4), (5) and (6) of the Criminal Code invalid and inoperative;
- (b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in section 251, subsections (4), (5) and (6) are invalid and inoperative, and the outlay of such moneys is ultra vires and unlawful;
- (c) A permanent injunction enjoining the Minister of Finance, his servants and agents, from allocating, disbursing or in any way providing public moneys out of the Consolidated Revenue Fund for the establishment or maintenance of therapeutic abortion committees, for the performance of abortions or in support of any act or object relating to the abortion and destruction of individual human foetuses;
- (d) The costs of this action; and
- (e) Such further and other relief as to this Honourable Court seems just and expedient.

**5** Prior to trial, a motion was brought by the respondents questioning the jurisdiction of the Court of Queen's Bench. That motion culminated in an appeal to this Court in which a central issue was Mr. Borowski's standing to bring the action. The resulting decision of the majority of this Court, reported in *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, was that Mr. Borowski

had standing to attack the provisions of the Code referred to in his statement of claim. [page350]  
Martland J., speaking for the majority, stated, at p. 598:

I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion, the respondent has met this test and should be permitted to proceed with his action.

6 Laskin C.J., with whom Lamer J. concurred, would have denied standing on the basis that Mr. Borowski was not a person affected by the legislation and that there were others, such as doctors and hospitals, who might be so affected. The Chief Justice concluded, therefore, that Mr. Borowski did not have any judicially cognizable interest in the matter and that the Court ought to exercise its discretion to deny standing.

7 An amended statement of claim was filed on April 18, 1983, in which the original claims based on an alleged violation of the Canadian Bill of Rights, R.S.C. 1970, App. III, were repeated. Allegations based upon the Canadian Charter of Rights and Freedoms, which had been proclaimed on April 17, 1982, were added. The prayer for relief claimed:

- (a) An Order of this Honourable Court declaring Subsections (4), (5) and (6) of Section 251 of the Criminal Code to be ultra vires, unconstitutional, invalid, inoperative and of no force or effect;
- (b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in Subsections (4), (5) and (6) of Section 251 of the Criminal Code are ultra vires, inoperative, unconstitutional, invalid and of no force or effect and the outlay of such moneys is unlawful;
- (c) The costs of this action; and
- (d) Such further and other relief as to this Honourable Court seems just.

8 The Saskatchewan Court of Queen's Bench dismissed Mr. Borowski's claim relating to an alleged violation of s. 1 of the Canadian Bill of Rights. [page351] Matheson J. held that both *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 (hereinafter *Morgentaler v. The Queen* (No. 1)) and *Dehler v. Ottawa Civic Hospital* (1980), 29 O.R. (2d) 677 (C.A.) (leave to appeal to S.C.C. refused [1981] 1 S.C.R. viii) concluded that the Canadian Bill of Rights did not give the courts the right to assess the substantive content or wisdom of legislation.

9 Matheson J. noted that Mr. Borowski's principal argument under the Charter was that the foetus is a person and therefore should be afforded the protection of s. 7 of the Charter. It was held, however, that s. 251(4), (5), and (6) did not violate the Charter as a foetus is not included in "everyone" so as to trigger the application of any s. 7 rights.

10 On appeal Mr. Borowski did not pursue his claim that government funding of abortions was unlawful. The Saskatchewan Court of Appeal dismissed Mr. Borowski's appeal by concluding that

neither s. 7 nor s. 15 (which had come into effect on April 17, 1985, prior to the hearing before the Court of Appeal) applied to a foetus. Speaking for the Court, Gerwing J.A. examined the historical treatment of the foetus as well as the language and legislative history of s. 7 and concluded that the guarantees of s. 7 were not intended to extend to the unborn. As well, the foetus was held not to be included in "every individual" for the purpose of s. 15.

**11** Leave to appeal to this Court was granted on September 3, 1987. The grounds for appeal alleged by the appellant in his notice of motion for leave to appeal refer primarily to ss. 7 and 15 of the Charter. On October 7, 1987, McIntyre J., pursuant to Rule 32 of the Rules of the Supreme Court of Canada, SOR/83-74, stated the following constitutional questions:

1. Does a child en ventre sa mère have the right to life as guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms?
2. If the answer to question 1 is "yes", do subsections (4), (5) and (6) of Section 251 of the Criminal Code violate or deny the principles of fundamental justice, contrary to Section 7 of the Canadian Charter of Rights and Freedoms? [page 352]
3. Does a child en ventre sa mère have the right to the equal protection and equal benefit of the law without discrimination because of age or mental or physical disability that are guaranteed by Section 15 of the Canadian Charter of Rights and Freedoms?
4. If the answer to question 3 is "yes", do subsections (4), (5) and (6) of Section 251 of the Criminal Code violate or deny the rights guaranteed by Section 15?
5. If the answer to question 2 is "yes" or if the answer to question 4 is "yes", are the provisions of subsections (4), (5) and (6) of Section 251 of the Criminal Code justified by Section 1 of the Canadian Charter of Rights and Freedoms, and therefore not inconsistent with the Constitution Act, 1982?

**12** On January 28, 1988, after leave to appeal was granted, this Court decided *R. v. Morgentaler* (No. 2), supra, in which all of s. 251 was found to violate s. 7 of the Charter. Accordingly, s. 251 in its entirety was struck down.

**13** In July of 1988 in light of this Court's judgment in *R. v. Morgentaler* (No. 2), supra, counsel on behalf of the Attorney General of Canada applied to adjourn the hearing of the appeal. The respondent argued that the issue was now moot as s. 251 of the Criminal Code had been nullified and that the two remaining constitutional questions (numbers 1 and 3) which simply ask whether a child en ventre sa mère is entitled to the protection of ss. 7 and 15 of the Charter respectively are not severable from the other, now moot constitutional questions. Although the respondent claimed the matter was moot, no application to quash the appeal was made. The application to adjourn the hearing of the appeal was denied by Chief Justice Dickson on July 19, 1988, leaving it to the Court to address the mootness issue.

**14** I am of the opinion that the appeal should be dismissed on the grounds that: (1) Mr. Borowski's case has been rendered moot and (2) he has lost his standing. When section 251 was struck down, the basis of the action disappeared. The initial prayer for relief was no longer applicable. The foundation for standing upon which the previous decision of this Court was based also disappeared.

[page353]

### Mootness

15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

16 The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[page354]

### When is an Appeal Moot? -- The Authorities

17 The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, some of which are discussed below.

18 In *The King ex rel. Tolfree v. Clark*, [1944] S.C.R. 69, this Court refused to grant leave to appeal to applicants seeking a judgment excluding the respondents from sitting and exercising their functions as Members of the Ontario Legislative Assembly. However, the Legislative Assembly had been dissolved prior to the hearing before this Court. As a result, Duff C.J., on behalf of the Court, held at p. 72:

It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. [Emphasis added.]

19 A challenged municipal by-law was repealed prior to a hearing in *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363, leading to a conclusion that the appealing party had no actual interest and that a decision could have no effect on the parties except as to costs. Similarly, in a fact situation analogous to this appeal, the Privy Council refused to address the constitutionality of challenged legislation where two statutes in question were repealed prior to the hearing: *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.)

20 Appeals have not been entertained in situations in which the appellant had agreed to an undertaking to pay the respondent the damages awarded in the court below plus costs regardless of the disposition of the appeal: *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944] S.C.R. 385, and *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111. In *Coca-Cola v. Mathews*, Rinfret C.J. held the result of the undertaking was to eliminate any further lis between the parties such [page355] that the Court would have been forced to decide an abstract proposition of law.

21 As well, the sale of a restaurant for which a renewal of a licence was sought as required by the impugned municipal by-law rendered an issue technically moot: *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58. Issues in contention may be of a short duration resulting in an absence of a live controversy by the time of appellate review. Such a situation arose in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.R. 628, in which the cessation of a strike between the parties ended the actual dispute over the validity of an injunction prohibiting certain strike action by one party.

22 The particular circumstances of the parties to an action may also eliminate the tangible nature of a dispute. The death of parties challenging the validity of a parole revocation hearing (*Re Cad-eddu and The Queen* (1983), 41 O.R. (2d) 481 (C.A.)) and a speeding ticket (*R. v. Mercure*, [1988] 1 S.C.R. 234) ended any concrete controversy between the parties.

23 As well, the inapplicability of a statute to the party challenging the legislation renders a dispute moot: *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357. This is similar to those situations in which an appeal from a criminal conviction is seen as moot where the accused has fulfilled his sentence prior to an appeal: *Re Maltby v. Attorney-General of Saskatchewan* (1984), 10 D.L.R. (4th) 745 (Sask. C.A.).

24 The issue of mootness has arisen more frequently in American jurisprudence, and there, the doctrine is more fully developed. This may be due in part to the constitutional requirement, contained in s. 2(1) of Article III of the American Constitution, that there exist a "case or controversy":

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, [page356] or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

However, despite the constitutional enshrinement of the principle, the mootness doctrine has its roots in common law principles similar to those in Canada: see "The Mootness Doctrine in the Su-



preme Court" (1974), 88 Harvard L.R. 373, at p. 374. Situations resulting in a finding of mootness are similar to those in Canada. For example, in *Hall v. Beals*, 396 U.S. 45 (1969), a challenge to a Colorado voter residency requirement of six months was held moot due to a legislative change in the law removing the plaintiff from the application of the statute. Mootness was also raised in *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), where a defendant voluntarily ceased allegedly unlawful conduct. Similarly, in *Sibron v. New York*, 392 U.S. 40 (1968), mootness was an issue where an accused completed his sentence prior to an appeal of his conviction.

**25** The American jurisprudence indicates a similar willingness to consider the merits of an action in some circumstances even when the controversy is no longer concrete and tangible. The rule that abstract, hypothetical or contingent questions will not be heard is not absolute (see: Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 84; Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory" (1974), 62 Calif. L.R. 1385). A two-stage process is involved in which a court may consider the merits of an appeal even where the issue is moot.

[page357]

Is this Appeal Moot?

**26** In my opinion, there is no longer a live controversy or concrete dispute as the substratum of Mr. Borowski's appeal has disappeared. The basis for the action was a challenge relating to the constitutionality of subss. (4), (5) and (6) of s. 251. That section of the Criminal Code having been struck down in *R. v. Morgentaler* (No. 2), supra, the *raison d'être* of the action has disappeared. None of the relief claimed in the statement of claim is relevant. Three of the five constitutional questions that were set explicitly concern s. 251 and are no longer applicable. The remaining two questions addressing the scope of ss. 7 and 15 Charter rights are not severable from the context of the original challenge to s. 251. These questions were only ancillary to the central issue of the alleged unconstitutionality of the abortion provisions of the Criminal Code. They were a mere step in the process of measuring the impugned provision against the Charter.

**27** In any event, this Court is not bound by the wording of any constitutional question which is stated. Nor may the question be used to transform an appeal into a reference: *Vadeboncoeur v. Landry*, [1977] 2 S.C.R. 179, at pp. 187-88, and *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 71. The procedural requirements of Rule 32 of the Rules of the Supreme Court of Canada are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record. Rule 32 provides:

32. (1) When a party to an appeal
- (a) intends to raise a question as to the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder,
  - (b) intends to urge the inoperability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder.

such party shall, upon notice to the other parties, apply to the Chief Justice or a Judge for the purpose of stating the question, within thirty days from the granting of leave to appeal or within thirty days from the filing of the notice of appeal in an appeal with leave of the court [page358] of final resort in a province, the Federal Court of Appeal, or in an appeal as of right.

The questions cannot, therefore, be employed as an independent basis for supporting an appeal that is otherwise moot.

**28** By reason of the foregoing, I conclude that this appeal is moot. It is necessary, therefore, to move to the second stage of the analysis by examining the basis upon which this Court should exercise its discretion either to hear or to decline to hear this appeal.

#### The Exercise of Discretion: Relevant Criteria

**29** Since the discretion which is exercised relates to the enforcement of a policy or practice of the Court, it is not surprising that a neat set of criteria does not emerge from an examination of the cases. This same problem in the United States led commentators there to remark that "the law is a morass of inconsistent or unrelated theories, and cogent judicial generalization is sorely needed." (Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", *supra*, at p. 1387). I would add that more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases. It is, however, a discretion to be judicially exercised with due regard for established principles.

**30** In formulating guidelines for the exercise of discretion in departing from a usual practice, it is instructive to examine its underlying rationalia. To the extent that a particular foundation for the practice is either absent or its presence tenuous, the reason for its enforcement disappears or diminishes.

**31** The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully [page359] argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context. This was one of the factors which played a role in the exercise of this Court's discretion in *Vic Restaurant Inc. v. City of Montreal*, *supra*. The restaurant, for which a renewal of permits to sell liquor and operate a restaurant was sought, had been sold and therefore no mandamus for a licence could be given. Nevertheless, there were prosecutions outstanding against the appellant for violation of the municipal by-law which was the subject of the legal challenge. Determination of the validity of this by-law was a collateral consequence which provided the appellant with a necessary interest which otherwise would have been lacking.

**32** In the United States, the role of collateral consequences in the exercise of discretion to hear a case is well recognized. In *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911), the United States Supreme Court was asked to examine an order of the Interstate Commerce Commission which fixed maximum rates for certain transportation charges. Despite the expiry of this order, it was held, in part, that the remaining potential liability of the railway company to shippers comprised a collateral consequence justifying a decision on the merits. The principle that col-

lateral consequences of an already completed cause of action warrant appellate review was most clearly stated in *Sibron v. New York*, supra. The appellant in that case appealed his conviction although his sentence had already been completed. At page 55, Warren C.J. stated:

... most criminal convictions do in fact entail adverse collateral legal consequences. The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness."

[page360]

**33** In Canada, the cases of *Law Society of Upper Canada v. Skapinker*, supra, and *R. v. Mercure*, supra, illustrate the workings of this principle. In those cases, the presence of interveners who had a stake in the outcome supplied the necessary adversarial context to enable the Court to hear the cases.

**34** The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. (See: Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide", *Charter Litigation*.) It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

**35** The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. The influence of this factor along with that of the first factor referred to above is evident in *Vic Restaurant Inc. v. City of Montreal*, supra.

**36** Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, supra. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case [page361] that was moot. Accordingly, this Court exercised its discretion to hear the case. To the same effect are *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, [1970] S.C.R. 713, and *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, [1973] S.C.R. 756. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

37 There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. See *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470, and *Kates and Barker*, supra, at pp. 1429-1431. Locke J. alluded to this in *Vic Restaurant Inc. v. City of Montreal*, supra, at p. 91: "The question, as I have said, is one of general public interest to municipal institutions throughout Canada."

38 This was the basis for the exercise of this Court's discretion in the *Re Opposition by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793. The question of the constitutionality of the patriation of the Constitution had, in effect, been rendered moot by the occurrence of the event. The Court stated at p. 806:

While this Court retains its discretion to entertain or not to entertain an appeal as of right where the issue has become moot, it may, in the exercise of its discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this Court. [page362] In the circumstances of this case, it appears desirable that the constitutional question be answered in order to dispel any doubt over it and it accordingly will be answered.

39 Patently, the mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient. National importance is a requirement for all cases before this Court except with respect to appeals as of right; the latter, Parliament has apparently deemed to be in a category of sufficient importance to be heard here. There must, therefore, be the additional ingredient of social cost in leaving the matter undecided. This factor appears to have weighed heavily in the decision of the majority of this Court in *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90.

40 The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability. (See: *Kates and Barker*, "Mootness in Judicial Proceedings: Toward a Coherent Theory", supra, and *Tribe*, *American Constitutional Law* (2nd ed. 1988), at p. 67.)

41 In my opinion, it is also one of the three basic purposes of the mootness doctrine in Canada and a most important factor in this case. I generally agree with the following statement in P. Macklem and E. Gertner: "Re Skapinker and Mootness Doctrine" (1984), 6 Sup. Ct. L. Rev. 369, at p. 373:

The latter function of the mootness doctrine -- political flexibility -- can be understood as the added degree of flexibility, in an allegedly moot dispute, in the law-making function of the Court. The mootness doctrine permits the Court not to hear a case on the ground that there no longer exists a dispute between the parties, notwithstanding the fact that it is of the opinion that it [page363] is a matter

of public importance. Though related to the factor of judicial economy, insofar as it implies a determination of whether deciding the case will lead to unnecessary precedent, political flexibility enables the Court to be sensitive to its role within the Canadian constitutional framework, and at the same time reflects the degree to which the Court can control the development of the law.

I prefer, however, not to use the term "political flexibility" in order to avoid confusion with the political questions doctrine. In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.

42 In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

#### Exercise of Discretion: Application of Criteria

43 Applying these criteria to this appeal, I have little or no concern about the absence of an adversarial relationship. The appeal was fully argued with as much zeal and dedication on both sides as if the matter were not moot.

44 The second factor to be considered is the need to promote judicial economy. Counsel for the appellant argued that an extensive record had been developed in the courts below which would be wasted if the case were not decided on the merits. Although there is some merit in this position, the same can be said for most cases that come to this Court. To give effect to this argument would emasculate the mootness doctrine which by definition applies if at any stage the foundation for the action disappears. Neither can the fact that this Court reserved on the preliminary points and heard the appeal be weighed in favour of the appellant. In the absence of a motion to quash in advance of the appeal, it was the only practical [page364] course that could be taken to prevent the possible bifurcation of the appeal. It would be anomalous if, by reserving on the mootness question and hearing the argument on the merits, the Court fettered its discretion to decide it.

45 None of the other factors that I have canvassed which justify the application of judicial resources is applicable. This is not a case where a decision will have practical side effects on the rights of the parties. Nor is it a case that is capable of repetition, yet evasive of review. It will almost certainly be possible to bring the case before the Court within a specific legislative context or possibly in review of specific governmental action. In addition, an abstract pronouncement on foetal rights in this case would not necessarily promote judicial economy as it is very conceivable that the courts will be asked to examine specific legislation or governmental action in any event. Therefore, while I express no opinion as to foetal rights, it is far from clear that a decision on the merits will obviate the necessity for future repetitious litigation.

46 Moreover, while it raises a question of great public importance, this is not a case in which it is in the public interest to address the merits in order to settle the state of the law. The appellant is asking for an interpretation of ss. 7 and 15 of the Canadian Charter of Rights and Freedoms at large. In a legislative context any rights of the foetus could be considered or at least balanced against the rights of women guaranteed by s. 7. See *R. v. Morgentaler* (No. 2), *supra*, per Dickson C.J., at p. 75; per Beetz J. at pp. 122-23; per Wilson J. at pp. 181-82. A pronouncement in favour of the [page365] appellant's position that a foetus is protected by s. 7 from the date of conception would decide the

032

issue out of its proper context. Doctors and hospitals would be left to speculate as to how to apply such a ruling consistently with a woman's rights under s. 7. During argument the question was posed to counsel for R.E.A.L. Women as to what a hospital would do with a pregnant woman who required an abortion to save her life in the face of a ruling in favour of the appellant's position. The answer was that doctors and legislators would have to stay up at night to decide how to deal with the situation. This state of uncertainty would clearly not be in the public interest. Instead of rendering the law certain, a decision favourable to the appellant would have the opposite effect.

47 Even if I were disposed in favour of the appellant in respect to the first two factors which I have canvassed, I would decline to exercise a discretion in favour of deciding this appeal on the basis of the third. One element of this third factor is the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention. The need for courts to exercise some flexibility in the application of the mootness doctrine requires more than a consideration of the importance of the subject matter. The appellant is requesting a legal opinion on the interpretation of the Canadian Charter of Rights and Freedoms in the absence of legislation or other governmental action which would otherwise bring the Charter into play. This is something only the government may do. What the appellant seeks is to turn this appeal into a private reference. Indeed, he is not seeking to have decided the same question that was the subject of his action. That question related to the validity of s. 251 of the Criminal Code. He now wishes to ask a question that relates to the Canadian Charter of Rights and Freedoms alone. This is not a request to decide a moot question but to decide a different, abstract question. To accede to this request would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court.

48 Having decided that this appeal is moot, I would decline to exercise the Court's discretion to decide it on the merits.

#### Standing

49 Mr. Borowski's original action alleged that subss. (4), (5) and (6) of the Criminal Code [page366] violated the s. 1 right to life of the Canadian Bill of Rights: *Minister of Justice of Canada v. Borowski*, supra. This Court held Borowski had standing as he was able to demonstrate a "genuine interest" in the validity of the legislation.

50 Standing was granted premised upon Mr. Borowski's desire to challenge specific legislation. Martland J. considered the earlier standing decisions of the Supreme Court in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, and *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, and concluded that the appellant had standing by reason of his "genuine interest as a citizen in the validity of the legislation" under attack (at p. 598):

51 The Court relied heavily upon the decision in *Thorson*, supra, where Laskin J. (as he then was), speaking for the majority, stated at p. 161:

In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised ....  
[Emphasis added.]

I believe these decisions were clear in allowing an expanded basis for standing where specific legislation is challenged on constitutional grounds.

52 There have been two significant changes in the nature of this action since this Court granted Mr. Borowski standing in 1981. The claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the Canadian Charter of Rights and Freedoms. Secondly, by holding s. 251 to be of no force and effect in *R. v. Morgentaler* (No. 2), *supra*, the legislative context of this claim has disappeared.

53 By virtue of s. 24(1) of the Charter and 52(1) of the Constitution Act, 1982, there are two possible [page367] means of gaining standing under the Charter. Section 24(1) provides:

24. (1) Anyone whose rights or freedoms as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

54 In my opinion s. 24(1) cannot be relied upon here as a basis for standing. Section 24(1) clearly requires an infringement or denial of a Charter-based right. The appellant's claim does not meet this requirement as he alleges that the rights of a foetus, not his own rights, have been violated.

55 Nor can s. 52(1) of the Constitution Act, 1982 be invoked to extend standing to Mr. Borowski. Section 52(1) reads:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This section offers an alternative means of securing standing based on the Thorson, McNeil, Borowski trilogy expansion of the doctrine.

56 Nevertheless, in the same manner that the "standing trilogy" referred to above was based on a challenge to specific legislation, so too a challenge based on s. 52(1) of the Constitution Act, 1982 is restricted to litigants who challenge a law or governmental action pursuant to power granted by law. The appellant in this appeal challenges neither "a law" nor any governmental action so as to engage the provisions of the Charter. What the appellant now seeks is a naked interpretation of two provisions of the Charter. This would require the Court to answer a purely abstract question which would in effect sanction a private reference. In my opinion, the original basis for the appellant's standing is gone and the appellant lacks standing to pursue this appeal.

57 Accordingly, the appeal is dismissed on both the grounds that it is moot and that the appellant lacks standing to continue the appeal. In my opinion, in [page368] lieu of applying to adjourn the appeal, the respondent should have moved to quash. Certainly, such a motion should have been brought after the adjournment was denied. Failure to do so has resulted in the needless expense to the appellant of preparing and arguing the appeal before this Court. In the circumstance, it is appropriate that the respondent pay to the appellant the costs of the appeal incurred subsequent to the disposition of the motion to adjourn which was made on July 19, 1988.

qp/i/qlcvd

**\*\* Translation \*\***

*Case Name:*  
**Laliberté v. Canada**

**Between**  
**Michel Laliberté, Corrections Officer, applicant, and**  
**Her Majesty the Queen, respondent**

[2004] F.C.J. No. 234

[2004] A.C.F. no 234

2004 FC 208

2004 CF 208

133 A.C.W.S. (3d) 234

Docket T-1890-02

Federal Court  
Ottawa, Ontario

**Noël J.**

Heard: In writing.  
Judgment: February 9, 2004.

(8 paras.)

**Counsel:**

Written submissions by:

Michel Laliberté, the applicant, for himself.

Marc Ribiero, for the respondent.



### REASONS FOR ORDER AND ORDER

1 **NOËL J.**-- This is a motion by the applicant appealing an order by Prothonotary Morneau dated December 16, 2003, made pursuant to Rule 369 of the Federal Court Rules, 1998 (the Rules).

2 The applicant represented himself and in his motion maintained that Prothonotary Morneau:

- should have remained impartial, thus insinuating that he was not;
- made a value judgment on the applicant's intentions when he wrote that the application to amend was a [TRANSLATION] "disguised attempt to ..."

and he added with respect to the respondent, the Attorney General of Canada:

- [TRANSLATION] "the Attorney General of Canada tried to manipulate the Court by his subversive remarks".

3 The applicant's statements regarding the prothonotary and the Attorney General of Canada are serious and could damage their reputations.

4 Additionally, I find that the statements are contained in the motion but are not supported by an affidavit as required in Rule 363.

5 The motion is vitiated prima facie, as there is no affidavit providing evidence of the applicant's statements. Accordingly, it is inadmissible and should be dismissed for this reason alone.

6 Having said that, I note that the applicant by his motion of December 4, 2003, wished to amend his statement of claim to include Charter provisions, without specifying the amendments to be made.

7 In his order dated December 16, 2003, Prothonotary Morneau dismissed the application to amend for vagueness, but further noted that it was an indirect means of reopening another of his orders (dated October 6, 2003) which disposed of the application. The applicant appealed the order of October 6, 2003 and, in a judgment dated November 4, 2003, Lemieux J. dismissed the appeal, concluding that the matter was res judicata.

8 Having reviewed the memorandums of the parties and the documents in support thereof, and in particular the judgment of my colleague Lemieux J., I can only come to the same conclusion, namely that the motion is an indirect means of reopening matters discussed at the pre-trial conference and that the application to amend is vague and unspecific. The applicant has once again raised the same question which was already decided by my colleague in the instant motion on appeal: the matter is therefore res judicata.

### ORDER

#### THE COURT ORDERS THAT:

The motion on appeal from the decision of Prothonotary Morneau dated December 16, 2003 is dismissed with costs.

Certified true translation: Suzanne M. Gauthier, C Tr, LLL

cp/e/qw/qlklc

*Case Name:*

**Pfeiffer & Pfeiffer Inc. v. Canada (Deputy  
Superintendent of Bankruptcy)**

**Between**

**Pfeiffer & Pfeiffer Inc. and Sydney H. Pfeiffer,  
appellants, and  
Alain Lafontaine, Deputy Superintendent - Programs  
Standards and Regulatory Affairs, respondent**

[2003] F.C.J. No. 1608

[2003] A.C.F. no 1608

2003 FCA 391

2003 CAF 391

127 A.C.W.S. (3d) 22

Dockets A-607-02, A-609-02

Federal Court of Appeal  
Montréal, Quebec

**Létourneau, Nadon and Pelletier JJ.A.**

Heard: October 22, 2003.

Oral judgment: October 22, 2003.

(9 paras.)

Appeal by Pfeiffer & Pfeiffer and Sydney Pfeiffer from orders allowing a motion by the Deputy Superintendent to strike their motion for review of orders granting the Deputy Superintendent access to their premises. The Deputy Superintendent's motion was brought on an ex parte basis.

HELD: Appeal dismissed. The appellants failed to file affidavit evidence, so that there was no evidence to contradict the affidavits submitted by the Deputy Superintendent.

**Statutes, Regulations and Rules Cited:**

Federal Court Rules, Rule 363.

**Counsel:**

Aaron Rodgers, for the appellants.

Vincent Veilleux and Robert Monette, for the respondent.

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[Editor's note: An amendment was released by the Court on May 11, 2004. The changes were not indicated. This document contains the amended text.]

The judgment of the Court was delivered by

- 1 PELLETIER J.A. (orally):-- These are appeals of two orders of Pinard J. in which he allowed the respondent's motion to strike the appellants' motion seeking among other things a review of ex parte order granting the respondent access to the appellants' premises.
- 2 The elucidation of the underlying issues was made more complex by the fact that the appellants' motion to review the ex parte orders claimed relief which was not available in the appellants' motions namely mounting a collateral attack on the conservatory orders made by the respondent.
- 3 That overreaching, however, would not justify the dismissal of the motions, though it might support an order striking the relief which is not available.
- 4 The relief which the appellants were entitled to seek was an order setting aside the ex parte orders. The grounds which they alleged support such a motion were that 1) the respondent did not make full disclosure when he obtained the original order; and 2) the order was made without jurisdiction.
- 5 The difficulty which the appellants have created for themselves is that there is no affidavit in support of their motions. Rule 363 requires that a party to a motion must set out in an affidavit facts which do not appear in the court record. In this case, the court record contains two affidavits submitted in support of the ex parte motion.
- 6 Those are the facts in the court record. If the appellants wish to contradict them, they must do so by affidavit. They may well uncover further proof of the facts alleged in their affidavit by cross-examining the respondent's affiants but this does not detract from the obligation to provide an affidavit.
- 7 As for second ground, lack of jurisdiction, this question was decided by the Quebec Court of Appeal in National Fruit 2000 inc. (syndic de) c. Lafontaine [2002] R.J.Q. 1 (C.A.).
- 8 In the end, the Motions Judge was entitled to strike the appellants' motion as he did.
- 9 The appeal will be dismissed with one set of costs and disbursements in both files.

PELLETIER J.A.

cp/e/qw/qlaim/qlhcs/qlhbb

*Case Name:*

**Jones v. Canada (Minister of Citizenship and  
Immigration)**

**Between**

**Shurlyn Cathy Ann Jones and Shurnikay Jones, Appellants,  
and  
The Minister of Citizenship and Immigration, respondent**

[2006] F.C.J. No. 1254

[2006] A.C.F. no 1254

2006 FCA 279

2006 CAF 279

272 D.L.R. (4th) 274

353 N.R. 93

49 Admin. L.R. (4th) 102

2006 D.T.C. 6182

58 Imm. L.R. (3d) 3

150 A.C.W.S. (3d) 898

2006 CarswellNat 2587

Docket A-173-06

Federal Court of Appeal  
Ottawa, Ontario

**Richard C.J., Evans and Pelletier JJ.A.**

Heard: In writing.  
Judgment: August 17, 2006.

(28 paras.)

*Civil procedure -- Appeals -- Moot issues -- Motion by the Minister of Citizenship and Immigration for an order dismissing an appeal on the basis that the appeal was moot allowed -- Federal Court had dismissed applications with respect to validity of Guideline 7 issued by the Chair of the Board under the power conferred by paragraph 159(1)(h) of the Immigration and Refugee Protection Act - - However, Federal Court had allowed appellants' application for judicial review of the Board's decision denying them refugee status -- Appellants could not claim the benefit of one order for the purpose of having their case re-heard by the Board, and, at the same time, assert that they had the right to challenge the earlier order denying them the relief which was granted.*

Motion by the Minister of Citizenship and Immigration for an order dismissing an appeal on the basis that the appeal was moot. The appellants appealed from an order stating that their application for judicial review of a decision by a Refugee Protection Division of the Immigration and Refugee Board was dismissed in respect of certain issues. In that decision, the Board had dismissed the claim of the appellant, Shurlyn Jones, the principle claimant, and her daughter, Shunikay, to be recognized in Canada as refugees. Prior to the decision dismissing the appellants' application for judicial review, a number of applications for judicial review were before the Federal Court which raised an important question of law and affected many cases before the Board, namely, the validity of a procedural guideline (Guideline 7) issued by the Chair of the Board under the power conferred by paragraph 159(1)(h) of the Immigration and Refugee Protection Act. Guideline 7 provided for "reverse order question" of a refugee claimant; the Refugee Claims Officer would question the claimant before the claimant's lawyer. Nineteen of the applications, including the appellants, were consolidated and heard together. The Federal Court found that Guideline 7 was valid and certified that each application involved the same serious questions of general importance. That order dismissed the application for judicial review with respect to the issues heard by the Court at that time. The "non-Guideline 7" aspects of the appellants' application for judicial review were later heard and the Court found that the Board had committed a number of reviewable errors unconnected with Guideline 7, allowed the appellant's application for judicial review, quashed the Board's decision and remitted the matter for re-determination by a differently constituted panel. The Board was directed to defer the hearing of the appellants' claim until any appeal of the decision regarding other aspects of the application for judicial review was disposed of. The appellants filed their notice of appeal from that decision. In support of the motion to dismiss, the Minister said that the appellants' appeal from the latter order was moot, on the ground that the Court granted the very relief which the appellants would obtain if their Guideline 7 appeal succeeded.

HELD: Motion allowed. The appellants could not have it both ways. They could not claim the benefit of one order for the purpose of having their case re-heard by the Board, and, at the same time, assert that they had the right to challenge the earlier order denying them the relief which was granted. The procedure adopted by the Federal Court for dealing with multiple applications raising, among others, a single issue, did not result in any unfairness to the appellants. While the appellants might be adversely affected by any later decision upholding the validity of Guideline 7, it was in the nature of adjudication, and the doctrine of precedent, that a decision of one court may effectively determine the rights of third parties in other proceedings.

**Statutes, Regulations and Rules Cited:**

Federal Court Immigration and Refugee Protection Rules, SOR/93-22, s. 22

Federal Court Rules, Rules 369

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 74(d), 159(1)(h)

**Counsel:**

Written representations by:

Rocco Galati, for the Appellants.

John Provart, for the Respondent.

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The judgment of the Court was delivered by

1 **EVANS J.A.**:-- This is a motion in writing under Rule 369 of the *Federal Courts Rules* brought by the Minister of Citizenship and Immigration. The Minister requests the Court to dismiss for mootness the appellants' appeal from an order of Justice Mosley of the Federal Court, dated April 10, 2006. Justice Mosley's order states that their application for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board is dismissed in respect of certain issues which he had decided.

2 In that decision, dated May 5, 2005, the Board had dismissed the claim of Shurlyn Cathy Jones, the principal claimant, and her daughter, Shurnikay, to be recognized in Canada as refugees.

3 Prior to Justice Mosley's decision, there were a number of applications for judicial review in the Federal Court raising an important question of law affecting many cases before the Board, namely, the validity of a procedural guideline ("Guideline 7") issued by the Chair of the Board under the power conferred by paragraph 159(1)(h) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

4 Guideline 7 provides for "reverse order questioning" of a refugee claimant: that is, the Refugee Claims Officer questions the claimant before the claimant's lawyer. In the Federal Court, the applicants argued that the Guideline was invalid on various Charter and administrative law grounds, including procedural unfairness, the deprivation of Board members' adjudicative independence, and the fettering of their discretion.

5 Nineteen of these applications, including the appellants', were consolidated and heard together by Justice Mosley on March 7-8, 2006. On April 10, 2006, he rendered his decision finding that Guideline 7 was valid and certified that each application involved the same seven serious questions of general importance pursuant to paragraph 74(d) of the Act. The order dismissed the application for judicial review "with respect to the issues heard by the Court" at the hearing held on March 7-8, 2006. Justice Mosley's decision is reported as *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 631, 2006 FC 461.

6 Like several of the nineteen applicants, the appellants also challenged the validity of the Board's rejection of their claim on other grounds, which were set down to be heard in separate hear-

ings before different Judges of the Federal Court. The "non-Guideline 7" aspects of the appellants' application for judicial review were heard by Justice Snider on March 21, 2006.

7 In a decision bearing the same date as *Benitez*, April 10, 2006, Justice Snider found that the Board had committed a number of reviewable errors unconnected with Guideline 7, allowed the appellants' application for judicial review, quashed the Board's decision and remitted the matter for re-determination by a differently constituted panel of the Board.

8 In her order, Justice Snider directed the Board to defer the hearing of the appellants' claim "until any appeal of the decision regarding other aspects of this application for judicial review is disposed of in the Federal Court of Appeal or the time in which a party may file a Notice of Appeal to that Court has expired, whichever last occurs." Justice Snider's decision is reported as *Jones v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 591, 2006 FC 405.

9 On April 21, 2006, the appellants filed their notice of appeal in this Court from the decision of Justice Mosley. The Minister filed the present notice of motion on July 18, 2006.

10 In support of the motion to dismiss, the Minister says that the appellants' appeal from the order of Justice Mosley is moot, on the ground that Justice Snider granted the very relief which the appellants would obtain if their Guideline 7 appeal succeeded, namely, a quashing of the Board's refusal of their refugee claims and a remittal to the Board for re-determination. The appellants raise three issues in response to the motion to dismiss their appeals.

11 First, they argue that the Crown's motion should be dealt with on the basis of an oral hearing, not the written submissions from the parties under Rules 369. They submit that if the Minister's motion were granted, they would be deprived of an important right, namely the right to appeal against the decision of Justice Mosley. Further, they allege, the issues raised by the motion are sufficiently complex that they can only be properly explored at an oral hearing.

12 I do not agree. Rule 369 imposes no express limits on the exercise of the Court's discretion to dispose of a motion under Rule 369 in writing or after an oral hearing. Neither the text of the Rule nor the jurisprudence supports the position that motions to dismiss an appeal may not be determined on the basis of written submissions. Rather, the Court exercises its discretion by asking whether, in all the circumstances of the given case, it can fairly dispose of the motion without the delay and additional expense of an oral hearing.

13 The questions in dispute on this motion are purely legal and, in my opinion, not unduly complex. None of the factors listed by Prothonotary Hargrave in *Karlsson v. Canada (Minister of National Revenue)* (1995), 97 F.T.R. 75 at para. 10, as warranting an oral hearing is present here.

14 I am satisfied that, assisted by the full and able written submissions of counsel for the parties, I am in a position to dispose fairly of the motion without an oral hearing, whether held at the beginning of the hearing of the appeals, or at any other time.

15 Second, the appellants argue that, when Justice Mosley dismissed their application for judicial review on the Guideline 7 issues, and certified questions for appeal, they had an unqualified right to appeal his decision. This right could not be removed by the order of Justice Snider allowing the application for judicial review and quashing the Board's decision. They had, they argue, only one application for judicial review before the Federal Court, a fact that was not altered when the Court bifurcated the application by separating the Guideline 7 issues from the other grounds on which they sought to have the Board's decision quashed.

16 I agree that the appellants had only one application for judicial review before the Federal Court, which the Court bifurcated in order to enable it to deal efficiently and fairly with the pressing problem caused by the large number of cases raising the same general legal issue about the propriety of an important and pervasive aspect of the Board's process.

17 When Justice Mosley rejected the attack made by the applicants, including the present appellants, on the validity of Guideline 7, and certified questions for appeal, it is clear from his order that he was not disposing finally of the application for judicial review, but only dismissing it on the Guideline 7 issues. Justice Snider's order finally disposed of the application by granting it.

18 The basic problem with the appellants' position is that, having been granted the relief by Justice Snider that they sought in their application, they, in effect, want to appeal against Justice Mosley's reasons. While the parties do not dispute that Justice Mosley's order dismissing the application on certain issues is an order from which the appellants may appeal, that appeal is rendered moot by the order of Justice Snider.

19 The appellants cannot have it both ways. They cannot both claim the benefit of Justice Snider's order for the purpose of having their case re-heard by the Board, and, at the same time, assert that they have the right to challenge Justice Mosley's order denying them the relief which Justice Snider granted.

20 I am satisfied that the procedure creatively adopted by the Federal Court for dealing with multiple applications raising, among others, a single issue, does not result in any unfairness to the appellants. I find it inconceivable that the Board would proceed with the hearing of the appellants' claim before this Court disposes of the appeals from Justice Mosley's order which go forward. It is immaterial that Justice Snider's direction to the Board to defer the hearing of the appellants' claim may appear to assume that the appellants' appeal will proceed, when, as result of the Court's order disposing of this motion, it will not.

21 Since other appeals from Justice Mosley's order will be heard by this Court, dismissing the appellants' appeal does not preclude the Court from determining the validity of Guideline 7. Indeed, I understand that the Court is likely to receive submissions from the appellants' counsel who is representing other appellants in the Guideline 7 appeals. If these appeals are successful, the Board will re-determine the present appellants' refugee claim in the light of this Court's decision.

22 True, the appellants may be adversely affected by a decision of this Court upholding the validity of Guideline 7, a question on which they will not have been heard by this Court. However, it is in the nature of adjudication, and the doctrine of precedent, that a decision of one court may effectively determine the rights of third parties in other proceedings. Moreover, since their counsel is representing other appellants, the present appellants will indirectly have the benefit of his submissions.

23 In brief, the appellants' position is not materially different from what it would have been if all the issues in their application for judicial review had been heard and decided by one judge, who found against them on the Guideline 7 issue, but allowed their application on other grounds.

24 Accordingly, the appellants' appeal is moot and no useful purpose would be served if, in the exercise of the Court's discretion, I allowed it to proceed.

25 Third, the appellants ask for costs, whether or not the Minister's motion is granted, on the ground that the Minister did not file this motion until July 18, 2006, more than three months after



043

the appellants had filed their notice of appeal. The Minister must have been aware that, by mid-July, counsel would have done a lot of work preparing for the appeal. Counsel filed the appellants' appeal book on July 24, 2006, after obtaining from counsel for the Minister a short extension of time, on condition that the appellants' counsel filed his memorandum of fact and law no later than August 12, 2006. In these circumstances, counsel argues, the appellants should be awarded costs on a solicitor-client basis in respect of this motion.

**26** Costs are not awarded in proceedings arising under the *Immigration and Refugee Protection Act*, unless "for special reasons" the Court so orders: *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22, section 22.

**27** Despite counsel's submissions, I am not persuaded that the circumstances of this case constitute "special circumstances". In my opinion, the appeal was fundamentally misguided and, having decided to pursue it, the appellants must be taken to have assumed the risk that the normal costs consequences would follow. The benefit of section 22 was available to the appellants if their appeal failed on its merits; that benefit does not become a burden when their appeal is dismissed summarily.

**28** For these reasons, I would grant the motion and dismiss the appeal for mootness.

EVANS J.A.

RICHARD C.J.:-- I agree.

PELLETIER J.A.:-- I agree.

cp/e/qw/qlklc/qltxp

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

Respondents

**AFFIDAVIT OF SERVICE**


I, Diane Dyke, Legal Assistant, of the City of Toronto, in the Province of Ontario

**SWEAR THAT:**

1. I served Anthony Bratschitsch with the Respondents' Motion Record (Applicant's motion in writing) by sending a copy by priority post on Tuesday, March 29, 2011 to 163 Governors Road, Dundas, Ontario L9H 6L6.
2. Annexed and marked as Exhibit "A" is a copy of the ship request with Canada Post tracking number as evidence thereof.

SWORN before me at the City of  
Toronto in the Province of  
Ontario on March 29, 2011.

  
Commissioner for Taking Affidavits

  
Diane Dyke

Michael J. Smith

T-2112-10

This is Exhibit "A" mentioned and  
referred to in the affidavit of

DIANE DYKE  
Sworn before me this 29th day of  
MARCH A.D. 2011

Page 1 of 1



A Commissioner for taking affidavits

*Michael J. R.*

## Ship Request



TxnID: NEO000053797

Code  
Name ANTHONY BRATSCHITSCH  
Address 163 GOVERNORS ROAD  
  
City DUNDAS  
Prov/State ON Postal Code L9H6L6  
Country CANADA  
Attention  
eMail

File Number 2-595438  
Date 3/29/11  
Service P-POST  
Portfolio REG  
Pieces 1  
Dangerous Goods None  
Coll/Prepaid Prepaid

### Client

Department of Environment

### Requestor Information:

Name DIANE DYKE User Name ddyke  
eMail  
Telephone  
Location 2323C

### Notes

PRIORITY POST

Serving Applicant with:

1. Respondents' Motion Record  
(Applicant's Motion in writing)
2. Respondents' Motion Record for the  
motion returnable April 4, 2011 *Before the Authorities*

**PRIORITE DEMAIN MATIN  
PRIORITY NEXT A.M.**



CANADA POST / POSTES CANADA

From  
Exp: DEPARTMENT OF JUSTICE  
3400-130 KING STREET W  
TORONTO, ON M5X1K6

PIN/NIP 386873700048660  
Ref/Ref 1: NEO000053797

To/Dest: Tel./Tel:

ANTHONY BRATSCHITSCH  
163 GOVERNORS ROAD  
DUNDAS ON L9H 6L6

UFMS V5.2  
Mailer/Exp:  
3868737

Ref/Ref 2:  
2-595438  
Method of Payment/  
Mode de paiement:  
Account/Compte  
Weight/Poids:  
1.36 KG

Size/Dim:  
0.00x0.00x0.00cm

CPC Tracking Number/Numero de repérage de la SCP

3868 7370 0004 8660

**L9H 6L6**



Sender warrants that this item does not contain dangerous goods  
L'expéditeur garantit que cet envoi ne contient pas de matières dangereuses

**Federal Court - Cour fédérale**

**CONFIRMATION OF MOTION**

This Confirmation of Motion was sent to the Federal Court on: 31-Mar-2011 10:04 AM EDT

Court Number: T-2112-10  
Style of Cause: ANTHONY BRATSCHITSCH v. AGC ET AL  
Location of Hearing: Toronto

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I, Michael J. Sims / (416) 952-7116 , representing the moving party, Respondent (application) , confirm that I have conferred with the other parties and confirm that the motion to be heard on 04-Apr-2011 will proceed on the following basis:

For a hearing of all the issues

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*A copy of the moving party's confirmation of motion communicated to the Registry must be sent to all other parties forthwith.*

*If the confirmation information communicated to the Registry changes, the moving party shall advise the Registry immediately by submitting a subsequent confirmation of motion and sending a copy to the other parties.*

---

Federal Court



Cour fédérale

**Date: 20110428**

**Docket: T-2112-10**

**Toronto, Ontario, April 28, 2011**

**PRESENT: Kevin R. Aalto, Esquire, Prothonotary**

**BETWEEN:**

**ANTHONY BRATSHITSCH**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA  
AND THE CHIEF ENFORCEMENT OFFICER,  
ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

**Respondents**

**ORDER**

**UPON MOTION** dated the 25<sup>th</sup> day of March, 2011, on behalf of the Respondents for:

- (a) an Order striking out the Notice of Application, without leave to amend; or
- (b) in the alternative, granting an extension of time to file responding affidavits; and
- (c) the costs of this motion.

**AND UPON** reading the Motion Record of the Respondents and of the Applicant and upon hearing the submissions of the parties;

AND UPON reading the Motion Record of the Applicant moving to strike the Respondents' motion to strike, the Respondents' Motion Record and the Applicant's Reply and upon hearing the submissions of the parties; and upon considering the matter;

The Respondents served and filed a motion to strike the application dated February 18, 2011 returnable at the General Sittings initially on March 28, 2011 which was then moved to April 4, 2011. The Applicant filed a Rule 369 motion on March 28, 2011 to strike the Respondents' motion to strike the application. Both motions were before the Court at the General Sittings on April 4, 2011. Because of my disposition of the motion of the Respondents there is no need to consider the motion of the Applicant.

In this application, the Applicant seeks to strike down s. 36 of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, SOR/2005-149 (the Regulations) which regulations were promulgated under the *Canadian Environmental Protection Act, 1999*, 1999, c.33 (CEPA). s. 36 of the Regulations requires that an importer or exporter of hazardous waste or recyclable materials provide the Minister of the Environment with written confirmation that the waste has been disposed of or recycled within 30 days of such disposal or recycling. Thus, for example, a certificate should be obtained from a U.S. company which disposes of waste that is shipped to the U.S. by a Canadian company for disposal or recycling. A contravention of s. 36 is a criminal offence.

Briefly, by way of background, the Applicant is a consultant in the waste disposal industry. The Applicant did consulting work for a company which was charged under s. 36. The Applicant was not charged. The Applicant seeks to strike down the legislation so that he will not be charged nor will others. The Applicant challenges the validity of s. 36 on three grounds:

- (a) s. 36 breaches the guarantee of liberty enshrined in s. 7 of the *Charter of Rights and Freedoms* (the Charter);
- (b) s. 36 does not comply with various international agreements on the transboundary movement of hazardous waste; and,
- (c) s. 36 violates the expectations of "fair justice" by unfairly placing an inference of guilt on a person in some cases.

The Respondent seeks to strike the application on four basic grounds:

- (a) there is no "decision" which is the subject matter of the application;
- (b) the Applicant does not have public interest standing;
- (c) the Applicant does not have direct standing; and,
- (d) the Court cannot grant the relief requested.

Notwithstanding that the Applicant is both passionate and articulate in his submissions in support of his application and his response to the grounds of the Respondent, it is my view that the application must be struck. The test to be applied on a motion to strike is whether the application is bereft of any chance of success (see *David Bull Laboratories v. Pharmacia Inc.*, [1994] F.C.J. No. 1629.

On the facts of this case, the Applicant is a concerned citizen who happens to also be a consultant in the hazardous waste disposal industry. He is not subject to criminal prosecution currently. As noted during argument the time to raise the Charter issues is during a prosecution not in the context of a hypothetical claim.

Section 18.1 (1) of the *Federal Courts Act*, R.S.C. 1985 c. F-7, as amended, requires that the Applicant be "directly affected" by the matter which is the subject matter of the application. Here, the Applicant is not directly affected in the sense that it is used in s. 18.1 (1). His legal rights and legal obligations are not affected. He, personally, has not been subjected to prosecution. His s. 7 Charter rights have not been violated. He is not an importer or exporter of hazardous waste. He does argue that he might be held to be an agent and therefore subject to prosecution. His strongly held concern is for those in the waste disposal industry, including himself, who may be subject to prosecution. He believes he could be "strongly impacted" by a risk of prosecution which would destroy his reputation. In his notice of application he claims: "Since at least one Canadian and at least one entity have already faced such prospects, which occurred without precedence, the applicant is applying to the court for remedies." In effect, he is asking the Court to rewrite the legislation or force a change in the legislation.

While the concerns of the Applicant are sincere, the prospect of prosecution is insufficient to give the Applicant the necessary direct standing. As was noted in *R. v. Ciarniello*, 2006 BCSC 1671 at par. 62:

A theoretical possibility of imprisonment under a penal statute is not, by itself, sufficient to establish private interest standing to challenge its constitutional validity. Everyone in Canada faces a theoretical possibility of imprisonment under the various charging sections of



the *Criminal Code* if they do any of the things that those sections proscribe. If such a theoretical possibility of imprisonment were sufficient, then everyone would have private interest standing.

Neither does the Applicant have public interest standing. He does not meet the tests set out in *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236. The tests can be summarized as follows:

- (a) Is there a serious issue raised concerning the invalidity of the legislation?
- (b) Is the party directly affected, and if not, does the party have a genuine interest in the issue? and,
- (c) Is there another more reasonable and effective way to raise the issue?

The Applicant describes himself as a citizen who is oppressed or possibly oppressed by the "actions or the potential actions" of the government relying upon *Amnesty International v. Canada (Canadian Forces)* 2007 FC 1147. However, the facts of *Amnesty International* are very different than what is raised here. In that case a public interest group sought a remedy in circumstances where no other avenue for relief existed. Quite apart from the "potential actions" the Applicant is concerned, about the real issue that is the validity of s. 36 of the Regulations which can be determined in the context of proceeding under that Regulation. The Applicant argues that he is an "agent" and is therefore directly affected by s. 36. He is not directly affected unless he is charged under the section. Further, the Applicant argues that the threat of charges and possible imprisonment is not fair and that waiting to be charged is an inefficient and ineffective way to determine the issue. However, as noted by Cory, J. in *Canadian Council of Churches*:

The whole purpose of granting status is to prevent the immunization of legislation or public act from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to an attack from a private litigant.

Given that there is no "decision" of a federal board, commission or other tribunal in issue; that the relief requested is not within the scope of remedies the Court can grant; and, that he lacks both direct and public interest standing, the application must be struck. Given the legal conclusions reached herein for striking the application, it should be struck without leave to amend.

**THIS COURT ORDERS that:**

1. The Notice of Application is struck without leave to amend.
2. The Respondent is entitled to costs, if demanded.

\_\_\_\_\_  
"Kevin Aalto"  
Prothonotary

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

**Respondents**

**COSTS SUBMISSIONS OF THE RESPONDENTS**

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Ontario Regional Office  
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**Counsel for the Respondents**

**TO:** The Administrator  
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AND TO: Anthony Bratschitsch  
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Dundas, Ontario  
L9H 6L6  
Tel. (289) 260-1153

Applicant

T-2112-10

**FEDERAL COURT**

**BETWEEN :**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT OFFICER,  
ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

Respondents

**COSTS SUBMISSIONS OF THE RESPONDENTS**

**INDEX**

1. Respondents' Bill of Cost
2. Affidavit of Diane Dyke
  - A. Exhibit "A"
  - B. Exhibit "B"
  - C. Exhibit "C"
  - D. Exhibit "D"
  - E. Exhibit "E"
3. Costs Submissions of the Respondents
4. *Greens At Tam O'Shanter Inc. v. Canada* (1999), 163 F.T.R. 311 (T.D.)
5. *Zundel v. Canada (Solicitor General)*, 2005 FCA 260
6. *Murphy v. Canada (Minister of National Revenue)*, 2002 FCA 160
7. Notice of Direction

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

**Respondents**

**RESPONDENTS' BILL OF COSTS  
(Column III of Tariff B)**

**Fees**

<b>Item</b>	<b>Description</b>	<b>Units claimed</b>	<b>Off</b>	<b>Allowed</b>
2	Preparation of notice of appearance	4		
5	Preparation and filing of respondents' contested motion record and materials (respondents' motion to strike application)	7		
5	Preparation and filing of responding record to applicant's contested motion in writing (applicant's motion to strike respondent's notice of motion)	7		
13(a)	Preparation for hearing of motions	5		
6	Appearance at motion (3 hours x 3 units)	9		

26	Assessment of costs	3		
27	Other services: responding to applicant's letter seeking directions	1		

Total units claimed: 36  
Total fees claimed (\$130/unit): \$4,680

**Disbursements**

Description	Amount claimed	Off	Allowed
Mailing respondents' motion records	\$7.61		
Printing and photocopying motion records and book of authorities	91.75		

Total disbursements claimed: \$99.36

Total fees and disbursements: \$4,779.36

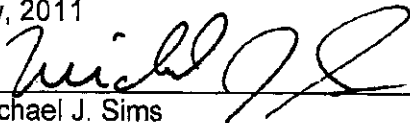
Assessed and allowed at \_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
Assessment Officer

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at Toronto this 4<sup>th</sup> day of May, 2011

  
\_\_\_\_\_  
Michael J. Sims  
Of Counsel for the Respondent

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

AND TO: Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel. (289) 260-1153

Applicant



T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

**Respondents**

**AFFIDAVIT OF DIANE DYKE**

I, Diane Dyke, of the City of Toronto, **SWEAR THAT:**

1. I am a legal assistant with the Department of Justice, Ontario Regional Office, and I am assisting Mr. Michael J. Sims, the lawyer with carriage of this matter. As such, I have personal knowledge of the matters which are hereinafter deposed to, except those based upon information and belief, in which case I indicate the source of the information and believe it to be true.

**Procedural History**

2. The Respondents brought a motion to strike out the Applicant's notice of application, originally returnable at the General Sittings of the Court on March 28, 2011. The hearing was later moved to the General Sittings on April 4, 2011, due to an administrative oversight by the Respondents' counsel.
3. In the interim, the Applicant brought a motion in writing to strike the Respondents' notice of motion. In their written response, the Respondents requested pursuant to Rule 369(2) that the matter be disposed of at the hearing on April 4, 2011, as the most efficient and cost-effective option. The motion was before Prothonotary Aalto on April 4, 2011 and disposed of at that time.

- 2 -

4. By order dated April 28, 2011, Proth. Aalto granted the Respondents' motion and struck out the Applicant's notice of application, without leave to amend. Prothonotary Aalto also awarded the Respondents their costs. In his reasons, Proth. Aalto held that his disposition of the Respondents' motion meant he did not have to consider the Applicant's motion. Attached hereto as Exhibit "A" is a copy of that order.
5. On April 5, 2011, the day after the hearing of the motions, the Applicant wrote to Mr. Sims indicating his intention to seek directions of the Court. Attached hereto as Exhibit "B" is a copy of that letter. Attached hereto as Exhibit "C" is a copy of Mr. Sims' response.

#### **Counsel Fees**

6. I am informed by Mr. Sims that the counsel fees submitted in the Respondents' bill of costs conservatively reflect the work he performed in responding to the application, bringing the successful motion to strike the notice of application, responding to the Applicant's motion in writing, and other services rendered to the Respondents.

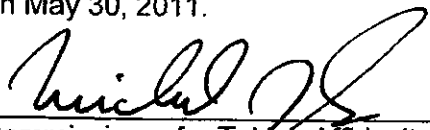
#### **Disbursements**

7. The only disbursements sought by the Respondents are postal charges for the service of the Respondents' motion records and photocopying charges for copying performed by an outside company.
8. Attached hereto as Exhibit "D" is the receipt for the postal charges.
9. Attached hereto as Exhibit "E" is the receipt for the printing and photocopying of the Respondents' motion record and book of authorities.
10. Although the Respondents' motion to strike the notice of application was moved from March 28 to April 4, 2011, requiring that a new motion record be served and filed, the Respondents have submitted disbursements for only one set of the motion records and books of authorities in their bill of costs.
11. The balance of printing and photocopying required for this file was performed in-house, and is not included in the bill of costs.
12. All of the disbursements recorded in Exhibits "D" and "E" have been charged to the Respondents.
13. Only those items reflected in Exhibits "D" and "E" have been included in the Respondents' bill of costs.

- 3 -

14. I swear this affidavit in support of the Respondents' bill of costs, as for no other or improper purpose.

SWORN before me at the City of  
Toronto in the Province of Ontario  
on May 30, 2011.

  
\_\_\_\_\_  
Commissioner for Taking Affidavits

  
\_\_\_\_\_  
Diane Dyke

04/29/2011 09:15 416-973-2154

C.A.S.

PAGE 02/07

Federal Court



Cour fédérale

Date: 20110428

Docket: T-2112-10

This is Exhibit "A" mentioned and  
referred to in the affidavit of

DIANE DYKE

Sworn before me this 30th day of

MAY AD. 2011

A Commissioner for taking affidavits

A handwritten signature in black ink, appearing to read "Diane Dyke".

Applicant

Toronto, Ontario, April 28, 2011

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

ANTHONY BRATSHITSCH

and

THE ATTORNEY GENERAL OF CANADA  
AND THE CHIEF ENFORCEMENT OFFICER,  
ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA

Respondents

**ORDER**

UPON MOTION dated the 25<sup>th</sup> day of March, 2011, on behalf of the Respondents for:

- (a) an Order striking out the Notice of Application, without leave to amend; or
- (b) in the alternative, granting an extension of time to file responding affidavits; and
- (c) the costs of this motion.

AND UPON reading the Motion Record of the Respondents and of the Applicant and upon  
hearing the submissions of the parties;

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C.A.S.

PAGE 03/07

Page: 2

**AND UPON** reading the Motion Record of the Applicant moving to strike the Respondents' motion to strike, the Respondents' Motion Record and the Applicant's Reply and upon hearing the submissions of the parties; and upon considering the matter;

The Respondents served and filed a motion to strike the application dated February 18, 2011 returnable at the General Sittings initially on March 28, 2011 which was then moved to April 4, 2011. The Applicant filed a Rule 369 motion on March 28, 2011 to strike the Respondents' motion to strike the application. Both motions were before the Court at the General Sittings on April 4, 2011. Because of my disposition of the motion of the Respondents there is no need to consider the motion of the Applicant.

In this application, the Applicant seeks to strike down s. 36 of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, SOR/2005-149 (the Regulations) which regulations were promulgated under the *Canadian Environmental Protection Act, 1999*, 1999, c.33 (*CEPA*). s. 36 of the Regulations requires that an importer or exporter of hazardous waste or recyclable materials provide the Minister of the Environment with written confirmation that the waste has been disposed of or recycled within 30 days of such disposal or recycling. Thus, for example, a certificate should be obtained from a U.S. company which disposes of waste that is shipped to the U.S. by a Canadian company for disposal or recycling. A contravention of s. 36 is a criminal offence.

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C.A.S.

PAGE 04/07

Page: 3

Briefly, by way of background, the Applicant is a consultant in the waste disposal industry. The Applicant did consulting work for a company which was charged under s. 36. The Applicant was not charged. The Applicant seeks to strike down the legislation so that he will not be charged nor will others. The Applicant challenges the validity of s. 36 on three grounds:

- (a) s. 36 breaches the guarantee of liberty enshrined in s. 7 of the *Charter of Rights and Freedoms* (the Charter);
- (b) s. 36 does not comply with various international agreements on the transboundary movement of hazardous waste; and,
- (c) s. 36 violates the expectations of "fair justice" by unfairly placing an inference of guilt on a person in some cases.

The Respondent seeks to strike the application on four basic grounds:

- (a) there is no "decision" which is the subject matter of the application;
- (b) the Applicant does not have public interest standing;
- (c) the Applicant does not have direct standing; and,
- (d) the Court cannot grant the relief requested.

Notwithstanding that the Applicant is both passionate and articulate in his submissions in support of his application and his response to the grounds of the Respondent, it is my view that the application must be struck. The test to be applied on a motion to strike is whether the application is bereft of any chance of success (see *David Bull Laboratories v. Pharmacia Inc.*, [1994] F.C.J. No. 1629.

04/29/2011 09:15 416-973-2154

C.A.S.

PAGE 05/07

Page: 4

On the facts of this case, the Applicant is a concerned citizen who happens to also be a consultant in the hazardous waste disposal industry. He is not subject to criminal prosecution currently. As noted during argument the time to raise the Charter issues is during a prosecution not in the context of a hypothetical claim.

Section 18.1 (1) of the *Federal Courts Act*, R.S.C. 1985 c. F-7, as amended, requires that the Applicant be "directly affected" by the matter which is the subject matter of the application. Here, the Applicant is not directly affected in the sense that it is used in s. 18.1 (1). His legal rights and legal obligations are not affected. He, personally, has not been subjected to prosecution. His s. 7 Charter rights have not been violated. He is not an importer or exporter of hazardous waste. He does argue that he might be held to be an agent and therefore subject to prosecution. His strongly held concern is for those in the waste disposal industry, including himself, who may be subject to prosecution. He believes he could be "strongly impacted" by a risk of prosecution which would destroy his reputation. In his notice of application he claims: "Since at least one Canadian and at least one entity have already faced such prospects, which occurred without precedence, the applicant is applying to the court for remedies." In effect, he is asking the Court to rewrite the legislation or force a change in the legislation.

While the concerns of the Applicant are sincere, the prospect of prosecution is insufficient to give the Applicant the necessary direct standing. As was noted in *R. v. Ciarniello*, 2006 BCSC 1671 at par. 62:

A theoretical possibility of imprisonment under a penal statute is not, by itself, sufficient to establish private interest standing to challenge its constitutional validity. Everyone in Canada faces a theoretical possibility of imprisonment under the various charging sections of

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C.A.S.

PAGE 06/07

Page: 5

the *Criminal Code* if they do any of the things that those sections proscribe. If such a theoretical possibility of imprisonment were sufficient, then everyone would have private interest standing.

Neither does the Applicant have public interest standing. He does not meet the tests set out in *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236. The tests can be summarized as follows:

- (a) Is there a serious issue raised concerning the invalidity of the legislation?
- (b) Is the party directly affected, and if not, does the party have a genuine interest in the issue? and,
- (c) Is there another more reasonable and effective way to raise the issue?

The Applicant describes himself as a citizen who is oppressed or possibly oppressed by the "actions or the potential actions" of the government relying upon *Amnesty International v. Canada (Canadian Forces)* 2007 FC 1147. However, the facts of *Amnesty International* are very different than what is raised here. In that case a public interest group sought a remedy in circumstances where no other avenue for relief existed. Quite apart from the "potential actions" the Applicant is concerned, about the real issue that is the validity of s. 36 of the Regulations which can be determined in the context of proceeding under that Regulation. The Applicant argues that he is an "agent" and is therefore directly affected by s. 36. He is not directly affected unless he is charged under the section. Further, the Applicant argues that the threat of charges and possible imprisonment is not fair and that waiting to be charged is an inefficient and ineffective way to determine the issue. However, as noted by Cory, J. in *Canadian Council of Churches*:

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PAGE 07/07

Page: 6

The whole purpose of granting status is to prevent the immunization of legislation or public act from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to an attack from a private litigant.

Given that there is no "decision" of a federal board, commission or other tribunal in issue; that the relief requested is not within the scope of remedies the Court can grant; and, that he lacks both direct and public interest standing, the application must be struck. Given the legal conclusions reached herein for striking the application, it should be struck without leave to amend.

**THIS COURT ORDERS that:**

1. The Notice of Application is struck without leave to amend.
2. The Respondent is entitled to costs, if demanded.

\_\_\_\_\_  
"Kevin Aalto"  
Prothonotary

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Apr 05 11 07:18a

Tony Bratschitsch

1-905-628-2532

p. 1

April 5, 2011

Sent via Fax

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario M5X 1K6

Tel: (416) 952-7117

Fax: (416) 973-4323

A Commissioner for taking affidavits

Exhibit "B"

forward to in the office of

DIANE DYKE

from before me this

30th

MAY

AD. 11

Re: Your File No. 2-595438  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10  
Procedures of Federal Court Rules

Dear Mr. Sims,

I am sending this letter to you in advance of sending a question of direction to the Court.

Later today, I will write a letter to the Federal Court to seek direction of the Court pursuant to Rule 309 of *the Federal Courts Rules*.

As we know, this file was subject to a "motion to strike" hearing yesterday presided by Mr. Prothonotary Aalto who is in the course of making his decision.

However, the Federal Court Registry Office had told me previously that the timing of procedures has not been stopped and that all parties were required to continue to comply with their filings on time.

The Court filed my Applicant's Affidavits and Exhibits on January 28, 2011 and my Applicant's Record is due to be filed 70 days later on April 8, 2011 – this Friday.

My question to the Federal Court will be: *Do I wait for Mr. Prothonotary Aalto's decision on the motion before I serve and file my record or do I follow the timing to file documents as per the Federal Court Rules while waiting for Mr. Aalto's decision?*

Personally, I would prefer that you are part of this decision and that we do not encounter any unnecessary hardships.

Thank you.



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario L9H 6L6  
Tel: (289) 260-1153



Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

April 6, 2011

VIA FACSIMILE

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Dear Mr. Bratschitsch:

Re: **BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

I returned to the office this morning from a business trip to find your letter of April 5, 2011. You indicate your intention to seek the directions of the court regarding the filing of your application record.

The respondents are of the view that you are not required, and in fact are not permitted, to proceed with filing your application record until Prothonotary Aalto has released his decision. You will recall that the respondents sought two, alternate forms of relief on their motion heard on April 4<sup>th</sup>: an order striking out your notice of application, or an order granting them an extension to serve and file responding affidavits. To file your record now would pre-empt Proth. Aalto's decision, which you cannot do.

In the event that your application is ordered to proceed, the respondents will consent to an extension of any deadline you have missed as a result of their April 4<sup>th</sup> motion to strike.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

This is Exhibit "C" made  
referred to in the affidavit of  
DIANE DYKE  
Sworn before me this 30th DAY  
MAY 2011  
A Commissioner for taking oaths

Canada



*enatachitsch v. A.C. } Resp. Motion Record (in writing)  
T. 2112-10 } Resp. Motion Record Oct. 4/11.  
Book of Authorities.*

**Tracking Number**

3868737000048660

Please note that this is the most up-to-date information available in our system. Our telephone agents have access to the same information presented here.

**Track Status****Product Type:** Priority Next A.M.**Expected Delivery :** 2011/03/30**Reference Number 1:** 2-595438**Reference Number 2:** NEO000053797

Date	Time	Location	Description	Retail Location	Signatory Name
2011/03/30	11:28	STONEY CREEK	Item successfully delivered		

**Track History**

Date	Time	Location	Description	Retail Location	Signatory Name
2011/03/30	11:28	STONEY CREEK	Item successfully delivered		
2011/03/30	08:11	STONEY CREEK	Item out for delivery		
2011/03/30	01:51	STONEY CREEK	Item processed at local delivery facility		
2011/03/29	21:18	MISSISSAUGA	Item processed at postal facility		
2011/03/29	16:26	TORONTO	Item accepted at the Post Office		
2011/03/29	16:22	MISSISSAUGA	Order information received by Canada Post		

**Shipping Options and Features for this Item****Dyke, Diane**

**From:** Petrick, Asha  
**Sent:** May 3, 2011 1:30 PM  
**To:** Dyke, Diane  
**Subject:** RE: NEO 000053797

\$7.61

**From:** Dyke, Diane  
**Sent:** May 3, 2011 12:11 PM  
**To:** Petrick, Asha  
**Subject:** NEO 000053797

Could you please tell me the charge on this one?

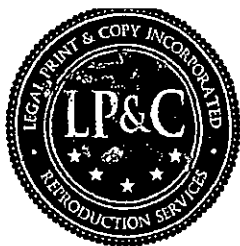
Thanks again,

Diane

<http://www.canadapost.ca/cpotools/apps/track/personal/printThisResult?ex...> 30/03/2011

This is Exhibit "D" mentioned and  
 referred to in the affidavit of  
 DIANE DYKE  
 Sworn before me this 30th day of  
 MAY A.D. 20 11

A Commissioner for taking affidavits  
*[Signature]*



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Department of Justice  
130 King Street West  
Toronto, ON M5X 1A4

No. 7508

ORDER SPECIFICATION SHEET

Date: 3.23.11 Ordered By: Diane Dyke  
Call Up # 4500102039 File # 2-595438

**Reproductions:** RBA/BA.

Number of Originals 202 / 2 Docs. 8.5 x 11 ☒ 8.5 x 14 ☐ 11 x 17 ☐

Number of Copies 300 Single Sided ☒ Double Sided ☐ As Originals ☒

Number of Tabs 52 Numeric ☒ Alphabetical ☐

Colour Copies ☐ 8.5 x 11 ☐ 8.5 x 14 ☐ 11 x 17 ☐

Case Books ☐ Number of Originals ☐ Blue Prints ☐ Size ☐

Manual Page Numbering of Originals ☐ Scan / Burn ☐ This is Exhibit "E" mentioned and referred to in the affidavit of DIANE DYKE

Sworn before me this 30TH day of

**Bindery:** MAY AD. 20 11

Originals Bound 2 Cerlox Bound 6 Stapled ☒ Paper Clipped ☒ A Commissioner for taking affidavits

Clear Cover ☐ Court Cover White 3 Hole Drilled ☐

Binders ☐ Size of Binders 16 Misc. Tabs int. Originals  
& checked.

Quality Control

Final Quality & Accuracy Check ☒ Job Completed By: [Signature]

Order Due Date & Time 3.24.11 / 9am

Cost: \$91.75 + Applicable Taxes

Original Invoice to Follow

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

**Respondents**

**COSTS SUBMISSIONS OF THE RESPONDENTS**

1. The Respondents seek their costs of their successful motion to strike the Applicant's notice of application, and of responding to the Applicant's motion in writing to strike their notice of motion.
2. The Respondents brought a motion to strike out the Applicant's notice of application, originally returnable at the General Sittings of the Court on March 28, 2011. The hearing was later moved to the General Sittings on April 4, 2011, due to an administrative oversight by the Respondents' counsel.<sup>1</sup>

---

<sup>1</sup> Affidavit of Diane Dyke, para. 2

3. In the interim, and in an attempt to take improper advantage of counsel's oversight, the Applicant brought a motion in writing to strike the Respondents' notice of motion.<sup>2</sup> The Respondents submit that such behaviour is deserving of costs sanctions. This Court has clearly held that motions should be opposed on their merits and should not be made the subject of further procedural motions.<sup>3</sup>

4. In their written response to the Applicant's motion, the Respondents requested pursuant to Rule 369(2) that the matter be disposed of on the April 4, 2011 hearing, as that presented the most efficient and cost-effective option for the parties and the Court. The Applicant's motion was before Prothonotary Aalto on April 4, 2011 and was disposed of at that time.<sup>4</sup>

5. By order dated April 28, 2011, Proth. Aalto granted the Respondents' motion and struck out the Applicant's notice of application, without leave to amend. In his reasons, Proth. Aalto held that his disposition of the Respondents' motion meant he did not have to consider the Applicant's motion.<sup>5</sup> The Respondents' motion, therefore, was dispositive of both matters.

---

<sup>2</sup> Affidavit of Diane Dyke, para. 3

<sup>3</sup> *Greens At Tam O'Shanter Inc. v. Canada* (1999), 163 F.T.R. 311 at para. 8 (T.D.).

<sup>4</sup> Affidavit of Diane Dyke, para. 3

<sup>5</sup> Affidavit of Diane Dyke, Ex. A

## **Counsel Fees**

6. The counsel fees submitted in the Respondents' bill of costs are reasonable, and conservatively reflect the work performed on the file.<sup>6</sup>

7. The amounts sought are modest, and reflect the moderate complexity of the legal issues involved.

8. The amount sought for preparing materials and responding to the Applicant's motion to strike the notice of motion are particularly appropriate, given that that motion was improper and unnecessary,<sup>7</sup> and imposed unnecessary financial costs on the Respondents.

## **Disbursements**

9. The only disbursements sought by the Respondents are postal charges for the service of the Respondents' motion records and photocopying charges for copying performed by an outside company. The printing and photocopying performed in-house is not included in the bill of costs.<sup>8</sup>

10. The postal charges are modest and reasonable, and were essential to the conduct of this matter. Service by mail is provided for in Rule 140 of the *Federal Courts Rules*, and is the most affordable option.

---

<sup>6</sup> Affidavit of Diane Dyke, para. 6

<sup>7</sup> Rule 400(3)(k)(i)

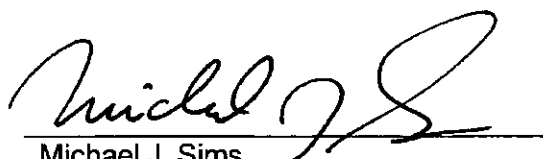


11. The photocopying fees submitted are for copying the Respondents' motion records and authorities only,<sup>9</sup> and were essential to the conduct of the action. The fees are reasonable in that they reflect actual out of pocket expenses incurred by the Respondents. This is in accordance with the jurisprudence of the Federal Court of Appeal.<sup>10</sup>

12. Although the Respondents' motion to strike the notice of application was moved from March 28 to April 4, 2011, requiring that a new motion record be served and filed, the Respondents have submitted a single set of copying expenses.<sup>11</sup>

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at Toronto this 30<sup>th</sup> day of May, 2011

  
Michael J. Sims  
Of Counsel for the Respondent

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

---

<sup>8</sup> Affidavit of Diane Dyke, paras. 7, 11

<sup>9</sup> Affidavit of Diane Dyke, para. 7, Ex. E

<sup>10</sup> *Zundel v. Canada (Solicitor General)*, 2005 FCA 260 at para. 12; *Murphy v. Canada (Minister of National Revenue)*, 2002 FCA 160 at para. 4.

<sup>11</sup> Affidavit of Diane Dyke, para. 10

AND TO: Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel. (289) 260-1153

Applicant



## Greens At Tam O'Shanter Inc. (The) v. Canada, 1999 CanLII 7512 (FC)

Date: 1999-02-24  
Docket: T-2946-92  
Parallel citations: 163 FTR 311  
URL: <http://www.canlii.org/en/ca/fct/doc/1999/1999canlii7512/1999canlii7512.html>  
Noteup: Search for decisions citing this decision

Date: 19990224

Docket: T-2946-92

### BETWEEN:

**THE GREENS AT TAM O'SHANTER INC.**

**Plaintiff**

**- and -**

**HER MAJESTY THE QUEEN**

**Defendant**

### REASONS FOR ORDER

**(Rendered orally at a teleconference in Ottawa, Ontario,**

**Wednesday, February 24, 1999)**

### HUGESSEN J.

[1] The defendant has moved for directions with respect to a motion brought by the plaintiff seeking to compel answers to a number of questions which were refused on an examination for discovery and to compel as well the production of certain documents which was equally refused.

[2] The basis for the defendant's motion is the inadequacy of the written representations which were filed with the plaintiff's motion as required by Rule 364(2)(e) of the *Federal Court Rules, 1998*.

[3] Let me say at the outset that it is, in my view, clear that the purpose of requiring written representations to accompany motions, a new requirement of the *Federal Court Rules, 1998*, is double.

[4] First, it is intended that the moving party should fairly inform the opposite party of the legal and factual basis of the motion that is being brought. Such information is not only a requirement of fairness but may also in fact contribute to a saving of the Court's time, in that the motion may well be agreed to by the party responding thereto. There may be a substantial saving of costs as well. The Rules also make special provision for the awarding of costs against a party who opposes a motion that should not have been opposed.

[5] The other, I think, obvious purpose of written representations is to inform the Court and to assist it in the disposition of the motion. These points are both taken by the defendant in the presentation of the motion this morning and I think they are well taken.

[6] Let me also say that the written representations filed by the plaintiff in connection with its motion to compel answers are certainly sparse in the extreme. I also think that, in the exchange of correspondence between the solicitors for the two parties which preceded the bringing of the present motion, the plaintiff's solicitor was wrong to assert that he is justified in refusing to make a fuller disclosure of his argument because to do so would be, so to speak, to give his opponent advance notice of the argument. Trial by ambush is not part of a sensible modern procedure.

[7] That said, however, it is my view that I am not the proper person to decide the adequacy of the written representations which have been filed by the plaintiff. In the first place, I do not have before me the plaintiff's motion to compel answers and while, as I have already said, I think the written representations are sparse, I really am not in a position to determine whether they adequately inform either the defendant or the Court of the basis of the motion.

[8] In the second place, and in the same interests of a sensible modern procedure, I think parties should be discouraged from bringing motions with respect to other motions. Motions should be opposed on their merits and should not be made the subject matter of further procedural motions. We risk building endless pyramids of motion materials if we do not enforce such a rule.

[9] Indeed, in this very case, it seems to me that, if the defendant is right in its suggestion that the plaintiff's motion materials are inadequate, and in particular that the written representations are inadequate, there are a number of remedies which are available that the defendant may seek at the return of the plaintiff's motion. The Court which hears the motion will be able to do any one of a number of things if it finds that the plaintiff's motion materials were inadequate and unhelpful. It may, of course, as Mr. Prothonotary Hargrave suggested he might have done in the recent and unreported case of *The Wuskwi Sipihk Cree Nation*<sup>1</sup> simply dismiss the motion which is not properly supported. It may, alternatively as was done in a number of cases which have been cited to me that arose prior to the coming into force of the *Federal Court Rules, 1998*, require that fuller written representations be filed and adjourn the case for that purpose to be decided on the basis of those representations. Thirdly and this remedy may, of course, be in addition to either of the other two, it may make an award of costs either on column 5 or on a solicitor and client basis against the party who has offended against the requirement of Rule 364(2)(e) by filing inadequate written representations.

[10] Any or all of those remedies are, it seems to me, adequate to meet any but the most extraordinary circumstances. I do not see extraordinary circumstances existing in the present case.

[11] Accordingly, I am going to dismiss the motion for directions. The matter of the adequacy of the written representations may be spoken to again upon the return of the plaintiff's motion. The remedies that I have suggested may be sought and may, if the Court so decides, be imposed. I will make no order as to costs with respect to today's motion.

"James K. Hugessen"

Judge

<sup>1</sup> See Rule 401.

<sup>2</sup> *The Wuskwi Sipihk Cree Nation v. Canada (Minister of National Health and Welfare)* (January 21, 1999), (F.C.T.D.) T-383-98 [unreported]



## Zundel v. Canada (Solicitor General), 2005 FCA 260 (CanLII)

Date: 2005-07-18

Docket: A-18-04

URL: <http://www.canlii.org/en/ca/fca/doc/2005/2005fca260/2005fca260.html>

Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Date: 20050718

Docket: A-18-04

**Citation: 2005 FCA 260**

BETWEEN:

ERNST ZUNDEL

Appellant

and

THE SOLICITOR GENERAL OF CANADA and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

### ASSESSMENT OF COSTS - REASONS

PAUL G.C. ROBINSON

### ASSESSMENT OFFICER

[1] This is an assessment of costs pursuant to a judgment dated April 1, 2004, by the Court of Appeal. The Court of Appeal granted the Respondents' motion to amend the style of cause and granted with costs the Respondents' motion to quash the Appellant's appeal from the designated judge's decision not to disclose additional information. In addition, within this judgment, the Court of Appeal dismissed with costs the Appellant's motion to stay the review of the security certificate pending his appeals at the Ontario Court of Appeal and the Federal Court of Appeal.

[2] On October 29, 2004, the Respondents filed a Bill of Costs regarding this Court of Appeal judgment as well as supporting material for the assessment. On the same date, the Respondents filed additional Bills of Costs regarding file DES-2-03 and the associated proceeding in file A-534-04.

[3] After discussions with the parties, a joint timetable was issued for the filing of all supporting materials regarding file A-18-04 as well as DES-2-03. All the supporting material was submitted within the time frames by the respective parties. For reasons of simplicity, I have decided to deal with each of these matters separately, notwithstanding my previous timetable direction which allowed for the filing of supporting material in respect of both Bills of Costs.

Appellant's Position

[4] The Appellant requests the maximum units of the assessable services claimed by the Respondents under Tariff B, Column III of the *Federal Courts Rules* be reduced since there is no justification for these amounts. In particular, the Appellant submits "...the travelling claim of five hours between Toronto and Ottawa is excessive." Inadvertently, it appears that the Appellant may be referring to the Respondents' Item 24 - Travel by Counsel to attend Motions and preparation of further submissions (M. Rodych, T. Hoffman - hotel accommodations January 23, 24, 27) as 5 hours not 5 units. However, I do understand the Appellant's argument on this latter point. In addition, the Appellant submits the Bill of Costs is simple and the "...claim of six hours for its preparation is excessive in the extreme. I note the Appellant may have inadvertently substituted the word "hours" when he may have meant "units" and I have also taken this argument into consideration. The Appellant objects to the one unit claimed for Item 25 (Services after judgment not otherwise specified) and requests it be disallowed since this was an interlocutory matter and the assessable service claimed "... does not apply as no judgment was pronounced." With regards to the Respondents' disbursements, the Appellant submits a disbursement "...of over \$1,000 for copying of brief of Authorities is excessive..." and should be reduced.

#### Respondents' Position

[5] The Respondents' submit this proceeding was extremely complex and required a specialization of litigation concerning national security certificates. In addition, the Respondents' note the two senior counsel assigned to this file were very experienced which, considering the complexity issue mentioned above, justifies their request for the maximum units allowed for the assessable services claimed. The Respondents note their claim of 5 units for Item 24 includes hotel accommodations during the hearing of the motion on January 28, 2004 and therefore, \$550.00 is not excessive. However, I must note there are no disbursements claimed for hotel accommodations in this proceeding. With regard to Item 26 (Assessment of Costs), the Respondents outline the varied steps taken to prepare and confirm the costs associated with this Bill of Costs and submit this justifies the 6 units claimed for this assessable service. The Respondents note the concern of the Appellant for the amount claimed for the Brief of Authorities but argue these photocopy costs were for multiple photocopy invoices for the various motions and the associated documents submitted for this proceeding.

#### Assessment

[6] In assessing this Bill of Costs, I have relied on the reasons in *Bruce Starlight et. al. v. Her Majesty the Queen*, [2001] F.C.J. 1376 and take the same viewpoint that "...each item is assessable in its own circumstances and it is not necessary to use the same point throughout in the range for items as they occur in the litigation." In addition, I have relied on the Rule 400(3) of the *Federal Courts Rules* which allows me to consider a number of factors when awarding costs. I have reviewed all the pertinent materials in the record and have summarized only those issues which are relevant for the disposition of this assessment in A-18-04.

[7] The parties have made their respective submissions on the issue of the maximum number of units claimed for the assessable services. The Respondents have claimed the maximum 5 units (\$550.00) for the Item 13. (a)(Preparation for hearing; including correspondence and preparation of books of authorities) in the Bill of Costs. There are a number of procedural steps that must be undertaken in any proceeding of this nature and a review of the court file record confirmed that at least two of these steps had been taken such as the filing of the Joint Appeal Books Agreement and the Appeal Books. For these reasons and considering *Bruce Starlight et. al. v. Her Majesty the Queen*, *supra*, I allow a reduced 4 units (\$440.00) for this assessable service.

[8] With respect to the Respondents' Item 21.(a) - Preparation and filing of Motion to Quash Appeal, Item 21.(a) - Preparation and filing of Reply to Appellant's Motion to Stay Inquiry, Item 21.(b) - Attend Court of Appeal for hearing of motions (January 28, 2004) and Item 15 - Preparation and filing of further argument and reply, in accordance with Order of the Court, the Respondent has claimed 3 units (\$330.00), 3 units (\$330.00), 12 units (\$1,320.00) and 7 units (\$770.00) respectively for each of these assessable services. It is appropriate in these circumstances that I outline and rely on Rule 400(3) of the *Federal Courts Rules* regarding these assessable services.

Rules 400(3)(a), (c), and (g):

Factors in awarding costs

(3) In exercising its discretion under subsection (1), the Court may consider

(a) the result of the proceeding;

(c) the importance and complexity of the issues;

(g) the amount of work;

...  
...  
Considering the factors such as complexity, the amount of work involved and the result of the hearing, I allow all 25 units (\$2,750.00) for these assessable services.

[9] The Respondents' in their Bill of Costs have claimed 5 units (\$550.00) for Item 24 - Travel by Counsel to attend Motions and preparation of further submissions (M. Rodych, T. Hoffman - hotel accommodations January 23, 24, 27). Item 24 of Tariff B of the *Federal Court Rules*, actually reads:

24. Travel by counsel to attend a trial, hearing, motion, examination or analogous procedure at the Direction of the Court.

I rely on the reasons in *Beaulieu v. Canada*, [2000] F.C.J. 2127 at paragraph 10:

... In item 24 of the bill of costs the respondent claimed the sum of \$500 for travel by counsel. In her written submissions in reply Ms. Laverne was prepared to reduce this amount to \$100. At the same time, the appellant based her objection on the phrase "at the discretion of the Court" contained in item 24, which she submitted did not extend to the assessment officer where no specific directions to that effect had been given. The appellant is correct: only judges have the discretionary authority to compensate counsel for travel. (emphasis mine)

I have reviewed the material in the Court record and have determined that no such direction exists, therefore Item 24 is disallowed.

[10] The Appellant has objected to Item 25 (Services after judgment not otherwise specified) and submits this assessable service should be disallowed since the matter before the Court of Appeal was interlocutory in nature and no judgment was pronounced. I view this submission as rather narrow in focus since the relief sought in one of the interlocutory matters was to quash the Appellant's appeal which in effect ended this proceeding. In addition, a common sense approach leads me to believe that it is reasonable that a party would have some tasks to complete for their client after such a decision had been rendered. In this proceeding, the Respondents sought payment from the Appellant for their awarded court costs as a preliminary step before filing a Bill of Costs which in my opinion entitles them to claim Item 25. For these reasons and specific to these circumstances, I allow the 1 unit (\$110.00) for this assessable service.

[11] This assessment of the Bill of Costs has proceeded by way of written submissions. It is my respectful opinion they were simple in nature and the parties did participate in the filing of materials which did assist me in the assessment of this Bill of Costs. However, I conclude a more modest amount is appropriate for this assessable service and I reduce Item 26 (Assessment of costs) to 2 units (\$220.00) for reasons I have outlined in the first two sentences of this paragraph.

[12] The Appellant has objected specifically to some of the photocopying disbursements for the Respondents' Briefs of Authorities as being excessive. As evidence of these disbursements, the Respondents' have submitted the affidavit of Jillian Schneider with copies of invoices as attached exhibits for most of these items. It is appropriate to rely on an excerpt from *Van Daele v. Van Daele* (1993), 45 C.P.C. 166 at 170, per McFarlane J.A. (B.C.C.A.) to consider this issue:

...

There, in my opinion, lies the error of principle into which Mr. Justice Meredith fell. The proper test, it seems to me, from a number of authorities referred to us this morning is whether at the time the disbursement or expense was incurred it was a proper disbursement in the sense of not being extravagant, negligent, mistaken or a result of

excessive caution or excessive zeal, judged by the situation at the time when the disbursement or expense was incurred.

...

With the latter reasons in mind, I am satisfied these were a reasonable and necessary expenses in this proceeding and the Respondents' have provided affidavit evidence to support these claims. The Respondents' total disbursements of \$1,713.57 are allowed in their entirety.

[13] The Respondents' Bill of Costs in A-18-04 is assessed and allowed in the amount of \$5,233.57 which includes assessable services, disbursements and applicable GST. A certificate is issued in this Court of Appeal proceeding payable to the Respondents for \$5,233.57.

"Paul Robinson"

Paul G.C. Robinson

Assessment Officer

Toronto, Ontario

July 18, 2005

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-18-04  
**STYLE OF CAUSE:** ERNST ZUNDEL  
Applicant

and

THE SOLICITOR GENERAL OF CANADA and  
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

ASSESSMENT OF COSTS -

**REASONS BY:** PAUL G.C. ROBINSON, Assessment Officer

**DATED:** July 18, 2005

**SOLICITORS OF RECORD:**

Peter Lindsay FOR THE APPELLANT  
Barrister ERNST ZUNDEL



Toronto, Ontario

John H. Sims, Q.C.

FOR THE RESPONDENTS

Deputy Attorney General of Canada


THE SOLICITOR GENERAL OF CANADA and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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CanLII

Home > Canada (federal) > Federal Court of Appeal >  
2002 FCA 160 (CanLII)

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## Murphy v. Canada (Minister of National Revenue), 2002 FCA 160 (CanLII)

Date: 2002-04-29

Docket: A-27-00

URL: <http://www.canlii.org/en/ca/fca/doc/2002/2002fca160/2002fca160.html>

Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Date: 20020429

Docket: A-27-00

Neutral Citation: 2002 FCA 160

**BETWEEN:**

**COLIN J. MURPHY, MARION MURPHY, RAYLYNN MURPHY,  
WILSON MURPHY, JR., MYRTLE MURPHY-SMITH AND RONALD SMITH**

**Applicants**

**- and -**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

### **ASSESSMENT OF COSTS - REASONS**

#### **FRANÇOIS PILON**

**Assessment Officer**

[1] This application for judicial review was dismissed with costs on June 4, 2001. The party and party assessment of the respondent's costs took place on April 16, 2002 by tele-conference with Mr. John Sinnott, Q.C. acting on behalf of the applicants and Mr. John Bodurtha on behalf of the respondent.

[2] Mr. Sinnott does not oppose the assessable services claimed under items 2, 14 and 25. However, he suggests 2 units would be reasonable for the assessment of costs under item 26. Mr. Bodurtha agrees to reduce the number of units from 3 to 2.

[3] Mr. Sinnott does not object to the following disbursements which are all supported by invoices:

- \$384.07 for photocopying services;

- \$14.00 for the services of a Commissioner of Oaths and

- \$39.68 for priority post charges.

[4] The amount of \$541.00 to photocopy the respondent's affidavit and application record is not opposed, but left to the discretion of the assessment officer. There is no evidence to support this expense. In Diversified Products Corp. et al v. Tye-Sil Corp., 34 C.P.R. (3<sup>rd</sup>) 267 Mr. Justice Teitelbaum established that the costs of photocopies is an allowable disbursement only if it is essential to the conduct of the proceedings. That test has been met here, the respondent having complied with the requirements of Rules 307 and 310. However, there is no evidence nor indication of the actual cost incurred. An examination of the Court record reveals that approximately 2,500 copies were made to comply with the above-noted Rules. I will allow the discretionary amount of \$300.00 which appears to be reasonable in the circumstances. In so doing I find support in the reasoning of Assessment Officer Parent at page 23 of her reasons for assessment of costs in Inverhuron & District Ratepayers Association v. Minister of the Environment et al [2001] F.C.J. no. 666. In the absence of proof of the actual costs of photocopying she allowed a lump sum well below the figure claimed.

[5] Finally, the respondent claims the sum of \$1,849.20 to obtain a copy of the transcript of cross-examination of F.G. Brown. This cost is supported by an invoice dated March 7, 2000. At the assessment it was established by counsel that this disbursement was not made for the above-noted purpose, but rather to obtain a copy of the full transcript of the oral evidence before the Tax Court. Mr. Sinnott opposes the payment of this expense for the following reasons:

- i) After appealing the decision of the Tax Court Judge, counsel for the applicants did not file a transcript and he did not request one;
- ii) The respondent did not provide a copy of the transcript to the applicants;
- iii) The transcript was not filed with the Court. It was only for the respondent's own, personal use;
- 4) Costs of photocopying portions of the transcript are already included in the amount of \$541.00;
- 5) He would have taken notes during the Tax Court hearing so as to avoid incurring additional expenses;
- 6) Only portions of the transcript were used in the Federal Court. The applicants should not pay for the full document and
- 7) Counsel maintains it is wrong in principle for the respondent to have included this item of disbursement in this bill of costs.

[6] Mr. Bodurtha rejects the arguments of Mr. Sinnott. His position is summarized below:

- 1) Portions of the transcript form part of the Court's record;
- 2) The respondent is entitled to rely upon the full transcript of the proceedings before the Tax Court in defence of its position;
- 3) The issues before the Tax Court Judge were, to a large extent, based upon the credibility of the applicants. The full transcript was essential to review the decision appealed from;
- 4) The Crown must not be punished for obtaining documentation required and relevant to its case;
- 5) The provisions of Rule 310 (2) (d) requires a respondent to include parts of the transcript of oral testimony and

6) At the time the transcript was requested counsel could not have known which portion would be relied upon at the hearing.

[7] I agree with both parties that this issue raises important principles. Rule 310 (2) of the Federal Court Rules provides that:

"The record of a respondent shall contain... d) the portions of any transcript of oral evidence before a tribunal that are to be used by the respondent at the hearing".

[8] Mr. Sinnott and Mr. Bodurtha presented excellent arguments in support of their respective positions. I find the principles set forth by the respondent of greater importance than the ones held by his opponent. In my view Mr. Bodurtha was justified and entitled to obtain a copy of the transcript of the Tax Court proceedings to prepare an adequate defence of his case. The provisions of the Rules specifically require a respondent to include parts of a transcript which he/she intends to rely upon. And as Mr. Bodurtha pointed out the full transcript was necessary because he could not have been reasonably expected to know which part was essential to his case. Three decisions of the Court were helpful in deciding this point. In *Hanson v. Canada (M.N.R.)* [1987] F.C.J. No. 729 Mr. Justice Muldoon wrote at page 1 of his Reasons for Order:

"The taxpayers of Canada do not unconditionally owe the plaintiff the cost of a transcript of proceedings in the Tax Court of Canada.... By whatever lawful means, however, the plaintiff is obliged to bear the disbursements of the action

which he has instituted. A transcript is available to all, and is not a document in the sole possession of the defendant. Therefore, if the plaintiff wants a transcript, he must pay for it. If the plaintiff be ultimately awarded his costs of this action, and if the Court or a taxing officer consider that the transcript was necessary and relevant to the prosecution of the plaintiff's action, then the cost of the transcript can be included as a disbursement in any such costs as may be awarded to the plaintiff. But first the plaintiff must decide whether such a transcript be relevant and necessary, and if so, pay for it at this stage of the proceedings."

[9] Taxing costs in a judicial review application in *Swanson Estate v. Canada* [1990] F.C.J. No. 357, Taxing Officer Stinson was faced with a similar situation to the case at bar. At page 4 he concludes:

"I am reluctant to apply, as a standard, my assessment of whether plaintiffs' solicitor could have functioned without the transcript because this would involve hindsight to some extent as opposed to the considerably more relevant test of the reasonableness of the decision to incur the disbursement given the circumstances at the time. Here, plaintiffs' solicitor could not ignore the potential relevance of this evidence to case preparation and I approve the cost."

[10] The same approach was endorsed by Taxing Officer Smith in *Robert Pocha v. The Queen* [1998] F.C.J. No. 306 where at page 2 he states:

"The defendant also claimed disbursements of \$184.90 for transcripts and \$12.94 for Goods and Services Taxes. Costs for a transcript were also opposed by the plaintiff on the ground that the action was discontinued before examinations for discovery were held and no transcripts had been created in the proceedings before this Court. Counsel for the defendant responded that the disbursement claimed and the related taxes were expenditures for a transcript of the proceedings before the Tax Court of Canada and that they were prudently here. Again, I must agree with the position taken by the defendant. It may well now appear that a transcript of the Tax Court proceedings was not needed. The defendant was nevertheless required to undertake prudent steps to defend against the plaintiff's action. In fact, a defence was filed on June 6, 1990. I find the disbursements and related taxes claimed to be reasonable and necessary in the circumstances."

[11] The respondent's bill of costs will accordingly be assessed and allowed in the amounts of \$1,320.00 for assessable services and \$2,586.95 for disbursements. A certificate of assessment will issue in the amount of \$3,906.95.

Halifax, Nova Scotia

April 29, 2002

François Pilon

Assessment Officer

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**COURT FILE NO.:** A-27-00

**BETWEEN:** COLIN J. MURPHY ET AL

**Applicants**

**-and-**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**ASSESSMENT BY TELEPHONE CONFERENCE ON APRIL 16, 2002**

**ASSESSMENT OF COSTS - REASONS BY: FRANÇOIS PILON**

**DATED:** APRIL 29, 2002

**APPEARANCES BY:** Mr. John Sinnott, Q.C. **For the Applicants**

Mr. John Bodurtha **For the Respondent**

**SOLICITORS OF RECORD:**

Lewis Sinnott

St. John's, Newfoundland & Labrador **For the Applicants**


Morris Rosenberg

Deputy Attorney General

of Canada (Ottawa) **For the Respondent**

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C.A.S.

PAGE 02/02

Federal Court



Cour fédérale

180 Queen Street West, Suite 200  
Toronto, Ontario  
M5V 3L6

Tuesday, May 10, 2011

**VIA FAX**  
Michael J. Sims  
Department of Justice  
416-973-4323

**VIA FAX**  
Anthony Bratschitsch  
905-628-2532

**RE: T-2112-10 (direction)**

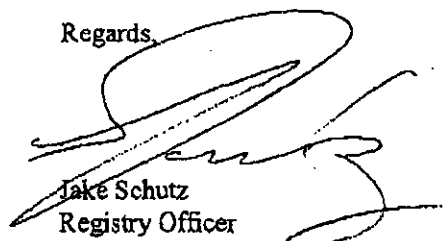
On 10-MAY-2011, Assessment Officer Johanne Parent issued the following direction with respect to the respondent bill of costs filed 04-MAY-2011.

**"The Assessment Officer, Johanne Parent, has noted the respondent's Bill of Costs received May 5, 2011 and has further indicated that this assessment of costs will be dealt with by way of written submissions.**

**Therefore the Assessment Officer has directed that:**

- (a) the respondent shall serve and file all materials (if not already done) including the Bill of Costs, supporting affidavit and written submissions together with a copy of this direction by May 31, 2011;**
- (b) the applicant may serve and file any reply materials by June 21, 2011;**
- (c) the respondent may serve and file any rebuttal materials by July 12, 2011."**

Regards,

  
Jake Schutz  
Registry Officer  
Courts Administration Service (Toronto Local Office)

MAY-10-2011 14:12

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FORM 146A - AFFIDAVIT OF SERVICE  
Federal Court Rules, 1998, Rule 146

T-2112-10

FEDERAL COURT

BETWEEN:

ANTHONY BRATSCHITSCH

Applicant

and

THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA

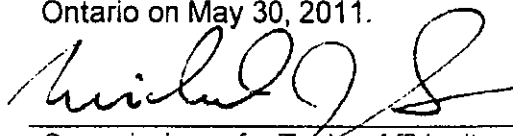
Respondents

AFFIDAVIT OF SERVICE

I, Diane Dyke, Legal Assistant, in the city of Toronto, in the Province of  
Ontario SWEAR THAT:

1. I served the Applicant, Anthony Bratschitsch with the cost submissions of the Respondents by sending a copy by priority post on Monday, May 30, 2011 to 163 Governors Road, Dundas, Ontario L9H 6L6.
2. Annexed and marked as Exhibit "A" is a copy of the ship request with the Canada Post tracking number as evidence thereof.

SWORN before me at the City of  
Toronto in the in the Province of  
Ontario on May 30, 2011.

  
Commissioner for Taking Affidavits

  
Diane Dyke



## Ship Request



TxnID: NEO000056831

Code  
Name ANTHONY BRATSCHITSCH  
Address 163 GOVERNORS ROAD

City DUNDAS  
Prov/State ON Postal Code L9H6L6  
Country  
Attention  
eMail

File Number 2-595438  
Date 5/30/11  
Service  
Portfolio REG  
Pieces 1  
Dangerous Goods None  
Coll/Prepaid Prepaid

### Client

Department of Environment

### Requestor Information:

Name DIANE DYKE User Name ddyke  
eMail  
Telephone  
Location 2323C

### Notes

PRIORITY POST - OVERNIGHT  
BRATSCHITSCH, Anthony v. AGC et al.  
Court File No.: T-2112-10

Respondents' Costs Submissions

**PRIORITE DEMAIN MATIN  
PRIORITY NEXT A.M.**



CANADA POST / POSTES CANADA

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Exp: DEPARTMENT OF JUSTICE  
3400-130 KING STREET W  
TORONTO, ON M5X1K8

UFMS V5.2  
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3868737

PIN/NIP 386873700050809  
Ref/Ref 1: NEO000056831

To/Dest: Tel./Tel:

ANTHONY BRATSCHITSCH  
163 GOVERNORS ROAD  
DUNDAS ON L9H 6L6

Ref/Ref 2:  
2-595438  
Method of Payment/  
Mode de paiement:  
Account/Compte  
Weight/Poids:  
0.45 KG

Size/Dim:  
0.00x0.00x0.00cm

CPC Tracking Number/Numero de repereage la SCP

3868 7370 0005 0809

**L9H 6L6**



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Sender warrants that this item does not contain dangerous goods  
L'expéditeur garantit que cet envoi ne contient pas de matières dangereuses



**Tracking Number**

3868737000050809

Please note that this is the most up-to-date information available in our system. Our telephone agents have access to the same information presented here.

**Track Status****Product Type:** Priority Next A.M.**Expected Delivery :** 2011/05/31**Reference Number 1:** NEO000056831**Reference Number 2:** 2-595438*Bratschitch v AGC  
Respondent's Bill of Costs*

Date	Time	Location	Description	Retail Location	Signatory Name
2011/05/31	11:19	Hamilton	Item successfully delivered		

**Track History**

Date	Time	Location	Description	Retail Location	Signatory Name
2011/05/31	11:19	Hamilton	Item successfully delivered		
2011/05/31	09:15	Hamilton	Item out for delivery		
2011/05/31	07:22	Hamilton	Item processed at local delivery facility		
2011/05/31	04:15	STONEY CREEK	Item processed at postal facility		
2011/05/30	23:35	MISSISSAUGA	Item processed at postal facility		
2011/05/30	16:27	TORONTO	Item accepted at the Post Office		
2011/05/30	16:15	MISSISSAUGA	Order information received by Canada Post		

**Shipping Options and Features for this Item**

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

**Respondents**

**RESPONDENTS' BILL OF COSTS  
(Column III of Tariff B)**

**Fees**

<b>Item</b>	<b>Description</b>	<b>Units claimed</b>	<b>Off</b>	<b>Allowed</b>
2	Preparation of notice of appearance	4		
5	Preparation and filing of respondents' contested motion record and materials (respondents' motion to strike application)	7		
5	Preparation and filing of responding record to applicant's contested motion in writing (applicant's motion to strike respondent's notice of motion)	7		
13(a)	Preparation for hearing of motions	5		
6	Appearance at motion (3 hours x 3 units)	9		

26	Assessment of costs	3		
27	Other services: responding to applicant's letter seeking directions	1		

Total units claimed: 36  
Total fees claimed (\$130/unit): \$4,680

#### Disbursements

Description	Amount claimed	Off	Allowed
Mailing respondents' motion records	\$7.61		
Printing and photocopying motion records and book of authorities	91.75		

Total disbursements claimed: \$99.36

Total fees and disbursements: \$4,779.36

Assessed and allowed at \_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
Assessment Officer

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at Toronto this 4<sup>th</sup> day of May, 2011

  
\_\_\_\_\_  
Michael J. Sims  
Of Counsel for the Respondent

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

AND TO: Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel. (289) 260-1153

Applicant

04/29/2011 09:15 416-973-2154

C.A.S.

PAGE 02/07

Federal Court



Cour fédérale

Date: 20110428

Docket: T-2112-10

Toronto, Ontario, April 28, 2011

**PRESENT:** Kevin R. Aalto, Esquire, Prothonotary

**BETWEEN:**

**ANTHONY BRATSHITSCH**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA  
AND THE CHIEF ENFORCEMENT OFFICER,  
ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

**Respondents**

**ORDER**

**UPON MOTION** dated the 25<sup>th</sup> day of March, 2011, on behalf of the Respondents for:

- (a) an Order striking out the Notice of Application, without leave to amend; or
- (b) in the alternative, granting an extension of time to file responding affidavits; and
- (c) the costs of this motion.

**AND UPON** reading the Motion Record of the Respondents and of the Applicant and upon hearing the submissions of the parties;

04/29/2011 09:15 416-973-2154

C.A.S.

PAGE 03/07

Page: 2

**AND UPON** reading the Motion Record of the Applicant moving to strike the Respondents' motion to strike, the Respondents' Motion Record and the Applicant's Reply and upon hearing the submissions of the parties; and upon considering the matter;

The Respondents served and filed a motion to strike the application dated February 18, 2011 returnable at the General Sittings initially on March 28, 2011 which was then moved to April 4, 2011. The Applicant filed a Rule 369 motion on March 28, 2011 to strike the Respondents' motion to strike the application. Both motions were before the Court at the General Sittings on April 4, 2011. Because of my disposition of the motion of the Respondents there is no need to consider the motion of the Applicant.

In this application, the Applicant seeks to strike down s. 36 of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, SOR/2005-149 (the Regulations) which regulations were promulgated under the *Canadian Environmental Protection Act, 1999*, 1999, c.33 (*CEPA*). s. 36 of the Regulations requires that an importer or exporter of hazardous waste or recyclable materials provide the Minister of the Environment with written confirmation that the waste has been disposed of or recycled within 30 days of such disposal or recycling. Thus, for example, a certificate should be obtained from a U.S. company which disposes of waste that is shipped to the U.S. by a Canadian company for disposal or recycling. A contravention of s. 36 is a criminal offence.

Page: 3

Briefly, by way of background, the Applicant is a consultant in the waste disposal industry. The Applicant did consulting work for a company which was charged under s. 36. The Applicant was not charged. The Applicant seeks to strike down the legislation so that he will not be charged nor will others. The Applicant challenges the validity of s. 36 on three grounds:

- (a) s. 36 breaches the guarantee of liberty enshrined in s. 7 of the *Charter of Rights and Freedoms* (the Charter);
- (b) s. 36 does not comply with various international agreements on the transboundary movement of hazardous waste; and,
- (c) s. 36 violates the expectations of "fair justice" by unfairly placing an inference of guilt on a person in some cases.

The Respondent seeks to strike the application on four basic grounds:

- (a) there is no "decision" which is the subject matter of the application;
- (b) the Applicant does not have public interest standing;
- (c) the Applicant does not have direct standing; and,
- (d) the Court cannot grant the relief requested.

Notwithstanding that the Applicant is both passionate and articulate in his submissions in support of his application and his response to the grounds of the Respondent, it is my view that the application must be struck. The test to be applied on a motion to strike is whether the application is bereft of any chance of success (see *David Bull Laboratories v. Pharmacia Inc.*, [1994] F.C.J. No. 1629.

Page: 4

On the facts of this case, the Applicant is a concerned citizen who happens to also be a consultant in the hazardous waste disposal industry. He is not subject to criminal prosecution currently. As noted during argument the time to raise the Charter issues is during a prosecution not in the context of a hypothetical claim.

Section 18.1 (1) of the *Federal Courts Act*, R.S.C. 1985 c. F-7, as amended, requires that the Applicant be "directly affected" by the matter which is the subject matter of the application. Here, the Applicant is not directly affected in the sense that it is used in s. 18.1 (1). His legal rights and legal obligations are not affected. He, personally, has not been subjected to prosecution. His s. 7 Charter rights have not been violated. He is not an importer or exporter of hazardous waste. He does argue that he might be held to be an agent and therefore subject to prosecution. His strongly held concern is for those in the waste disposal industry, including himself, who may be subject to prosecution. He believes he could be "strongly impacted" by a risk of prosecution which would destroy his reputation. In his notice of application he claims: "Since at least one Canadian and at least one entity have already faced such prospects, which occurred without precedence, the applicant is applying to the court for remedies." In effect, he is asking the Court to rewrite the legislation or force a change in the legislation.

While the concerns of the Applicant are sincere, the prospect of prosecution is insufficient to give the Applicant the necessary direct standing. As was noted in *R. v. Ciarniello*, 2006 BCSC 1671 at par. 62:

A theoretical possibility of imprisonment under a penal statute is not, by itself, sufficient to establish private interest standing to challenge its constitutional validity. Everyone in Canada faces a theoretical possibility of imprisonment under the various charging sections of



the *Criminal Code* if they do any of the things that those sections proscribe. If such a theoretical possibility of imprisonment were sufficient, then everyone would have private interest standing.

Neither does the Applicant have public interest standing. He does not meet the tests set out in *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236. The tests can be summarized as follows:

- (a) Is there a serious issue raised concerning the invalidity of the legislation?
- (b) Is the party directly affected, and if not, does the party have a genuine interest in the issue? and,
- (c) Is there another more reasonable and effective way to raise the issue?

The Applicant describes himself as a citizen who is oppressed or possibly oppressed by the "actions or the potential actions" of the government relying upon *Amnesty International v. Canada (Canadian Forces)* 2007 FC 1147. However, the facts of *Amnesty International* are very different than what is raised here. In that case a public interest group sought a remedy in circumstances where no other avenue for relief existed. Quite apart from the "potential actions" the Applicant is concerned, about the real issue that is the validity of s. 36 of the Regulations which can be determined in the context of proceeding under that Regulation. The Applicant argues that he is an "agent" and is therefore directly affected by s. 36. He is not directly affected unless he is charged under the section. Further, the Applicant argues that the threat of charges and possible imprisonment is not fair and that waiting to be charged is an inefficient and ineffective way to determine the issue. However, as noted by Cory, J. in *Canadian Council of Churches*:

Page: 6

The whole purpose of granting status is to prevent the immunization of legislation or public act from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to an attack from a private litigant.

Given that there is no "decision" of a federal board, commission or other tribunal in issue; that the relief requested is not within the scope of remedies the Court can grant; and, that he lacks both direct and public interest standing, the application must be struck. Given the legal conclusions reached herein for striking the application, it should be struck without leave to amend.

**THIS COURT ORDERS that:**

1. The Notice of Application is struck without leave to amend.
2. The Respondent is entitled to costs, if demanded.

\_\_\_\_\_  
"Kevin Aalto"  
Prothonotary

FEDERAL COURT  
COUR FÉDÉRALE  
Copy of Document  
Copie du document  
Filed / Déposé  
Received / Reçu

MAY 31 2011

T-2112-10

Date \_\_\_\_\_  
Registrar \_\_\_\_\_  
Greffier \_\_\_\_\_

FEDERAL COURT

BETWEEN:

ANTHONY BRATSCHITSCH

Applicant

and

THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA

Respondents

**COSTS SUBMISSIONS OF THE RESPONDENTS**

Michael J. Sims  
Department of Justice  
Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323

Counsel for the Respondents

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

FEDERAL COURT  
COURT FÉDÉRALE  
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Produit en vertu de la Loi sur l'accès à l'information

FORM 146A – AFFIDAVIT OF SERVICE  
Federal Court Rules, 1998, Rule 146

T-2112-10

Date \_\_\_\_\_  
Region \_\_\_\_\_  
Clerk \_\_\_\_\_

MAY 31 2011

FEDERAL COURT

BETWEEN:

ANTHONY BRATSCHITSCH

Applicant

and

THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA

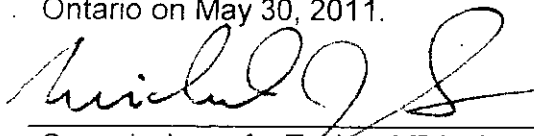
Respondents

### AFFIDAVIT OF SERVICE

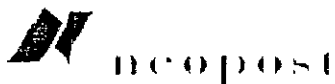
I, Diane Dyke, Legal Assistant, in the city of Toronto, in the Province of  
Ontario SWEAR THAT:

1. I served the Applicant, Anthony Bratschitsch with the cost submissions of the Respondents by sending a copy by priority post on Monday, May 30, 2011 to 163 Governors Road, Dundas, Ontario L9H 6L6.
2. Annexed and marked as Exhibit "A" is a copy of the ship request with the Canada Post tracking number as evidence thereof.

SWORN before me at the City of  
Toronto in the Province of  
Ontario on May 30, 2011.

  
Commissioner for Taking Affidavits

  
Diane Dyke



# Ship Request



TxnID: NEO000056831

Code  
Name ANTHONY BRATSCHITSCH  
Address 163 GOVERNORS ROAD

City DUNDAS  
Prov/State ON Postal Code L9H6L6

Country  
Attention  
eMail

File Number 2-595438  
Date 5/30/11  
Service  
Portfolio REG  
Pieces 1  
Dangerous Goods None  
Coll/Prepaid Prepaid

## Client

Department of Environment

## Requestor Information:

Name DIANE DYKE User Name ddyke  
eMail  
Telephone  
Location 2323C

## Notes

PRIORITY POST - OVERNIGHT  
BRATSCHITSCH, Anthony v. AGC et al.  
Court File No.: T-2112-10

Respondents' Costs Submissions

## PRIORITE DEMAIN MATIN PRIORITY NEXT A.M.



CANADA POST / POSTES CANADA

UFMS V5.2

From  
Exp: DEPARTMENT OF JUSTICE  
3400-130 KING STREET W  
TORONTO, ON M5X1K6

Mailer/Exp:  
3868737

PIN/NIP 3868737000050809  
Ref/Ref 1: NEO000056831

Ref/Ref 2:  
2-595438

To/Dest: Tel./Tel:

Method of Payment/  
Mode de paiement:  
Account/Compte

ANTHONY BRATSCHITSCH  
163 GOVERNORS ROAD  
DUNDAS ON L9H 6L6

Weight/Poids:  
0.45 KG

Size/Dim:  
0.00x0.00x0.00cm

Signature of Diane Dyke

CPC Tracking Number/Numero de reperage de la SCP

3868 7370 0005 0809

L9H 6L6



<http://tow10020:8080/ship2/ui/ShipRequest.js>

Sender warrants that this item does not contain dangerous goods  
L'expéditeur garantit que cet envoi ne contient pas de matières dangereuses

Federal Court



Cour fédérale

Date: 20110913

Docket: T-2112-10

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA  
AND THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA**

**Respondents**

**CERTIFICATE OF ASSESSMENT**

**I HEREBY CERTIFY** that the Respondents' Bill of Costs is assessed and allowed in the amount of \$2,829.36.

A large, stylized handwritten signature in black ink, consisting of a large loop and a crossbar, positioned above a horizontal line.

Assessment Officer

Dated at Toronto, Ontario, this 13<sup>th</sup> day of September, A.D. 2011

Federal Court



Cour fédérale

## Facsimile Transmittal Form / Formulaire d'acheminement par télécopieur

TO / DESTINATAIRE(S) :1. Name / Nom : **ANTHONY BRATSHITSCH**Facsimile / Télécopieur : **905-628-2532**

Telephone / Téléphone :

☐ As requested / tel que demandé☐ Left voice message / suite au message vocal2. Name / Nom : **MICHAEL J. SIMS**Facsimile / Télécopieur : **416-973-4323**

Telephone / Téléphone :

☐ As requested / tel que demandé☐ Left voice message / suite au message vocal

3. Name / Nom :

Facsimile / Télécopieur :

Telephone / Téléphone :

☐ As requested / tel que demandé☐ Left voice message / suite au message vocalFROM / EXPÉDITEUR : **Vanessa George**DATE : **September 14, 2011**Telephone / Téléphone : **416-954-0380**TIME / HEURE : **11:07 AM**Facsimile / Télécopieur : **416-973-2154**

Total number of pages (including this page) /

Nombre de pages (incluant cette page) : **2**SUBJECT / OBJET :Court File No. / N° du dossier de la Cour: **T-2112-10**Between / entre: **ANTHONY BRATSHITSCH v. AGC ET AL \* CERTIFICATE OF ASSESSMENT**Enclosed is a true copy of the Order / Judgment / Reasons for Assessment of Costs: // Vous trouverez ci-joint une copie conforme de l'ordonnance / jugement / motifs de: **Johanne Parent,****Assessment Officer**dated / daté du **13- SEP-2011**COMMENTS / REMARQUES :

Pursuant to section 20 of the Official Languages Act all final decisions, orders and judgments, including any reasons given therefore, issued by the Court are issued in both official languages. In the event that such documents are issued in the first instance in only one of the official languages, a copy of the version in the other official language will be forwarded on request when it is available.

Conformément à l'article 20 de la Loi sur les langues officielles, les décisions, ordonnances et jugements définitifs avec les motifs y afférents, sont émis dans les deux langues officielles. Au cas où ces documents ne seraient émis, en premier lieu, que dans l'une des deux langues officielles, une copie de la version dans l'autre langue officielle sera transmise, sur demande, dès qu'elle sera disponible.

N.B.: If you do not receive all pages being transmitted, please call the sender at the above telephone number. / Si vous ne recevez pas toutes les pages transmises, prière de communiquer avec l'expéditeur au numéro de téléphone ci-haut.

Federal Court



Cour fédérale

## Facsimile Transmittal Form / Formulaire d'acheminement par télécopieur

**TO / DESTINATAIRE(S) :**1. Name / Nom : **ANTHONY BRATSHITSCH**Facsimile / Télécopieur : **905-628-2532**

Telephone / Téléphone :

- ☐ As requested / tel que demandé  
☐ Left voice message / suite au message vocal

2. Name / Nom : **MICHAEL J. SIMS**Facsimile / Télécopieur : **416-973-4323**

Telephone / Téléphone :

- ☐ As requested / tel que demandé  
☐ Left voice message / suite au message vocal

3. Name / Nom :

Facsimile / Télécopieur :

Telephone / Téléphone :

- ☐ As requested / tel que demandé  
☐ Left voice message / suite au message vocal

**FROM / EXPÉDITEUR : Vanessa George****DATE : September 14, 2011****Telephone / Téléphone : 416-954-0380****TIME / HEURE : 10:40 AM****Facsimile / Télécopieur : 416-973-2154**
**Total number of pages (including this page) /**  
**Nombre de pages (incluant cette page) : 6**
**SUBJECT / OBJET :**Court File No. / N° du dossier de la Cour: **T-2112-10**Between / entre: **ANTHONY BRATSHITSCH v. AGC ET AL**

Enclosed is a true copy of the Order / Judgment / Reasons for Assessment of Costs: // Vous trouverez ci-joint une copie conforme de l'ordonnance / jugement / motifs de: **Johanne Parent, Assessment Officer**

dated / daté du **13- SEP-2011****COMMENTS / REMARQUES :**

*Pursuant to section 20 of the Official Languages Act all final decisions, orders and judgments, including any reasons given therefore, issued by the Court are issued in both official languages. In the event that such documents are issued in the first instance in only one of the official languages, a copy of the version in the other official language will be forwarded on request when it is available.*

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Federal Court



Cour fédérale

**Date: 20110913**

**Docket: T-2112-10**

**Citation: 2011 FC 1069**

**Present: JOHANNE PARENT, Assessment Officer**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA  
AND THE CHIEF ENFORCEMENT OFFICER,  
ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

**Respondents**

Dealt with in writing without the appearance of parties.

Certificate delivered at Toronto, Ontario, on September 13, 2011.

**REASONS FOR ASSESSMENT OF COSTS BY:**

**JOHANNE PARENT**

Federal Court



Cour fédérale

Date: 20110913

Docket: T-2112-10

Citation: 2011 FC 1069

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA  
AND THE CHIEF ENFORCEMENT OFFICER,  
ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

**Respondents**

**REASONS FOR ASSESSMENT OF COSTS**

**JOHANNE PARENT, Assessment Officer**

[1] The Court, upon a motion on behalf of the respondents, struck the Notice of Application pursuant to the *Canadian Environment Protection Act* (1999) on April 28, 2011, with the respondents being entitled to their costs, if demanded. Further to the receipt of the respondents' Bill of Costs, directions were issued and sent to the parties on May 10, 2011 informing them that the assessment of the respondents' Bill of Costs would proceed in writing and of the deadline to file representations.

[2] Both parties filed written representations within the prescribed timeframe.

[3] The assessable services claimed under Tariff B of the *Federal Courts Rules* for the preparation and filing of the respondents' record and materials (respondents' motion to strike the application) claimed under Item 5 as well as the claims for appearance at the motion (Item 6), for the assessment of costs (Item 26) and for such other services (Item 27) have not been contested and will be allowed as demanded.

[4] Under Item 2 of Tariff B, the respondents claimed four units (\$130 per unit) for the preparation of the Notice of Appearance. Although this service has not been contested, it cannot be allowed as claimed considering that Item 2 pertains to the "preparation and filing of all defences, replies, counterclaims or respondent's records and materials". Given that Tariff B does not cover for the preparation of the notice of appearance, Item 27 is the Tariff item that has generally been allowed by assessment officers for this service (see *Bayer Healthcare AG v Sandoz Canada Inc.* 2009 FC 691 par 27). Considering the amount of work required for this type of service, the document on file and the actual jurisprudence, I will allow one unit for the Notice of Appearance.

[5] Seven units are claimed by the respondents for the preparation and filing of the responding record to applicant's contested motion in writing to strike the respondents' notice of motion (Item 5). The respondents argue that:

"... in an attempt to take improper advantage of counsel's oversight, the applicant brought a motion in writing to strike the respondents' notice of motion. The respondents submit that such behaviour is deserving of costs sanctions. This Court has clearly held that motions should be opposed on their merits and should not be made the subject of further procedural motions".

The applicant opposes that claim.

Page: 3

[6] In the Reasons disposing of the matter on April 28, 2011, the Court held that because of his "disposition of the motion of the respondents there is no need to consider the motion of the applicant". Where a contested motion results in an Order that is silent as to costs, the assessment officer does not have the authority to award costs. The jurisprudence is consistent that for costs to be assessed on any motions, they must have been awarded by the Court. Considering the principle that there is no award of costs on motions where the order disposing of the motion is silent as to costs, I will disallow the claim for this service.

[7] The respondents claimed five units under Item 13(a) for the preparation for the hearing of motions. Although this Item had not been contested by the applicant, it cannot be allowed. Undoubtedly, efforts were put by the respondents to prepare for the hearing of the motion but costs have already been allowed under Item 5 for said service. Item 13(a) of Tariff B is found under the sub-heading "Pre-Trial and Pre-Hearing Procedures" and covers for the services attached to the preparation for a trial or hearing and not for the preparation of a motion already covered under Item 5.

[8] I examined the disbursements claimed along with the supporting material and consider them necessary charges to the conduct of this matter. They are not contested. The amounts are reasonable and are therefore allowed.

[9] The Bill of Costs is allowed for a total amount of \$2,829.36.

Toronto, Ontario  
September 13, 2011

"Johanne Parent"  
Assessment Officer

N

OROCIV 2-595438

VOL 1

Department of Justice  
Ministère de la Justice

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OROCIV 2-595438

PRA

VOL 1  
04/01/2011

CIVIL LAW  
BRATSCHITSCH, Anthony v. Attorney General of Canada et al

OBJET  
SUBJECT

COURT FILE NUMBER

T-2112-10

LEAD : Michael Sims

De  
From

Mandataire  
Agent

Renvoi  
Cross Reference

2

5

9

5

4

3

8

BRING FORWARD - - DORMANT - - CLOSED  
RETOURNER EN ATTENTE TERMINÉ

[illegible]



Department of Justice  
Canada

Ministère de la Justice  
Canada

FORM "A" / FORMULAIRE "A"

MUST BE COMPLETED ON CLOSING THE FILE  
BY THE APPROPRIATE LAWYER.

DOIT ÊTRE COMPLÉTÉ À LA FERMETURE DU  
DOSSIER PAR L'AVOCAT CONCERNÉ.

I PLEASE INDICATE:  
VEUILLEZ INDIQUER:

A) Department REGULATORY  
Ministère

B) File No. 2595438  
N° du dossier  
BRATSCHITSCHU AGC et al

II PLEASE CHECK THE APPROPRIATE SQUARE:  
VEUILLEZ COCHER À L'ENDROIT APPROPRIÉ:

This file contains material of precedential value  
Ce dossier contient des documents susceptibles d'utilisation ultérieure

Yes ☐ Oui

No ☒ Non

DEFINITION

"Material of precedential value - letters, memoranda,  
JUDGMENTS or other documents containing  
opinions, research, studies, pleadings or factums  
which may be useful in other future matters."

"Documents susceptibles d'utilisation ultérieure -  
lettres, notes, JUGEMENTS ou autres documents  
contenant des opinions, recherches, études,  
conclusions ou mémoires pouvant servir dans  
d'autres cas."

III PLEASE LIST THE DATES OF ALL MATERIAL OF PRECEDENTIAL VALUE  
VEUILLEZ INSCRIRE LES DATES DE TOUS LES DOCUMENTS SUCEPTIBLES D'UTILISATION ULTÉRIEUR

A) Letters dated: \_\_\_\_\_  
Dates de lettres: \_\_\_\_\_  
B) Memoranda dated: \_\_\_\_\_  
Date de notes: \_\_\_\_\_  
C) Other material dated: \_\_\_\_\_  
Date des autres documents: \_\_\_\_\_

DATE: Sept. 30, 2011

Signature: [Signature]

IV FOR FILE RETIREMENT SECTION ONLY:  
POUR LA SECTION CHARGÉE DE LA DISPOSITION DES DOSSIERS SEULEMENT:

SCHEDULE - CALENDRIER

Scheduled for destruction À éliminer	<input checked="" type="checkbox"/>	Date of transfer to N.A.R.C.* Date de l'envoi au D.C.A.N.*
Scheduled for retention À conserver	<input type="checkbox"/>	<u>2014</u>
Not scheduled En attente de décision	<input type="checkbox"/>	Date of destruction Date d'élimination
NAC Approval No. Approbation des ANC No.	<u>2011/006</u>	<u>2034</u>
Sec. Art.	<u>4</u>	Transfer to Historical Branch of N.A.C.* Dépôt à la division historique des A.N.C.*
S. Sec. Para.	<u>1</u>	
Retention Period Durée de conservation		
In Justice Au Ministère	Records Management Branch of N.A.C. À la direction de la gestion des documents d'A.N.C.	Total No. of years Nombre total d'années
<u>2</u>	<u>19</u>	<u>21</u>

\*N.A.R.C.: National Archives Records Centre - D.C.A.N.: Dépôt Central des Archives Nationales  
\*N.A.C.: National Archives of Canada - A.N.C.: Archives Nationales du Canada

Signature Wendell Leest

To be kept in chronological order as per this date:  
À être gardé en ordre chronologique selon cette date:

mar 23/12

A CONSERVER DANS CE DOSSIER

TO BE KEPT IN THIS FILE



Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: Michael.Sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

September 29, 2011

**VIA REGISTERED MAIL**

Mark Vanderlaan  
845 Harrington Court, Unit #3  
Burlington, Ontario  
L7N 3P3

Dear Mr. Vanderlaan:

Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al  
Court File No.: T-2112-10

---

Please find enclosed a cheque, in the amount of \$2,829.36, which represents the amount awarded by the court for costs and disbursements in the above noted matter.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Enclosure

in mailroom at 11:40 am on Sept. 29 - 2011

Canada



4169734323 P.002

6-2011 15:56

4169734323 ✓

Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

September 15, 2011

**VIA FACSIMILE**

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

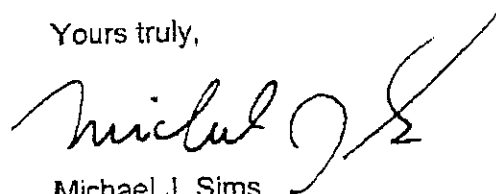
Dear Mr. Bratschitsch:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

As you have seen, the Court has awarded the respondents \$2,829.36 in costs and disbursements in this matter. Please provide us with payment forthwith. Your cheque should be made payable to the Receiver General of Canada.

Yours truly,



Michael J. Sims  
Counsel  
Regulatory Law Division

Canada

Name: MICHAEL SIMS

1 of 1

09/28/2011 08:53

Suite: 3400

Sender: ANTHONY

BUILDING:: 130 KING STREET

1MXK5160015741000688233

DEPT:: REG23

SUITE:: 3400

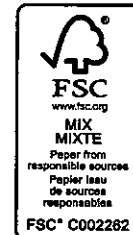
TYPE DOC:

COMMENT::

*John Doe*



092812085303



Signature Required

Sender warrants that this  
shipment does not contain  
dangerous goods.  
L'expéditeur garantit que cet  
envoi ne contient pas de  
matières dangereuses.



Department of Justice  
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Ministère de la Justice  
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Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

September 15, 2011

**VIA FACSIMILE**

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Dear Mr. Bratschitsch:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

As you have seen, the Court has awarded the respondents \$2,829.36 in costs and disbursements in this matter. Please provide us with payment forthwith. Your cheque should be made payable to the Receiver General of Canada.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Canada

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE SEP-15-2011 \*\*\*\*\* TIME 15:56 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=SEP-15 15:56

END=SEP-15 15:56

FILE NO.=985

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	19056623828	002	00:00:22

\*\*\*\*\* UF-7200 \*\*\*\*\* - \*\*\*\*\* - 4169734323- \*\*\*\*\*

 Department of Justice Canada Ministère de la Justice Canada  
Ontario Regional Office Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
<b>Name / Nom:</b> Anthony Bratschitsch		<b>Name / Nom:</b> Michael J. Sims Counsel	
<b>Address / Adresse:</b> 163 Governors Road Dundas, Ontario L9H 6L6		<b>Address / Adresse:</b> Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
905-662-3828		(416) 973-4323	(416) 952-7116
<b>Comments / Commentaires:</b> Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10 Letter from Michael Sims attached			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice.			
Protected documents? / Documents protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
TRANSMISSION			
<b>Pages (including cover sheet)</b>	<b>Date:</b>	<b>Time:</b>	
2	September 15, 2011		

**NOTICE:**

This message is intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you have received this communication in error, please notify us immediately by telephone. Thank you.

Cette communication est exclusivement destinée à qui elle est adressée. Elle peut contenir de l'information privilégiée, confidentielle et ne pouvant être divulguée selon la loi applicable à l'espèce. Si vous avez reçu cette communication par erreur, veuillez nous en aviser immédiatement par téléphone. Merci.

In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
 Name / Nom: Diane Dyke at / au: 416-952-7114

**Department of Justice  
Canada**

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

**Ministère de la Justice  
Canada**

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

*Tel:* (416) 952-7116  
*Fax:* (416) 973-4323  
*Email:* michael.sims@justice.gc.ca

*Our File:* 2-595438  
*Notre dossier:*

*Your File:*  
*Votre dossier:*

June 23, 2011

**VIA FACSIMILE**

Registry of the Federal Court  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

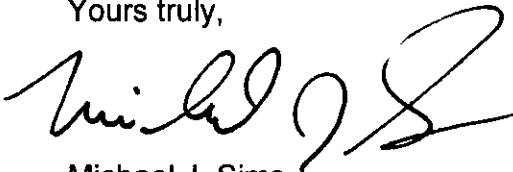
Dear Sir/Madam:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada, et al.  
Court File No.: T-2112-10**

---

The Respondents do not intend to file reply costs submissions in the above matter.

Yours truly,



Michael J. Sims  
Counsel  
Regulatory Law Division

cc. Anthony Bratschitsch (via facsimile)

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE JUN-23-2011 \*\*\*\*\* TIME 16:49 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=JUN-23 16:48

END=JUN-23 16:49

FILE NO.=659

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	294169732154	002	00:00:20

\*\*\*\*\* UF-7200 \*\*\*\*\* - \*\*\*\*\* - 4169734323- \*\*\*\*\*

 Department of Justice Canada  
Ontario Regional Office

Ministère de la Justice Canada  
Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
<b>Name / Nom:</b> Registry of the Federal Court		<b>Name / Nom:</b> Michael J. Sims Counsel	
<b>Address / Adresse:</b> 180 Queen Street West Suite 200 Toronto, Ontario M5V 3L6		<b>Address / Adresse:</b> Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
416-973-2154		(416) 973-4323	(416) 952-7116
<b>Comments / Commentaires:</b> Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice.			
Protected documents? / Documents protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
TRANSMISSION			
<b>Pages (including cover sheet)</b>	<b>Date:</b>	<b>Time:</b>	
2	June 23, 2011		

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
 Name / Nom: Diane Dyke at / au: 416-952-7114

Canada

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE JUN-23-2011 \*\*\*\*\* TIME 16:50 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=JUN-23 16:49

END=JUN-23 16:50

FILE NO.=660

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	219056623828	002	00:00:21

\*\*\*\*\* UF-7200 \*\*\*\*\* - \*\*\*\*\* - 4169734323- \*\*\*\*\*

 Department of Justice Canada / Ministère de la Justice Canada  
Ontario Regional Office / Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
<b>Name / Nom:</b> Anthony Bratschitsch		<b>Name / Nom:</b> Michael J. Sims Counsel	
<b>Address / Adresse:</b>  		<b>Address / Adresse:</b> Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
(905) 662-3828		(416) 973-4323	(416) 952-7116
<b>Comments / Commentaires:</b> Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice.			
Protected documents? / Documents protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
TRANSMISSION			
<b>Pages (including cover sheet)</b>	<b>Date:</b>	<b>Time:</b>	
2	June 23, 2011		

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---

In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
 Name / Nom: Diane Dyke at / au: 416-952-7114

**Canada**



Department of Justice  
Canada

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Released under the Access to Information Act /  
Divulgué(s) en vertu de la Loi sur l'accès à l'information.

Tel: 416-952-7116  
Fax: 416-973-4323  
Email: Michael.Sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

May 30, 2011

**VIA PRIORITY MAIL**

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Dear Mr. Bratschitsch:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

Enclosed please find the costs submissions of the respondents, served upon you in accordance with the *Federal Courts Rules*.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

MS/dd  
Enclosure

COPY

Canada





Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: Michael.Sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

May 30, 2011

**VIA PROCESS SERVER**

Registry of the Federal Court  
180 Queen Street West  
Toronto, Ontario  
M5V 3L6

Dear Sir/Madam:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

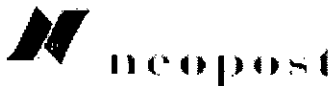
Please file the enclosed costs submissions of the respondents and affidavit of service in accordance with the *Federal Courts Rules*.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

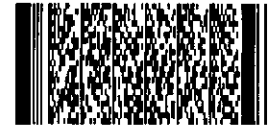
MS/dd  
Enclosure

Canada



---

## Ship Request



TxnID: NEO000056851

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Code	File Number	2-595438
Name CYBERBAHN	Date	5/30/11
Address	Service	
	Portfolio	REG
	Pieces	1
City	Dangerous Goods	None
Prov/State Postal Code	Coll/Prepaid	Prepaid
Country		
Attention		
eMail		

---

### Client

Department of the Environment

---

### Requestor Information:

Name DIANE DYKE User Name ddyke  
eMail  
Telephone  
Location 2323C

---

### Notes

BRATSCHITSCH v. AGC et al  
filing costs submissions

---

COPY

**Matter Reference Number/Name:**

Receipt No.	hes3V46HPFGY
Matter Reference Name/Number	Bratschtisch COSTS/2-595438
Order Type	Pick Up Request (Manual document acquisition)
Submitted Timestamp	2011-05-30 17:01:01.0

**User Info:**

Firm ID	A4BA31E6692A43EB9B94B383C7941CCE
Firm Name	hes3316GG817 / Regulatory Division-Dept of Justice
Firm Type	Government / Regulatory
Firm Address	130 King Street West 3400 Toronto Ontario M5X 1K6 Canada
Firm Phone	4169730942
Firm Fax	4169730809
User	Diane Dyke [diane.dyke@justice.gc.ca]
Source	ILINK

**Details and Instructions:**

Filing Court	Ontario - Federal - Toronto - Toronto - 180 Queen West - Federal
Complete By	2011-05-31
Pick-up	10:00 am on 2011-05-31
Document(s) to be processed	Costs Submissions with Affidavit of service
Instructions	Please file these documents at the Federal Court in Toronto. There is a cover letter for the court. This must be filed by Tuesday May 31, 2011. Please contact me when completed. Thanks - Diane 416-952-7114



COPY

**PRIORITE DEMAIN MATIN  
PRIORITY NEXT A.M.**



**CANADA POST / POSTES CANADA**

UFMS V5.2

From  
Exp: DEPARTMENT OF JUSTICE  
3400-130 KING STREET W  
TORONTO, ON M5X1K6

Mailer/Exp:  
3868737

PIN/NIP 3868737000050009  
Ref/Ref 1: NE0000056831

Ref/Ref 2:  
2-595438

**To/Dest:**

**Tel./Tel:**

Method of Payment/  
Mode de paiement:  
Account/Compte

ANTHONY BRATSCHITSCH  
163 GOVERNORS ROAD  
DUNDAS ON L9H 6L6

Weight/Poids:  
0.45 KG

Size/Dim:  
0.00x0.00x0.00cm

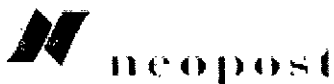
---  
CPC Tracking Number/Numero de reperage de la SCP

**3868 7370 0005 0809**

**L9H 6L6**



Sender warrants that this item does not contain dangerous goods  
L'expéditeur garantit que cet envoi ne contient pas de matières dangereuses  
---



---

## Ship Request



TxnID: NEO000056831

---

Code  
Name ANTHONY BRATSCHITSCH  
Address 163 GOVERNORS ROAD

File Number 2-595438  
Date 5/30/11  
Service  
Portfolio REG  
Pieces 1  
Dangerous Goods None  
Coll/Prepaid Prepaid

City DUNDAS  
Prov/State ON Postal Code L9H6L6  
Country  
Attention  
eMail

---

### Client

Department of Environment

---

### Requestor Information:

Name DIANE DYKE User Name ddyke  
eMail  
Telephone  
Location 2323C

---

### Notes

PRIORITY POST - OVERNIGHT  
BRATSCHITSCH, Anthony v. AGC et al.  
Court File No.: T-2112-10

Respondents' Costs Submissions

---

COPY

05/10/2011 14:05 416-973-2154

Federal Court



Cour fédérale

180 Queen Street West, Suite 200  
Toronto, Ontario  
M5V 3L6

Tuesday, May 10, 2011

**VIA FAX**  
Michael J. Sims  
Department of Justice  
416-973-4323

**VIA FAX**  
Anthony Bratschitsch  
905-628-2532

**RE: T-2112-10 (direction)**

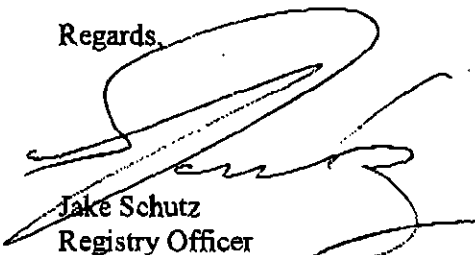
On 10-MAY-2011, Assessment Officer Johanne Parent issued the following direction with respect to the respondent bill of costs filed 04-MAY-2011.

**"The Assessment Officer, Johanne Parent, has noted the respondent's Bill of Costs received May 5, 2011 and has further indicated that this assessment of costs will be dealt with by way of written submissions.**

**Therefore the Assessment Officer has directed that:**

- (a) the respondent shall serve and file all materials (if not already done) including the Bill of Costs, supporting affidavit and written submissions together with a copy of this direction by May 31, 2011;**
- (b) the applicant may serve and file any reply materials by June 21, 2011;**
- (c) the respondent may serve and file any rebuttal materials by July 12, 2011."**

Regards,

  
Jake Schutz  
Registry Officer  
Courts Administration Service (Toronto Local Office)

Courts Administration Service

Service administratif  
des tribunaux judiciaires**Facsimile Transmittal Form / Formulaire d'acheminement par télécopieur****TO / DESTINATAIRE(S):**

1. Name / Nom Michael J. Sims

Address / Adresse :

Facsimile / Télécopieur : 416-973-4323

Telephone / Téléphone :

2. Name / Nom

Address / Adresse

Facsimile / Télécopieur :

Telephone / Téléphone :

3. Name / Nom

Address / Adresse :

Facsimile / Télécopieur :

Telephone / Téléphone :

**FROM / EXPÉDITEUR :** Jake Schutz

Telephone / Téléphone : 416-973-3356

Facsimile / Télécopieur : 416-973-2154

**DATE :** May 6, 2011**TIME / HEURE :** 2:15 p.m.**Total number of pages (including this page) /**  
**Nombre de pages (incluant cette page) : 2****SUBJECT / OBJET** T-2112-10 (direction)**COMMENTS / REMARQUES :**

N.B.: If you do not receive all pages being transmitted, please call the sender at the above telephone number. / Si vous ne recevez pas toutes les pages transmises, prière de communiquer avec l'expéditeur au numéro de téléphone ci-haut.



Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

May 4, 2011

**VIA FACSIMILE**

Registry of the Federal Court  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

Dear Sir/Madam:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada, et al.**  
**Court File No.: T-2112-10**

---

Please file the enclosed bill of costs of the respondents, and order of Prothonotary Aalto entitling the respondents to costs. The respondents seek an appointment for an assessment of their costs.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Encl.

Canada



\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE MAY-04-2011 \*\*\*\*\* TIME 10:37 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=MAY-04 10:36

END=MAY-04 10:37

FILE NO.=429

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	894169545068	011	00:01:06

\*\*\*\*\* UF-7200 \*\*\*\*\* - \*\*\*\*\* - 4169734323- \*\*\*\*\*

 Department of Justice Canada / Ministère de la Justice Canada  
Ontario Regional Office / Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
<b>Name / Nom:</b> Registry of the Federal Court		<b>Name / Nom:</b> Michael J. Sims Counsel	
<b>Address / Adresse:</b> 180 Queen Street West Suite 200 Toronto, Ontario M5V 3L6		<b>Address / Adresse:</b> Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
416-954-5068		(416) 973-4323	(416) 952-7116
<b>Comments / Commentaires:</b> Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
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<b>Pages (including cover sheet)</b>	<b>Date:</b>	<b>Time:</b>	
11	May 4, 2011		

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
 Name / Nom: Diane Dyke at / au: 416-952-7114



April 8, 2011

3 pages

Sent via Fax

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario M5X 1K6

Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-594929  
RPR Environmental Inc. v. Brian J. Saunders, Director of Public Prosecutions  
Court File No.: T-1602-10

Your File No. 2-595438  
Anthony Bratschitsch et al v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10

Dear Mr. Sims,

I am sending this letter and attachments concerning the possible dates for teleconference concerning case management of the above two files for your convenience.

We have just faxed the same attachments to the Federal Court Registrar.

Yours truly,



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario L9H 6L6  
Tel: (289) 260-1153

*copy sent to  
D. Tapscott  
Apr. 8/2011*

Apr 08 11 10:53a

Tony Bratschitsch



**RPR ENVIRONMENTAL**

**T-1602-10**

164 - 166 South Service Road,  
Stoney Creek, Ontario L8E 3H6  
Phone: (905) 662-0062 Fax: (905) 662-3828  
Toll Free: 1-800-667-5217

April 8, 2011

Registry Office  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

Tel: (416) 973-3356  
Fax: (416) 973-2154

Dear Sir/Madame:

Re: RPR Environmental Inc. v. Brian J. Saunders, Director of Public Prosecutions  
Federal Court File No.: T-1602-10

On behalf of the applicant, I wish to forward the following dates of availability for teleconference for case management.

April 19: all day  
April 21: all day  
April 25: all day  
April 26: all day  
April 27: all day

If dates for the month of May are required, I would be grateful for a fax message being sent to (905) 662-3828.

Thank you.

Patrick Whitty  
RPR Environmental

**RESPONSIBLE CHEMICAL WASTE MANAGEMENT**

Apr 08 11 10:53a

Tony Bratschitsch

1-905-628-2532

p. 3



**RPR ENVIRONMENTAL**

**T-2176-10**

164 - 166 South Service Road,  
Stoney Creek, Ontario L8E 3H6  
Phone: (905) 662-0062 Fax: (905) 662-3828  
Toll Free: 1-800-667-5217

April 8, 2011

Registry Office  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

Tel: (416) 973-3356  
Fax: (416) 973-2154

Dear Sir/Madame:

Re: Anthony Bratschitsch et al v. Attorney General of Canada et al  
Federal Court File No.: T-2176-10

On behalf of the applicant, I wish to forward the following dates of availability for teleconference for case management.

April 19: all day  
April 21: all day  
April 25: all day  
April 26: all day  
April 27: all day

If dates for the month of May are required, I would be grateful for a fax message being sent to (905) 662-3828.

Thank you.

Patrick Whitty  
RPR Environmental

**RESPONSIBLE CHEMICAL WASTE MANAGEMENT**

Apr 07 11 06:48a Tony Bratschitsch

April 7, 2011

**Sent via Fax**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario M5X 1K6

Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-595438  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10  
Procedures of Federal Court Rules

Dear Mr. Sims,

Thank you for your letter of April 6, 2011 responding to my inquiry about proper procedures in the filing of court documents while waiting Prothonotary Aalto's decision on the recent motion hearing.

I will respect and comply with your advice.

Thank you for your quick response.

Yours truly,



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario L9H 6L6  
Tel: (289) 260-1153

**Department of Justice  
Canada**

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

**Ministère de la Justice  
Canada**

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

*Tel:* (416) 952-7116  
*Fax:* (416) 973-4323  
*Email:* michael.sims@justice.gc.ca

*Our File:* 2-595438  
*Notre dossier:*

*Your File:*  
*Votre dossier:*

April 6, 2011

**VIA FACSIMILE**

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Dear Mr. Bratschitsch:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

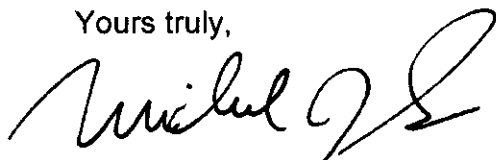
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I returned to the office this morning from a business trip to find your letter of April 5, 2011. You indicate your intention to seek the directions of the court regarding the filing of your application record.

The respondents are of the view that you are not required, and in fact are not permitted, to proceed with filing your application record until Prothonotary Aalto has released his decision. You will recall that the respondents sought two, alternate forms of relief on their motion heard on April 4<sup>th</sup>: an order striking out your notice of application, or an order granting them an extension to serve and file responding affidavits. To file your record now would pre-empt Proth. Aalto's decision, which you cannot do.

In the event that your application is ordered to proceed, the respondents will consent to an extension of any deadline you have missed as a result of their April 4<sup>th</sup> motion to strike.

Yours truly,



Michael J. Sims  
Counsel  
Regulatory Law Division

Canada

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE APR-06-2011 \*\*\*\*\* TIME 10:47 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=APR-06 10:47

END=APR-06 10:47

FILE NO.=324

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	Δ19056623828	002	00:00:23

\*\*\*\*\* UF-7200 \*\*\*\*\* - \*\*\*\*\* - 4169734323- \*\*\*\*\*

 Department of Justice Canada / Ministère de la Justice Canada  
Ontario Regional Office / Bureau régional de l'Ontario

### FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
Name / Nom: Anthony Bratschitsch		Name / Nom: Michael J. Sims Counsel	
Address / Adresse: 163 Governors Road Dundas, Ontario L9H 6L6		Address / Adresse: Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur: (905) 662-3828	Tel. No. / No du Tél:	Fax # / No du télécopieur: (416) 973-4323	Tel. No. / No du Tél: (416) 952-7116
Comments / Commentaires:  BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10 *Please see attached letter.			
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Pages (including cover sheet) 2	Date: April 6, 2011	Time:	

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Cette communication est exclusivement destinée à qui elle est adressée. Elle peut contenir de l'information privilégiée, confidentielle et ne pouvant être divulguée selon la loi applicable à l'espèce. Si vous avez reçu cette communication par erreur, veuillez nous en aviser immédiatement par téléphone. Merci.

In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
Name / Nom: Asvini Krishnamoorthy at / au: (416) 954-5481

Canada

April 5, 2011

**Sent via Fax**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario M5X 1K6

Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-595438  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10  
Procedures of Federal Court Rules

Dear Mr. Sims,

I am sending this letter to you in advance of sending a question of direction to the Court.

Later today, I will write a letter to the Federal Court to seek direction of the Court pursuant to Rule 309 of *the Federal Courts Rules*.

As we know, this file was subject to a "motion to strike" hearing yesterday presided by Mr. Prothonotary Aalto who is in the course of making his decision.

However, the Federal Court Registry Office had told me previously that the timing of procedures has not been stopped and that all parties were required to continue to comply with their filings on time.

The Court filed my Applicant's Affidavits and Exhibits on January 28, 2011 and my Applicant's Record is due to be filed 70 days later on April 8, 2011 – this Friday.

My question to the Federal Court will be: *Do I wait for Mr. Prothonotary Aalto's decision on the motion before I serve and file my record or do I follow the timing to file documents as per the Federal Court Rules while waiting for Mr. Aalto's decision?*

Personally, I would prefer that you are part of this decision and that we do not encounter any unnecessary hardships.

Thank you.



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario L9H 6L6  
Tel: (289) 260-1153



March 31, 2011

**Via Priority Post**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-595438  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: **T-2112-10**  
Written Representation in Reply to Motion in Writing

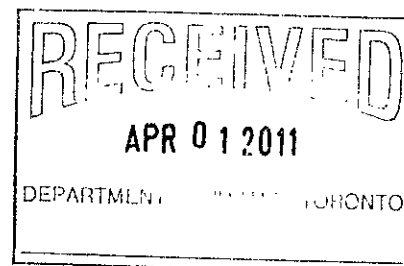
Dear Mr. Sims,

I wish to serve this written representation in reply to my motion in writing concerning court file T-2112-10 pursuant to the Federal Court Rules.

Yours truly,




Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6



Bratschitsch  
163 Governor's Road  
Dundas, Ontario L9H 6L6

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Department of Justice  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6



Name: MICHAEL SIMS 1 of 1

Suite: 3400

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Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

March 31, 2011

**VIA FACSIMILE**

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Dear Mr. Bratschitsch:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

Thank you for your letter of March 30, 2011. Please find enclosed a copy of the confirmation of motion form, which was submitted electronically to the Court this morning.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Encl.

**Federal Court - Cour fédérale**

**CONFIRMATION OF MOTION**

This Confirmation of Motion was sent to the Federal Court on: 31-Mar-2011 10:04 AM EDT

Court Number: T-2112-10  
Style of Cause: ANTHONY BRATSCHITSCH v. AGC ET AL  
Location of Hearing: Toronto

---

I, Michael J. Sims / (416) 952-7116 , representing the moving party, Respondent (application) , confirm that I have conferred with the other parties and confirm that the motion to be heard on 04-Apr-2011 will proceed on the following basis:

For a hearing of all the issues

---

*A copy of the moving party's confirmation of motion communicated to the Registry must be sent to all other parties forthwith.*

*If the confirmation information communicated to the Registry changes, the moving party shall advise the Registry immediately by submitting a subsequent confirmation of motion and sending a copy to the other parties.*

---

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE MAR-31-2011 \*\*\*\*\* TIME 10:22 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=MAR-31 10:21

END=MAR-31 10:22

FILE NO.=291

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	819056623828	003	00:00:31

\*\*\*\*\* UF-7200 \*\*\*\*\* -

- \*\*\*\*\* -

4169734323- \*\*\*\*\*



Department of Justice Canada  
Ontario Regional Office

Ministère de la Justice Canada  
Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
Name / Nom:  Anthony Bratschitsch		Name / Nom:  Michael J. Sims Counsel	
Address / Adresse:  		Address / Adresse:  Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur: (905) 662-3828	Tel. No. / No du Tél:	Fax # / No du télécopieur: (416) 973-4323	Tel. No. / No du Tél: (416) 952-7116
Comments / Commentaires: Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10  Letter from M. Sims with Motion confirmation form attached			
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
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<b>TRANSMISSION</b>			
Pages (including cover sheet)  3	Date:  March 31, 2011	Time:	

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
Name / Nom: Diane Dyke at / au: 416-952-7114

Canada



**Department of Justice  
Canada**

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

**Ministère de la Justice  
Canada**

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

March 30, 2011

**VIA FACSIMILE**

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Dear Mr. Bratschitsch:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

The respondents are required to confirm to the Court by noon tomorrow that the motion returnable April 4, 2011 will proceed. The respondents intend to proceed on all the issues set out in their notice of motion. Would you please confirm whether you intend to respond to the motion, and if so on which issues.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE MAR-30-2011 \*\*\*\*\* TIME 13:00 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=MAR-30 12:59

END=MAR-30 13:00

FILE NO.=283

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	519056623828	002	00:00:21

\*\*\*\*\* UF-7200 \*\*\*\*\* - \*\*\*\*\* - 4169734323- \*\*\*\*\*

 Department of Justice Canada  
Ontario Regional Office

Ministère de la Justice Canada  
Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
Name / Nom:  Anthony Bratschitsch		Name / Nom:  Michael J. Sims Counsel	
Address / Adresse:  		Address / Adresse:  Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur:	Tel. No. / No du Tél:	Fax # / No du télécopieur:	Tel. No. / No du Tél:
(905) 662-3828		(416) 973-4323	(416) 952-7116
Comments / Commentaires:			
Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10 Letter from Michael Sims dated March 30, 2011			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
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TRANSMISSION			
Pages (including cover sheet)	Date:	Time:	
2	March 30, 2011		

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
Name / Nom: Diane Dyke at /au: 416-952-7114

Canada



Department of Justice  
Canada

Ministère de la Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: Michael.Sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

March 30, 2011

Registry of the Federal Court  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

Dear Sir/Madam:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

Please file the attached copies of the following documents:

- the Respondents' Motion Record (Applicant's motion in writing) (3 copies);
- the Respondents' Motion Record (for motion returnable April 4, 2011) (3 copies);
- Book of Authorities (3 copies);
- Affidavits of Service (2 copies);

all pursuant to the *Federal Courts Rules*.

Yours truly,

---

Michael J. Sims  
Counsel  
Regulatory Law Division

MS/dd

Enclosures

Canada





Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

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la tour Exchange  
130 rue King ouest  
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Toronto (Ontario)  
M5X 1K6

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Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: Michael.Sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

March 29, 2011

**VIA PRIORITY POST**

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Dear Mr. Bratschitsch,

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

Enclosed please find the Respondents' Motion Record (Applicant's motion in writing), served upon you in accordance with the *Federal Courts Rules*.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

MS/dd

Enclosure: Respondents' Motion Record (Applicant's motion in writing)

Canada



Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

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Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: Michael.Sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

March 29, 2011

**VIA PRIORITY POST**

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Dear Mr. Bratschitsch,

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

Enclosed please find the Respondents' Motion Record for the motion returnable April 4, 2011, served upon you in accordance with the *Federal Courts Rules*.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

MS/dd

Enclosure: Respondents' Motion Record (Applicant's motion in writing)

Canada

Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

March 29, 2011

**VIA FACSIMILE**

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Dear Mr. Bratschitsch:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

We have sent to you by overnight courier the respondents' motion record for the motion returnable on Monday, April 4, 2011. Please substitute the enclosed notice of motion for that found at Tab 1 of the motion record.

Yours truly,



Michael J. Sims  
Counsel  
Regulatory Law Division

Encl.

Canada



\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE MAR-29-2011 \*\*\*\*\* TIME 17:29 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=MAR-29 17:28

END=MAR-29 17:29

FILE NO.=279

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	a19056623828	005	00:00:37

\*\*\*\*\* UF-7200 \*\*\*\*\* -

- \*\*\*\*\* -

4169734323- \*\*\*\*\*

 Department of Justice Canada  
Ontario Regional Office

Ministère de la Justice Canada  
Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
<b>Name / Nom:</b>  Anthony Bratschitsch		<b>Name / Nom:</b>  Michael J. Sims Counsel	
<b>Address / Adresse:</b>  		<b>Address / Adresse:</b>  Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
(905) 662-3828		(416) 973-4323	(416) 952-7116
<b>Comments / Commentaires:</b> Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice.			
Protected documents? / Documents protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
TRANSMISSION			
<b>Pages (including cover sheet)</b>	<b>Date:</b>	<b>Time:</b>	
5	March 29, 2011		

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
 Name / Nom: Diane Dyke at / au: 416-952-7114



March 21, 2011

**Sent by Fax**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-595438  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10

Dear Mr. Sims,

In preparation for the hearing on March 28, 2011, I would be grateful if you would fax (if convenient) your Motion Record to (905) 662-3828 or, otherwise, please courier it to my below address.

If needed, I can be contacted at (289) 260-1153.

Yours truly,



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6



Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

March 8, 2011

**VIA FACSIMILE (416) 973-2154**

Registry of the Federal Court  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

**Attention: John Gornick**

Dear Mr. Gornick:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

I have seen Mr. Bratschitsch's letter to the Registry of today's date, seeking the direction of the Court. In his letter, Mr. Bratschitsch acknowledges that he has been served with the Respondents' notice of motion to strike his pleading, but says that the notice of motion was not filed.

The Respondents' notice of motion was sent to the Registry by fax on February 18, 2011, along with an accompanying affidavit of service. Attached hereto is a copy of the notice of motion and affidavit, as well as the fax confirmation sheet confirming that those documents were sent. Please note that the confirmation sheet mistakenly states the date of delivery as February 10<sup>th</sup>, rather than the 18<sup>th</sup>.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Encl.

cc. Anthony Bratschitsch (by fax (905) 260-1153) > BUSY SIGNAL

1-905-662-3828

Canada

FORM 359 – NOTICE OF MOTION  
Federal Court Rules, 1998, Rule 359

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

Respondents

**NOTICE OF MOTION**

TAKE NOTICE THAT the Respondents will make a motion to the Court at a general sitting on Monday, March 28, 2011, at 9:30 am or as soon thereafter as the motion can be heard, at the Federal Court, 180 Queen Street West, Toronto, Ontario.

THE MOTION IS FOR an Order:

- (a) striking out the Notice of Application, without leave to amend; or
- (b) in the alternative, granting an extension of time to file responding affidavits; and
- (c) the costs of this motion.

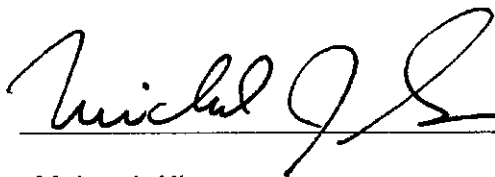
THE GROUNDS FOR THE MOTION ARE:

- (a) the Applicant brings this application for judicial review on his own behalf;
- (b) on the application, he seeks to challenge the constitutionality of s. 36 of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulation (the "Regulation"), promulgated under the *Canadian Environmental Protection Act*;

- 2 -

- (c) the Applicant does not allege that he has been charged under s. 36 of the Regulation;
- (d) the Applicant lacks standing to bring this application;
- (e) the Applicant does not meet the criteria for public interest standing;
- (f) there is no administrative decision or action in this case to be judicially reviewed by this Court;
- (g) absent some form of administrative action, the Court cannot grant the relief the Applicant seeks;
- (h) s. 18.1 *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended;
- (i) such further and other grounds as counsel may advise and the Court may accept.

February 18, 2011



Myles J. Kirvan  
Deputy Attorney General of Canada  
Per: Michael J. Sims  
Department of Justice  
Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6  
Tel: (416) 952-7116  
Fax: (416) 973-4323

Solicitor for the Respondents



- 3 -

TO: Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel. (289) 260-1153

Applicant

FORM 146A – AFFIDAVIT OF SERVICE  
Federal Court Rules, 1998, Rule 146

T-2112-10

**FEDERAL COURT**

**BETWEEN:**

**ANTHONY BRATSCHITSCH**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF  
ENFORCEMENT OFFICER, ENVIRONMENTAL ENFORCEMENT,  
ENVIRONMENT CANADA**

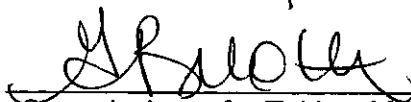
Respondents

**AFFIDAVIT OF SERVICE**

I, Diane Dyke, Legal Assistant, of the City of Toronto, in the Province of  
Ontario SWEAR THAT:

I served Anthony Bratschitsch with the Notice of Motion of the  
Respondents by sending a copy by regular mail on Friday, February  
18, 2011 to 163 Governors Road, Dundas, Ontario L9H 6L6 the last  
address for service provided by Anthony Bratschitsch.

SWORN before me at the City of  
Toronto in the in the Province of  
Ontario on February 18, 2011.

  
Commissioner for Taking Affidavits

  
Diane Dyke

Grace Bilotta, a Commissioner, etc.,  
City of Toronto, Government of Canada  
Department of Justice. Expires June 6, 2011.

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE FEB-10-2011 \*\*\*\*\* TIME 20:53 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=FEB-10 20:53

END=FEB-10 20:53

FILE NO.=136

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	294169545068	006	00:00:38

\*\*\*\*\* UF-7200 \*\*\*\*\* - \*\*\*\*\* - 4169734323- \*\*\*\*\*

 Department of Justice Canada  
Ontario Regional Office

Ministère de la Justice Canada  
Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
<b>Name / Nom:</b>  Registry of the Federal Court		<b>Name / Nom:</b>  Michael J. Sims Counsel	
<b>Address / Adresse:</b>  180 Queen Street West Suite 200 Toronto, Ontario M5V 3L6		<b>Address / Adresse:</b>  Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
416-954-5068		(416) 973-4323	(416) 952-7116
<b>Comments / Commentaires:</b> BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice.			
Protected documents? / Documents protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
TRANSMISSION			
<b>Pages (including cover sheet)</b>	<b>Date:</b>	<b>Time:</b>	
6	February 18, 2011		

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---

In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
 Name / Nom: Diane Dyke at / au: 416-952-7114

*Resending → 6 page fax. - earlier transmission only Spargo Canada*

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE FEB-10-2011 \*\*\*\*\* TIME 20:53 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=FEB-10 20:53

END=FEB-10 20:53

FILE NO.=135

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	894169545068	005	00:00:40

\*\*\*\*\* UF-7200 \*\*\*\*\* -

- \*\*\*\*\* -

4169734323- \*\*\*\*\*



Department of Justice Canada  
Ontario Regional Office

Ministère de la Justice Canada  
Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
<b>Name / Nom:</b>  Registry of the Federal Court		<b>Name / Nom:</b>  Michael J. Sims Counsel	
<b>Address / Adresse:</b>  180 Queen Street West Suite 200 Toronto, Ontario M5V 3L6		<b>Address / Adresse:</b>  Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
416-954-5068		(416) 973-4323	(416) 952-7116
<b>Comments / Commentaires:</b> BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
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Protected documents? / Documents protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
TRANSMISSION			
<b>Pages (including cover sheet)</b>	<b>Date:</b>	<b>Time:</b>	
6	February 18, 2011		

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
 Name / Nom: Diane Dyke at / au: 416-952-7114

Canada

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE MAR-08-2011 \*\*\*\*\* TIME 12:43 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=MAR-08 12:41

END=MAR-08 12:43

FILE NO.=194

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	294169732154	008	00:01:10

\*\*\*\*\* UF-7200 \*\*\*\*\* - \*\*\*\*\* - 4169734323- \*\*\*\*\*

 Department of Justice Canada Ministère de la Justice Canada  
Ontario Regional Office Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
<b>Name / Nom:</b>  John Gornick		<b>Name / Nom:</b>  Michael J. Sims Counsel	
<b>Address / Adresse:</b>  Registry of the Federal Court 180 Queen Street West Suite 200 Toronto, Ontario M5V 3L6		<b>Address / Adresse:</b>  Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
416-973-2154		(416) 973-4323	(416) 952-7116
<b>Comments / Commentaires:</b> Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice.			
Protected documents? / Documents protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
TRANSMISSION			
<b>Pages (including cover sheet)</b>	<b>Date:</b>	<b>Time:</b>	
8	March 08, 2011		

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
 Name / Nom: Diane Dyke at /au: 416-952-7114

Canada

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE MAR-08-2011 \*\*\*\*\* TIME 15:05 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=MAR-08 15:04

END=MAR-08 15:05

FILE NO.=200

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	a19056623828	008	00:01:02

\*\*\*\*\* UF-7200 \*\*\*\*\* -

- \*\*\*\*\* -

4169734323- \*\*\*\*\*



Department of Justice Canada Ministère de la Justice Canada  
Ontario Regional Office Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
Name / Nom:  Anthony Bratschitsch		Name / Nom:  Michael J. Sims Counsel	
Address / Adresse:  		Address / Adresse:  Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur:	Tel. No. / No du Tél:	Fax # / No du télécopieur:	Tel. No. / No du Tél:
(905) 662-3828		(416) 973-4323	(416) 952-7116
Comments / Commentaires:			
Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
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Protected documents? / Documents protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
TRANSMISSION			
Pages (including cover sheet)	Date:	Time:	
8	March 08, 2011		

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Name / Nom: Diane Dyke at / au: 416-952-7114

Canada

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE MAR-08-2011 \*\*\*\*\* TIME 14:00 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=MAR-08 13:44

END=MAR-08 14:00

FILE NO.=198

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	BUSY	Δ19052601153	000/008	00:00:00

\*\*\*\*\* UF-7200 \*\*\*\*\* - \*\*\*\*\* - 4169734323- \*\*\*\*\*

 Department of Justice Canada / Ministère de la Justice Canada  
Ontario Regional Office / Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
<b>Name / Nom:</b> Anthony Bratschitsch		<b>Name / Nom:</b> Michael J. Sims Counsel	
<b>Address / Adresse:</b>  		<b>Address / Adresse:</b> Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
(905) 260-1153		(416) 973-4323	(416) 952-7116
<b>Comments / Commentaires:</b> Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice.			
Protected documents? / Documents protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
TRANSMISSION			
<b>Pages (including cover sheet)</b>	<b>Date:</b>	<b>Time:</b>	
8	March 08, 2011		

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 Name / Nom: Diane Dyke at / au: 416-952-7114



\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE MAR-08-2011 \*\*\*\*\* TIME 13:06 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=MAR-08 12:50

END=MAR-08 13:06

FILE NO.=195

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	BUSY	a19052601153	000/008	00:00:00

\*\*\*\*\* UF-7200 \*\*\*\*\* - \*\*\*\*\* - 4169734323- \*\*\*\*\*

 Department of Justice Canada Ministère de la Justice Canada  
Ontario Regional Office Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
Name / Nom:  Anthony Bratschitsch		Name / Nom:  Michael J. Sims Counsel	
Address / Adresse:  		Address / Adresse:  Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur:	Tel. No. / No du Tél:	Fax # / No du télécopieur:	Tel. No. / No du Tél:
(905) 260-1153		(416) 973-4323	(416) 952-7116
Comments / Commentaires: Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al Court File No.: T-2112-10			
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice.			
Protected documents? / Documents protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
TRANSMISSION			
Pages (including cover sheet)	Date:	Time:	
8	March 08, 2011		

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
Name / Nom: Diane Dyke at / au: 416-952-7114

Canada



Mar 08 11 11:21a Tony Bratschitsch

March 8, 2011

**Sent by Fax**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-595438  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10

Dear Mr. Sims,

I wish to forward this letter that I have sent to the Registry Office.

Yours truly,



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

March 8, 2011

Registry Office  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

Tel: (416) 973-3356

Dear Sir/Madame:

Re: Direction of the Court – Rule 307 of the Federal Court  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10

I write to seek direction of the Court pursuant to Rule 307 of *the Federal Courts Rules*, which states:

Within 30 days after service of the applicant's affidavits, a respondent shall serve its supporting affidavits and documentary exhibits and shall file proof of service. The affidavits and exhibits are deemed to be filed when the proof of service is filed in the Registry.

Before the expiration of the time period that the Respondent was to have served and filed the affidavits and exhibits, I received a Notice of Motion to take place on March 28, 2011.

However, as of today, the Registry Office has confirmed that the Respondent's Notice of Motion has not been filed.

If the Notice of Motion has not been filed with the Court, and considering that the time period to comply with Rule 307 has elapsed, would I be able to proceed to serve and file the Applicant's Record as per Rule 309?

I would be grateful if you could call me at (289) 260-1153 or fax the direction to (905) 662-3828.

Thank you.



Anthony Bratschitsch  
Applicant  
163 Governors Road  
Dundas, Ontario L9H 6L6  
Tel: (289) 260-1153



Department of Justice  
Canada

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

February 18, 2011

**VIA FACSIMILE**

Registry of the Federal Court  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

Dear Sir/Madam:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

Please file the attached Notice of Motion of the Respondents and Affidavit of Service pursuant to the *Federal Courts Rules*.

Yours truly,

Diane Dyke  
Legal Assistant for  
Michael J. Sims  
Counsel  
Regulatory Law Division

Enclosures: Notice of Motion of the Respondents  
Affidavit of Service

Canada





Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
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Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

February 18, 2011

**VIA REGULAR MAIL**

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6

Dear Mr. Bratschitsch

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

Enclosed please find the Notice of Motion of the Respondents, served upon you in accordance with the *Federal Courts Rules*.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Encl.

January 24, 2011

**Sent by Registered Parcel Mail**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-595438  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10  
Affidavit and Exhibits

Dear Mr. Sims,

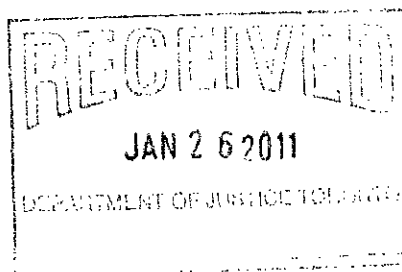
I wish to serve this Affidavit with Exhibits.

If needed, I can be contacted at (289) 260-1153.

Yours truly,



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6



T-2112-10

FORM 80A - Rule 80

**AFFIDAVIT**

FEDERAL COURT

BETWEEN:

ANTHONY BRATSCHITSCH

Applicant

and

THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA AND THE ATTORNEY  
GENERAL OF CANADA

Respondents

**AFFIDAVIT OF ANTHONY BRATSCHITSCH**

I, Anthony Bratschitsch, of the Town of Dundas, in the amalgamated City of Hamilton, in the Province of Ontario SWEAR THAT:

1. I am a Canadian citizen and I am employed as a consultant in the environmental waste industry affected by Section 36 of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* (EIHWHRMR). The EIHWHRMR, published in the Canada Gazette, is provided as **Exhibit A**. Section 36 is found on page 1220;
2. I am very knowledgeable of EIHWHRMR, the *Canadian Environmental Protection Act, 1999* (CEPA 1999) and the three relevant international agreements affecting the transboundary movement of hazardous wastes referred to in Item No. 8 in the Application. One of those three international agreements, *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, Amended 1992*, commonly known as "The Bilateral Agreement", is used to bridge the discrepancies of the other two international agreements to accommodate Canadian and American requirements. A copy of The Bilateral Agreement has been provided from Environment Canada's web site as **Exhibit B**;

3. I am also very knowledgeable of the typical operating procedures used by the hazardous waste industry that is utilized to achieve regulatory compliance, such as manifesting and tracking procedures;
4. I have known and provided industry-related services to Mr. Patrick Whitty and the three companies that he co-owns, including RPR Environmental Inc. (RPR), since 1998;
5. I am very knowledgeable of the facts involving the particular Environment Canada Enforcement (ECE) investigation of RPR and Mr. Whitty concerning alleged violations of Section 36 and of the subsequent prosecution. The ECE investigation file number (3007-2007-12-19-014) is shown on a copy of an ECE power point slide. This is **Exhibit C**.
6. The ECE Section 36 investigation and prosecution of RPR is a matter of public information and is of significant concern to the industry, for the reasons including fairness, predictability and consistency. **Exhibit D** is an internet publication by a reknown environmental law practioner, Dr. Dianne Saxe, detailing the Section 36 violation and her own reaction to it. Also, Environment Canada published an internet Enforcement Notification, last modified on August 11, 2009 (**Exhibit E**);
7. Dr. Saxe's internet publication refers to ECE enforcement and compliance in this manner (last paragraph) :

***We need it to be fair, and proportional to the real fault involved.***

As explained in the Application, the Canadian exporter has no control over the issuance of confirmations, commonly described as Certificates of Destruction, from the United States.

As a result, there is a perception in the industry of, at least, unfairness in the enforcement of Section 36 on Canadian exporters.

It is also my belief that there is no real fault because American legislation does not require the issuance of those Certificates, as explained in the Application.

8. Section 2.(1)(o) of CEPA 1999 states


*2. (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),*

*(o) apply and enforce this Act in a fair, predictable and consistent manner.*

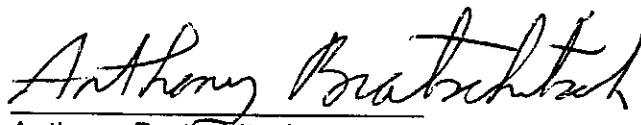
9. The *Canadian Manifesting Mechanism Will Say* of Mr. Joachim Wittwer, Head of Operations Section, Waste Management Division of Environment Canada succinctly describes the functions and applications of various mechanisms used to ensure compliance with CEPA 1999 and The Bilateral Agreement for the transboundary movement of hazardous waste. Mr. Wittwer's document also refers to the importance of each country's domestic legislation. As stated in the Application, the Certificates of Destruction specified in Section 36 of EHWHRMR are not part of The Bilateral Agreement. Mr. Wittwer's Will Say also does not make any reference to confirmations or Certificates of Destruction. It is clear that the confirmations or Certificates of Destruction are not a requirement of the international agreements governing the transboundary movement of hazardous wastes. Mr. Wittwer's Will Say is provided as **Exhibit F**.

Sworn (or Affirmed) before me at the City of Hamilton in the Province of Ontario

on January 24, 2011 (date).

  
Commissioner for Taking Affidavits  
(or as the case may be)

Deborah Patricia Pigott, a Commissioner, etc.,  
Province of Ontario, for D. Gordon F. Morton,  
Barrister and Solicitor.  
Expires April 6, 2012.

  
Anthony Bratschitsch  
(Signature of Deponent)

Exhibits :

- A. Canada Gazette Part II, Volume 139, No. 11: *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*
- B. *The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992*
- C. Environment Canada Enforcement power point slide identifying investigation file and Section 36 investigation
- D. Internet publication by Dr. Dianne Saxe publishing information about concerns over the fairness of the enforcement of the Section 36 regulation
- E. Internet Publication by Environment Canada
- F. *Canadian Manifesting Mechanism Will Say* of Joachim Wittwer, Head of Operations Section, Waste Management Division of Environment Canada



Jun 20 11 06:01a

Tony Bratschitsch

T-2112-10

**FEDERAL COURT**

Between:

**ANTHONY BRATSCHITSCH**

Applicant

And

**THE ATTORNEY GENERAL OF CANADA and THE CHIEF ENFORCEMENT  
OFFICER, ENVIRONMENTAL ENFORCEMENT, ENVIRONMENT CANADA**

Respondents

**REPLY TO COST SUBMISSIONS OF THE RESPONDENTS**

**Written Representation of Anthony Bratschitsch**

1. I have read the *Cost Submissions of the Respondents* and I have particularly noted two statements in paragraph 6 (page 2) of the Affidavit of Diane Dyke, such as:
  - a. counsel fees conservatively reflecting work in responding to the application, and
  - b. bringing the successful motion to strike the notice of application.
2. It appears to me that Mr. Sims did not submit costs for the motion that lapsed due to an administrative error. Therefore, if that is correct, I concur with above paragraph 1.b.
3. It also appears to me that the Disbursements from the *Respondents' Bill of Costs* are reasonable.
4. I understand that counsel is able to select the units from Column III of Tariff B and I have observed that, except for Item 2, he has selected the highest number that he is entitled to.
5. I have one concern to forward to the Assessment Officer with the admission that I am a layman and ignorant of legal matters.

However, at no time do I wish to reflect any negative comments towards the Counsel or the Court because I have found the Counsel to be professional and the Court to be very fair and tolerant.

Jun 20 11 06:01a Tony Bratschitsch

2

My concern is regarding the second Item 5 in the *Respondents' Bill of Costs* regarding the "applicant's motion to strike respondent's notice of motion".

As per the Recorded Entries for T-2112-10, dated 2011-03-24, the Hearing was removed from the General Sitting because no motion record was filed.


This was due to an administrative error on the respondents' side.

When that happened, I then filed a motion to strike the respondents' motion in what I believed, at the time, and, perhaps ignorantly, to be in my best interest.

I wish to state that the resulting extra cost was caused by a combination of the respondents' administrative error and the lack of definitive information and communication that left me concerned about the process.

Therefore, I ask if that cost is justified in whole or part of.

Respectfully submitted,

  
Anthony Bratschitsch  
Applicant

Date : June 20, 2011

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

AND TO: Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6  
Tel: (416) 952-7117  
Fax: (416) 973-432

Solicitor for the Respondent to the Application

June 20, 2011

Fax Transmission: 3 pages

**Sent via Fax**

Mr. Michael J. Sims  
Counsel, Regulatory Law Division  
Department of Justice Canada  
130 King St. West  
Suite 3400, Box 36  
Toronto, Ontario M5X 1K6


Tel: (416) 952-7117  
Fax: (416) 973-4323

Re: Your File No. 2-595438  
Anthony Bratschitsch v. Attorney General of Canada et al  
Federal Court File No.: T-2112-10  
Reply to Cost Submissions of the Respondents

Dear Mr. Sims,

Please find my reply to the cost submissions of the respondents, served upon you in accordance to the *Federal Courts Rules*.

Thank you.



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario L9H 6L6  
Tel: (289) 260-1153



Department of Justice  
Canada

Ontario Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

January 6, 2011

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel. (289) 260-1153

Dear Mr. Bratschitsch:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

Enclosed please find the Notice of Appearance of the Respondents, served upon you in accordance with the *Federal Courts Rules*.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

Encl.



Department of Justice  
Canada

Ministère de la Justice  
Canada

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 952-7116  
Fax: (416) 973-4323  
Email: michael.sims@justice.gc.ca

Our File: 2-595438  
Notre dossier:

Your File:  
Votre dossier:

January 07, 2011

**VIA FACSIMILE**

Registry of the Federal Court  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

Dear Sir/Madam:

**Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al**  
**Court File No.: T-2112-10**

---

Please file the attached Respondents' Notice of Appearance and Affidavit of Service pursuant to the *Federal Court Rules*.

Yours truly,

Michael J. Sims  
Counsel  
Regulatory Law Division

MS/dd

Enclosures: Notice of Appearance  
Affidavit of Service

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE JAN-07-2011 \*\*\*\*\* TIME 11:34 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=JAN-07 11:32

END=JAN-07 11:34

FILE NO.=978

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	894169545068	004	00:00:34

\*\*\*\*\* UF-7200 \*\*\*\*\* - \*\*\*\*\* - 4169734323- \*\*\*\*\*

 Department of Justice Canada Ministère de la Justice Canada  
Ontario Regional Office Bureau régional de l'Ontario

## FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

SEND TO / ENVOYER À		FROM / DE	
<b>Name / Nom:</b> Registry of the Federal Court		<b>Name / Nom:</b> Michael J. Sims Counsel	
<b>Address / Adresse:</b> 180 Queen Street West Suite 200 Toronto, Ontario M5V 3L6		<b>Address / Adresse:</b> Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>	<b>Fax # / No du télécopieur:</b>	<b>Tel. No. / No du Tél:</b>
416-954-5068		(416) 973-4323	(416) 952-7116
<b>Comments / Commentaires:</b>			
<b>Re: BRATSCHITSCH, Anthony v. Attorney General of Canada et al</b> <b>Court File No.: T-2112-10</b> Notice of Appearance and Affidavit of Service attached			
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice.			
<b>Protected documents? / Documents protégés?</b> <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			
<b>TRANSMISSION</b>			
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4	January 07, 2011		

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:  
 Name / Nom: Diane Dyke at / au: 416-952-7114



**Sims, Michael**

---

**From:** Sims, Michael  
**Sent:** January 4, 2011 3:03 PM  
**To:** 'Michael.sousa@ec.gc.ca'  
**Subject:** Bratschitsch v. AGC and Bratschitsch, et al. v. AGC  
**Attachments:** Bratschitsch -Notice of Application.pdf; Bratsch. et al -Notice of Application.pdf

Michael,

We have been served with the two attached notices of application for judicial review. They are related, both to each other and to a series of proceedings against Environment Canada and the PPSC arising out of the prosecution of RPR Environmental.

Please let me know when counsel from your office has been assigned to these matters.



Bratschitsch -Notice  
of Applic...



Bratsch. et al  
-Notice of Appl...

Regards,

Michael

**Michael J. Sims**

Counsel | Avocat  
Regulatory Law | La loi du droit réglementaire  
Department of Justice Canada | Ministère de la Justice Canada  
Ontario Regional Office | Bureau régional de l'Ontario  
130 King Street West | 130, rue King ouest  
Suite 3400 | pièce 3400  
Toronto, Ontario M5X 1K6  
Tel. / Tél.: (416) 952-7116  
Fax / Téléc.: (416) 973-4323  
E-mail / courriel.: michael.sims@justice.gc.ca

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**AVIS DE CONFIDENTIALITÉ:** Le contenu de ce courrier électronique est confidentiel et strictement réservé à l'usage des personnes auxquelles il s'adresse. Ce message peut contenir de l'information protégée par le secret professionnel. Si vous avez reçu ce message par erreur, contactez immédiatement l'expéditeur et détruisez le message original et toutes copies. Veuillez noter qu'il est strictement interdit de divulguer, reproduire ou diffuser le contenu de ce message ou de prendre des mesures en conséquence. Tout nouvel envoi, reproduction ou usage de ce message par une personne autre que le destinataire est strictement interdit.

**Leadbeater, Wendell**

---

**From:** torfort@justice.gc.ca

**Sent:** January 4, 2011 12:41 PM

**To:** \* Toronto - File Open Requests Team

**Cc:** \* Toronto - File Open Requests Team

**Subject:** Regulatory Law File Opening Request

**Diane Dyke** has submitted the following file opening request:

**Section:** Regulatory Law

**File Type:** Litigation

**File Name:** BRATSCHITSCH, Anthony v. AGC et al

**Crown's Involvement in the Proceedings:** Proceedings against the Crown

**Court Forum:** Federal Court

**Court File No.:** T-2112-10

**Court Registry:** Toronto

**Proceeding:** Application

**Issues:** S. 18.1 - Judicial Review

**Complexity:** Medium

**Client:** Environment (Department of the)

**Order Number:** 200051 - General / Legal Services

**Client Billing %:** 100%

**Client Contact:** To be determined

**Lead:** Michael Sims

**Requested By:** Diane Dyke



## **IMPORTANT PLEASE NOTE**

**IT IS IMPORTANT THAT ALL REPLIES TO  
CORRESPONDENCE BEAR THE FILE NUMBER.**

**TRANSFER OF FILES FROM ONE OFFICER TO  
ANOTHER SHOULD BE MADE THROUGH RECORDS.**

**IF FOR SPECIAL REASONS, A FILE IS HANDED  
PERSONALLY TO ANOTHER OFFICER, RECORDS  
MUST BE INFORMED. (PASS SLIPS)**

**PLEASE DO NOT KEEP FILES LONGER THAN  
ABSOLUTELY NECESSARY.**

**THE OFFICER TO WHOM A FILE IS CHARGED  
IS HELD RESPONSIBLE FOR SAFETY UNTIL IT IS  
RETURNED TO RECORDS BRANCH.**

## **IMPORTANT PRIÈRE DE NOTER**


**IL EST ESSENTIEL QUE TOUTE CORRESPONDANCE  
PORTE LE NUMÉRO DU DOSSIER.**

**LE TRANSFERT DE DOSSIERS D'UN  
FONCTIONNAIRE À UN AUTRE DOIT SE FAIRE  
PAR L'INTERMÉDIAIRE DES PRÉPOSÉS AUX  
DOCUMENTS.**

**LORSQUE, POUR DES RAISONS PARTICULIÈRES,  
UN DOSSIER EST REMIS PERSONNELLEMENT À  
UN AUTRE FONCTIONNAIRE, LA DIRECTION DES  
DOCUMENTS DOIT EN ÊTRE INFORMÉE.  
(PAPILLON DE TRANSFERT)**

**VEUILLEZ NE PAS CONSERVER LES DOSSIERS  
PLUS LONGTEMPS QU'IL N'EST ABSOLUMENT  
NÉCESSAIRE.**

**LE FONCTIONNAIRE AUQUEL EST CONFIÉ UN  
DOSSIER EST TENU RESPONSABLE DE SA  
SÉCURITÉ JUSQU'À SON RETOUR À LA  
DIRECTION DES DOCUMENTS.**



No. 2.5954.38

**Page 3025**

**is withheld pursuant to section  
est retenue en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

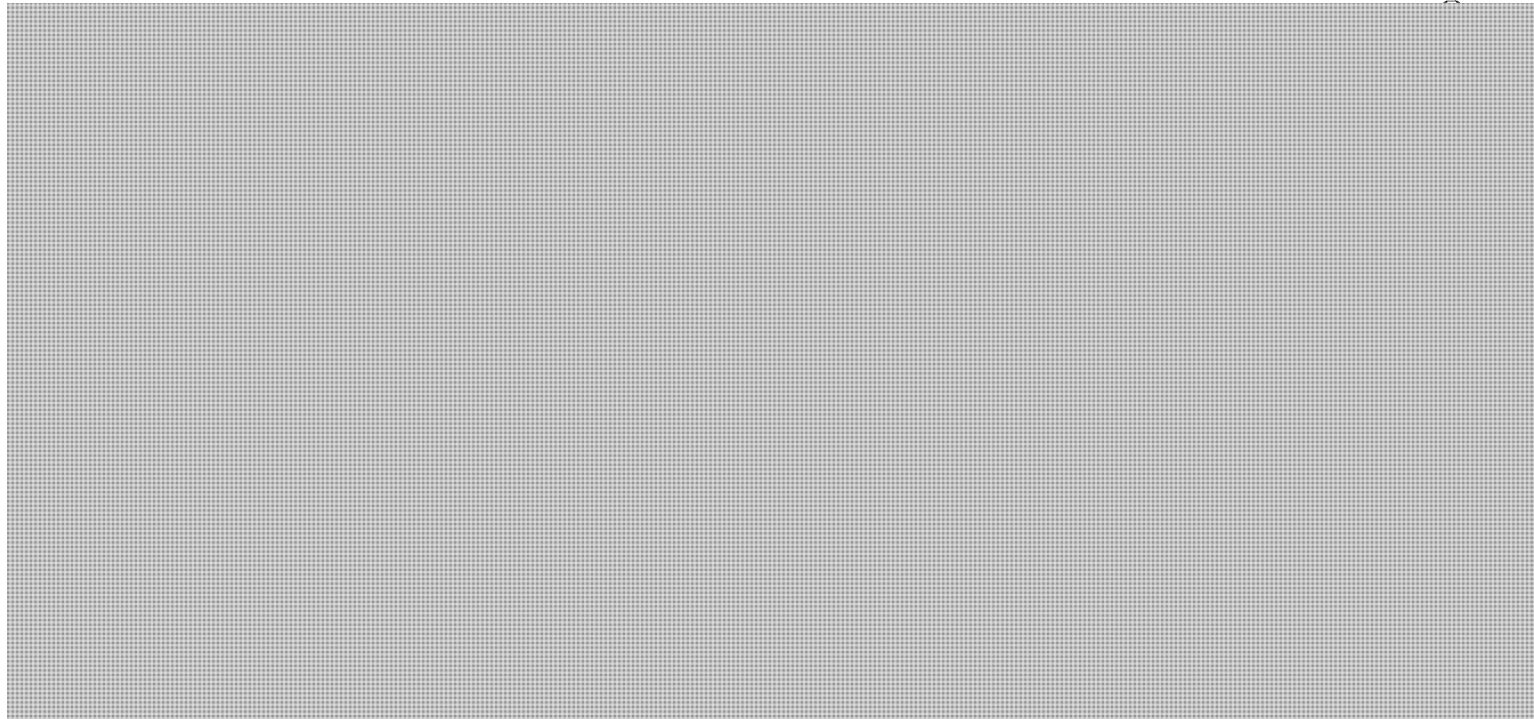
## Howarth, Scott [NCR]

---

**From:** Atkinson, Heather [NCR]  
**Sent:** Monday, June 04, 2001 5:33 PM  
**To:** Howarth, Scott [NCR]  
**Subject:** [REDACTED]

s.23

Hi Scott,



*Heather Atkinson*

Use Patterns and Controls Implementation Section / Section de l'utilisation des produits et de l'application des contrôles  
Environment Canada / Environnement Canada



**Tel / Téléphone:** (819) 953-1669



**Fax / Télécopier:** (819) 994-0007



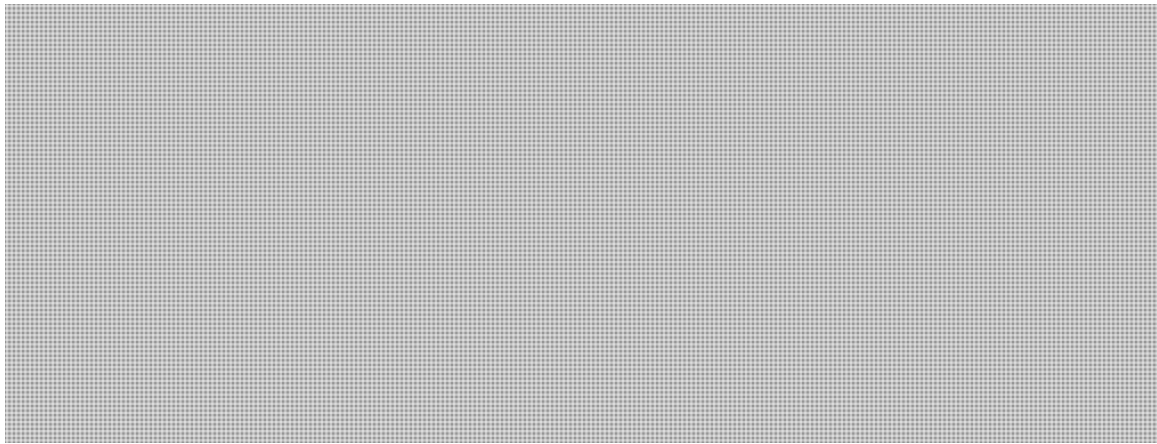
**E-mail / Courriel:** Heather.Atkinson@ec.gc.ca

**Page 3027**

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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



Scott Howarth  
953-1665

**Sidhu,Dianne [NCR]**

---

**From:** Gavrel,Paul [NCR]  
**Sent:** Tuesday, November 28, 2000 2:35 PM  
**To:** Keller,Joseph [NCR]  
**Cc:** Meaney, John [Ontario]  
**Subject:** FW: Control Fire

s.23

FYI

Francine, please file this e-mail and the enclosure in 2520-14. Thank you.

-----Original Message-----

**From:** Meaney, John [Ontario]  
**Sent:** Tuesday, November 28, 2000 2:02 PM  
**To:** Gavrel,Paul [NCR]  
**Subject:** Control Fire

Paul,



**Pages 3030 to / à 3037  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



**Keller, Joseph [NCR]**

---

**From:** Meaney, John [Ontario]  
**Sent:** May 14, 2001 2:04 PM  
**To:** Pascoe, Dave [Ontario]; May, Bradley [Ontario]; Bell, Michael [Ontario]  
**Cc:** Keller, Joseph [NCR]  
**Subject:** [REDACTED]

FYI

s.23



**Page 3039**

**is withheld pursuant to section  
est retenue en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 3040 to / à 3052**

**are not relevant**

**sont non pertinentes**

**“ UNSOLICITED  
FOR MINISTER AND DEPUTY MINISTER”**

**LETTER FROM CONTROL FIRE SYSTEMS  
DATED JULY 14, 2000**

**ISSUE**

- A letter dated July 14 from Adam Richardson, President of Control Fire Systems (CFS), was sent to the Minister and the Deputy Minister in relation to an Environment Canada enforcement action.

**CURRENT STATUS**

- As part of an investigation of illegal importation, cylinders of Ozone-depleting substances (ODS) products were seized by Environment Canada inspectors.
- Charges were laid against CFS, and Adam Richardson, President of CFS, for illegal importation of 75 cylinders of used Bromotrifluoromethane (Halon 1301) under EIH Regulations.

•

- Since the charges were dropped, the Crown has made all reasonable efforts to re-deliver the seized cylinders of Halon 1301 to CFS.
- CFS is claiming that Environment Canada has not stored the cylinders properly. They have refused to accept redelivery of the cylinders, and are threatening civil action.

•

- The investigation has not been closed as the disposition of the seized material has not yet been resolved.

**NEXT STEPS**

- EPB-Ontario Region is drafting a response to the letter from CFS.

•

Prepared by:  
Dave Pascoe  
Environmental Protection Branch  
Ontario Region  
(416) 739-5897

July 18, 2000

Approved by R. Shimizu, A/RD, EPB-OR

## BACKGROUND

In May 1999 information was received from Atlantic Region that two sea containers of used ODS Halon 1301 had arrived in Halifax from Pakistan enroute to Toronto without all the necessary notices having been given or permits obtained under ODS or EIHW Regulations. The importer was identified as Control Fire Systems (CFS).

The shipment was seized by EPB-OR inspectors on May 13, 1999, and later moved to a storage container at Environment Canada's 4905 Dufferin Street site.

An investigation by EPB-OR indicated that there were violations of both ODS and EIHW Regulations, and the matter was referred to the Department of Justice. In addition to this, Transport Canada conducted their own investigation under TDGR, resulting in a \$5,000 fine against CN.

Although it was decided not to proceed with regard to alleged violations of the ODS regulations, as it was discovered that information which had been previously provided by the program was in error and Justice decided that it could constitute officially induced error, 7 charges were laid against CFS, and Adam Richardson, the company President, for illegal importation of 75 cylinders of used Bromotrifluoromethane (Halon 1301) under EIHW Regulations. Those charges were withdrawn on January 14, 2000 when DOJ further determined that, because of the officially induced error relating to the ODS violations, any resultant fine for the EIHW charges would probably be small, and the matter might reflect badly on the Department.

Since the charges were dropped, the Crown has made all reasonable efforts to re-deliver the seized cylinders of Halon 1301 to CFS. However, CFS has placed a number of conditions on its acceptance of redelivery:

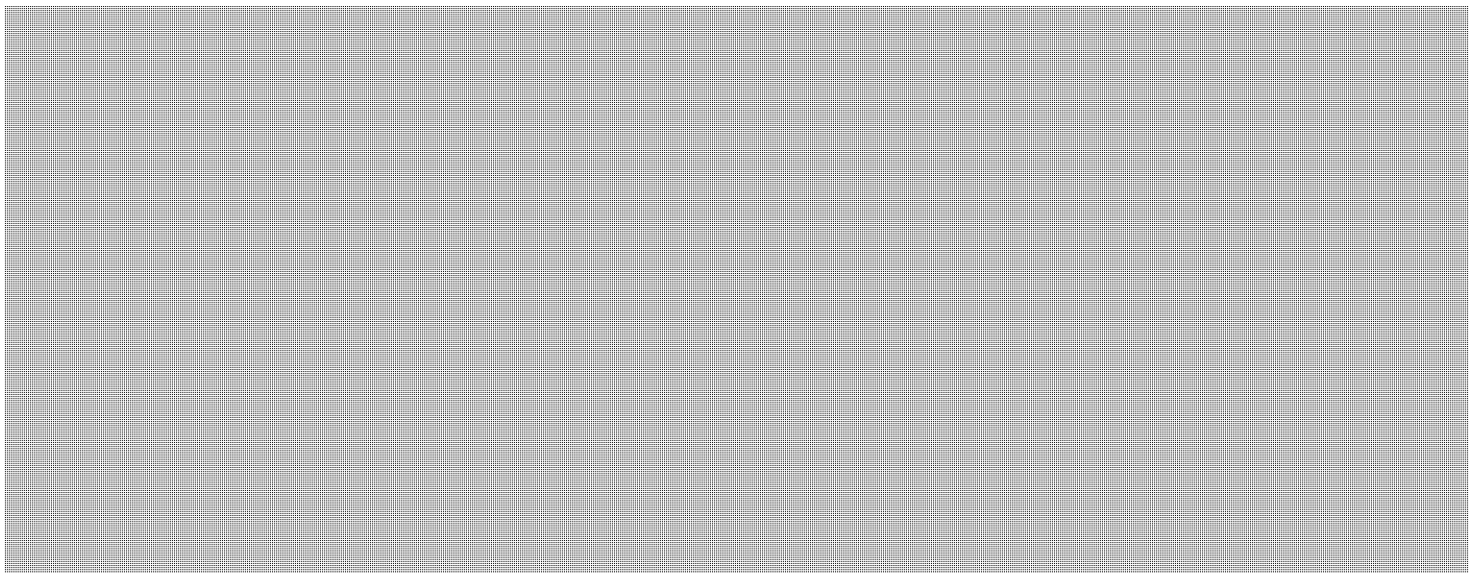
1. In a letter dated April 12, 2000 from the law firm representing CFS, CFS alleged "considerable losses" of the Halon since seizure. It alleges that the cylinder valves state a threshold temperature of 130° F and that the temperature in the storage container has exceeded that during summer weather. CFS also advised of its intention to commence proceedings to recover damages for the lost Halon.
2. In a letter dated May 12, 2000 CFS demanded that the Crown supply it with a list of all persons who had handled the cylinders since seizure, and that the cylinders be weighed by the Crown, but not by any of CFS' competitors.
3. In a letter dated June 16, 2000 CFS alleged "regulatory ambiguity" in the permits it was issued to move the seized cylinders to its New York facility. CFS wanted assurances from the federal Crown that it meets all applicable regulations and requirements to ship the Halon.

In corresponding with CFS, the Crown has held the position that the return of the seized cylinders and Halon 1301 is not linked to any of the issues raised by CFS.

The most serious concern is that the cylinders have been leaking Halon while under seizure. Transport Canada officials advise that:

- (a) even though the cylinders may state a threshold of 130° F, they can withstand pressures up to about four times their market service pressure, and
- (b) any loss of integrity would have to involve substantial overpressuring, exposure to extreme temperature conditions and excessive corrosion or damage. None of the above appears to have occurred while under seizure.

s.23



**Pages 3057 to / à 3067**  
**are not relevant**  
**sont non pertinentes**



**Keller, Joseph [NCR]**

---

**From:** Meaney, John [Ontario]  
**Sent:** May 11, 2001 12:55 PM  
**To:** Keller, Joseph [NCR]  
**Cc:** May, Bradley [Ontario]; 'Gina Scarcella'; Gavrel, Paul [NCR]  
**Subject:** Control Fire Systems - Statement of Claim

Joe - further to my earlier correspondence, attached is a short note relative to the statement of claim. I will have a copy of the statement of claim faxed to you this afternoon. Could you have your assistant make a copy for Paul Gavrel.



Note - Statement of  
Claim.doc

s.23

**Note re: Statement of Claim**  
***Control Fire Systems Limited v. Michael Bell & Environment Canada***

"A statement of claim in the above matter was filed in the Ontario Superior Court of Justice and served on May 10, 2001.

CFS claims as follows:

- a) for damages caused by the negligence of the defendants from May 21, 1999 to August 1, 2000 for ignoring warnings from the Plaintiff about the safe storage of Halon 1301, in failing to store the Halon 1301 in a safe manner, and in permitting a quantity of Halon 1301 to escape into the atmosphere;
- b) for damages caused by the defendants' negligence from May 21, 1999 to August 1, 2000 in seizing and retaining a quantity of Halon 1301 belonging to the plaintiff on the basis of an alleged importing into Canada, notwithstanding the advice of officials in Environment Canada's Ottawa office, that the shipment was not being imported into Canada; *— who - what evidence ?*
- c) for damages caused by the defendants by their unlawful sale and conversion of the balance of Halon 1301 on August 1, 2000 at a price substantially below the amount necessary to replace the total volume of Halon 1301;
- d) for further consequential damages arising from the unlawful seizure and retention of the Halon 1301, and the loss of Halon 1301 into the atmosphere from May 21, 1999 up to the date of the issuance of this Notice of Action.

CFS seeks the following damages:

- a) general damages of \$700,000 for the negligent and wrongful seizure, destruction and conversion of raw material belonging to the plaintiff;
- b) special damages of \$600,000 for the negligent and wrongful seizure, destruction and conversion of raw material belonging to the plaintiff;
- c) punitive damages of \$200,000;
- d) prejudgment and postjudgment interest; and
- e) costs on a solicitor & client scale

Litigation counsel - Gina Scarcella, Senior Counsel, Ontario Regional Office - now has charge of the file. She can be reached at 416-954-8111; fax 416-973-5004.

Pursuant to the court's case management rules applicable to this type of action, the defendants are to file a defence by May 29, 2001. But a motion on consent is being considered to extend the deadline for filing to July 29, 2001."

**Pages 3070 to / à 3072**  
**are not relevant**  
**sont non pertinentes**

Department of Justice  
CanadaMinistère de la Justice  
Canada

2520-14

FACSIMILE TRANSMISSION  
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MAY 23 A 9:19

RECU 27/88

<b>SEND TO / ENVOYER À</b>		<b>FROM / DE</b> <b>DECEES JURIDIQUES ENVIRONNEMENT CANADA</b>	
Name / Nom:		Name / Nom: Gina M. Scarcella Senior Counsel	
Address / Adresse: Joseph Keller, Counsel Environment Canada, Legal Services PVM, Floor: 06 351 St. Joseph Boulevard Hull, Quebec K1A 0H3		Address / Adresse: Ontario Regional Office The Exchange Tower 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur: (819) 953-9110	Tel. No. / No du Tél: (819) 953-1385	Fax # / No du télécopieur: (416) 973-5004	Tel. No. / No du Tél: (416) 954-8111
Comments / Commentaires: Re: Control Fire Systems Limited v. Bell et al			
<b>TRANSMISSION</b>			
Number of Pages / Nombre de page: 20	Date / La date: 22/05/01	Time / Heure: 11:45 am	
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice. Protected document / Document protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			

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Cette communication est exclusivement destinée à qui elle est adressée. Elle peut contenir de l'information privilégiée, confidentielle et ne pouvant être divulguée selon la loi applicable à l'espèce. Si vous avez reçu cette communication par erreur, veuillez nous en aviser immédiatement par téléphone. Merci.

In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:

Name / Nom: Debbie Fairlie at / au: (416) 973-2590

**Department of Justice  
Canada**

Ontario Regional Office  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

**Ministère de la Justice  
Canada**

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Security classification -- Côte de sécurité

File number -- Numéro de dossier

ORO #2-475543

Date

22/05/01

Telephone/FAX -- Téléphone/Télécopieur

(416) 954-8111 / (416) 973-5004

**MEMORANDUM / NOTE DE SERVICE**

TO / DEST: Joseph Keller, Counsel  
Environment Canada, Legal Services

FROM / ORIG: Gina M. Scarcella  
Senior Counsel


SUBJECT / OBJET: Re: Control Fire Systems Limited v. Bell et al, Court File No. 00-CV-  
20711CM

Comments/Remarques

As discussed this morning I am forwarding copies of the following, from the prosecution brief:

1. Witness statement of Grace Berlingieri, Manifest Officer, EC, HQ (2 pages), with attached notes (3 pages)
2. Witness statement of Heather Atkinson, Use Patterns Survey Officer, EC, Ontario Region (2 pages), with attached notes (4 pages)
3. Witness Statement of Yves Bovet, A/Head, Use Patterns, EC, HQ (2 pages), with attached notes (3 pages)
4. Statement of Robert Bell, Inspector, EC, Ontario Region (1 page)
5. Statement of Jean Carboneau, Regulation Engineer, EC, Ontario Region (1 page)

Thank you.

  
GMS:daf  
Encls.

Do not write in this space / Ne pas écrire dans cet espace

**STATEMENT OF:**

**Grace Berlingieri  
Manifest Officer  
Environment Canada  
Headquarters  
819-**

- 
- I am Manifest Officer employed by the Transboundary Movement Division, Environment Canada Headquarters in Hull Quebec.
  - I am responsible for reviewing, documenting, and recommending for approval Notifications for the import and export of hazardous wastes pursuant to the Export and Import of Hazardous Wastes Regulations.
  - On May 17, 1999 I queried our database for the company name "Control Fire Systems Limited and Control Fire Systems Inc. UN1009 for possible transits from Pakistan" in response to a request this office received from Mike Bell. I found that no company by those names existed on the database and that no transits from Pakistan had been filed. Control Fire Systems Limited and Control Fire Systems Inc. have never applied to this office to import, export or transit a shipment of hazardous waste.
  - On May 17, 1999 I received a call from Adam Richardson of Control Fire Systems Limited inquiring as to what was he was required to do to ship hazardous waste in transit according the regulations. I faxed him a transit notice and mailed a complete information package to his attention.
  - On May 18, I received a call from Rolando Zalamea from Control Fire Systems requesting assistance with completing the documentation. It was evident from the conversation that he was unfamiliar with the notification process.
  - On May 21, 1999 I received a completed transit notice from Mr. Richardson which was incomplete. A corrected notice was filed on may 25, 1999. The Notice indicated that the company intended to recycle the shipment at the warehouse in Niagara Falls New York.
  - On May 26, 1999 I forwarded the application the USEPA who must approve any such shipment of hazardous waste.

s.23

- On June 21, 1999 I received notification from the USEPA that they would allow the import to proceed.

I am able to discuss Canada's international obligations with regard to the global movement of hazardous wastes and specifically the requirements under the Export and Import of Hazardous Wastes Regulations.

06/16/98 13:14 819 997 3068

Hazardous Waste

0003

- 2 -

10:00 a.m. May 17, 1999

- request from Suzanne Leppinen to query our database for company name "Control Fire Systems Inc." UN1009, Bromotrifluoro methane, for possible transits from Pakistan (she had received request from Mike Ball, Inspector, Ontario Region)

10:10 a.m. May 17, 1999

- I informed Sue that no company by that name existed on the database and that no transits from Pakistan had ever been filed. I also passed this information on to Mike Ball by phone.

3:30 p.m. May 17, 1999

- I received a call from Adam Richardson of Control Fire Systems. He indicated that he has shipped "in bond", reclaimed Halons from England into Canada (Montreal) then by train into USA. His USEPA contact was Tom Land (whose division at USEPA had provided consent to the import) and he had contacted Environment Canada's Ozone Depleting Substances Division (Heather Atkinson) for the appropriate applications for these shipments. He felt he had satisfied Environment Canada's requirements and now learned that he is also regulated under the Export and Import of Hazardous Waste Regulations (EIHWWR). Hence his "in bond" shipment of Halons from Pakistan was held in Toronto. He further indicated that at times, the Halons are reclaimed in Toronto and then move into the USA as a product OR they are sent through Canada directly to the USA for reclamation. I then advised Mr Richardson of the forms and documents he must file for any export, import or transit of hazardous waste in Canada. I faxed the transit notice #T-04717 to his attention and on May 18<sup>th</sup> mailed a complete info package to his attention. Mr Richardson expressed that he would get his comptroller Rolando Zalamea to call me with any questions regarding the notice.

a.m. May 18, 1999

- I received a call from Rolando Zalamea requesting assistance with the IWIC and insurance requirements. it was very evident from the conversation, he was unfamiliar with the classification codes and what they represented. I explained the insurance requirements and the need to know where the waste was destined and how it would be processed/disposed of. u.6.

a.m. May 20, 1999

- Received call from Heather Atkinson to discuss what information had been exchanged with the company. She asked if there were any exemptions to our Regulations and if waste moving "in bond" would still be subject to our Regulations. I advised that regardless of quantity, type, "bond", etc. if these were wastes under TDGR of EIHWWR, and they are moving through International borders, a notice and permit is required under our Regs.



06/16/99 13:15

819 987 3088

Hazardous Waste

004

- 3 -

a.m. May 20, 1999

- Mike Bell had called to find out whether CFS had filed any paperwork yet. I briefed him on the aforementioned items and informed him we had seen no transit notice yet.

May 21, 1999

- received from Mr Richardson, a cover letter, the transit notice, and a copy of the letter of "non-objection" from the Stratospheric Protection Division of USEPA to import the waste. This information was processed on our system, and a copy was sent to Mike Bell for his information.

May 25, 1999

- I contacted Rolando to inform him that the file was incomplete. We were still waiting for a list of carriers and their insurance certificates and a weight correction to litres or Kilogram weight.
- Rolando later faxed the corrected notice, carrier list, and respective insurance certificates.

May 26, 1999

- Spoke to Mike Bell regarding the aforementioned and we reviewed the recycling option the company had indicated *R14 - Recovery or regeneration of a substance or use or re-use of a hazardous waste, other than by any operation set out in R1 to R10*. Using this option, the company is indicating that they intend to carry-out this procedure at the listed "Foreign Receiver" site.
- I sent letter to Robert Helss, USEPA (Enforcement Planning, Targeting and Data Division) for their letter of "non-objection" to the waste entering the USA. They have not yet replied. A copy of this correspondence was also forwarded to Mike Bell.
- Rolando called for the status of the file. He was advised we are still awaiting USEPA correspondence. He was also interested in acquiring blank manifests. He was referred to our manifest section where Francine Pretty forwarded 20 blank manifests to his attention via Purolator Courier.

May 28, 1999

- Rolando called to ask for status of file. He was told that USEPA has not yet replied.
- Suzanne e-mailed me to send copy of CFS correspondence/file to Peter Levedag

May 31, 1999

- Rolando called for the name and phone number of our USEPA contact so that he could pursue the situation from that end. I provided the Office of Enforcement and Compliance number.

06/16/99 13:15

819 987 1068

Hazardous Waste

005

- 4 -

June 4, 1999

- received call from Lorraine Young regarding the CFS file. We discussed all of the aforementioned and she indicated that in her findings, the site identified on the notice as the Foreign Receiver Site was merely a storage warehouse. She faxed a copy of the letter received by USEPA from CFS indicating that their site in Niagara Falls NY was for storage only, not recycling. Lorraine had also mentioned that upon visiting the waste held in Toronto, the cylinders were marked with decals from various places including Singapore. When she mentioned that, I recalled a previously circulated memo about the dismantling of ships. We were to be cautious of any wastes derived from dismantling, so I faxed Lorraine the memo for her information.

I have received no further calls or correspondence regarding CFS. The file now remains in "waiting" status with A/Notification Officer Francine Pretty.

Grace Berlingieri  
June 15, 1999

**STATEMENT OF:**

**Heather Atkinson  
Use Patterns Survey Officer  
Environment Canada  
Ontario Region  
(416) 739-5905**

- 
- I am a Use Patterns Survey Officer employed by Environment Canada at Headquarters in Hull Quebec
  - My responsibilities include the administrative requirements of the Ozone Depleting Substances Regulations administered by Environment Canada specifically the permitting requirements.
  - I have dealt with Control Fire Systems and Adam Richardson on many occasions when processing a request for a permit to import or export halons.
  - It is standard procedure to inform all companies that products regulated by the Ozone Depleting Substances Regulations may also be regulated by the Export and Import of Hazardous Wastes Regulations and the Toxic Substance Export Notification Regulations.

## Witness Statement

Surname:	<u>Atkinson</u>	G1:	<u>Heather</u>	G2:	
D.O.B:		Phone-Res:	<u>(613)</u>	Phone-Bus:	<u>(819) 953-1669</u>
DL No:		Prov/Terr:			
Address - Res:					
Officer(s) Taking Statement:	<u>Ms. Lorraine Young</u>	<u>Mr. Michael Bell</u>			
Taken at:	<u>Place Vincent Massey -14<sup>th</sup> floor</u>				
Starting Time:	<u>9:30</u>	Finishing Time:	<u>11:15</u>		

s.19(1)

The issue concerning trans-shipment of ozone-depleting substances being controlled under the *Ozone-Depleting Regulations* (ODS Regulations) was discussed within Chemical Controls Division (CCD). It was firmly agreed within Chemical Controls Division that the ODS Regulations were not applicable to any trans-shipments of ozone-depleting substances (i.e. no permits were required).

The Montreal Protocol is concerned with the Consumption for each Party (P+I-E) and not with any movement within the countries.

Majority of the Parties of the Montreal Protocol have established their own Regulations concerning the import and export of ozone-depleting substances. If countries were to apply their own Regulations to trans-shipments, the application of the Regulations would be redundant, placing the companies under unnecessary regulatory burden. For example, if a company from country A was shipping material to country B and it passed through country C, then company A would be required to obtain one import permits and two export permits.

As the result of the above information and the firm agreement among CCD, when companies inquired if trans-shipments were controlled, I would verbally reply that trans-shipment was not covered under the ODS Regulations. ✓

In June - July 1999, CCD received a letter and communication from Paul Gavel indicating that in his legal opinion, trans-shipments are covered under the ODS Regulations.

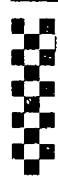
During conversations with companies, I make it a point to stress the fact that Environment Canada administers another Regulation known as the *Export and Import of Hazardous Waste Regulations* (EIHW Regulations) and that the importation and exportation of ozone-depleting substances may fall under these provisions. I informed the companies that I am unable to provide details concerning the EIHW Regulations, however, for further information they should contact the Transboundary Movement Division at (819) 997-3378 (telephone) or (819) 997-3088 (fax). ✓

When a permit for recovered, recycled, or used substances is issued, the following information items are included:

- a sentence informing the recipient that a permit issued under the *Ozone-depleting Substances Regulations* does not remove your obligation to comply with other federal and provincial regulations

a sentence informing the recipient that a request for a permit to import or export recovered, recycled or already used ozone-depleting substance may also be subject to section 43 of Canadian Environmental Protection Act (CEPA) and the *Export and Import of Hazardous Wastes Regulations* (EIHW Regulations)

- a paragraph written by the person responsible for administering the EIHW Regulations, indicating the fact



# Witness Statement

s.19(1)

Surname: <u>Atkinson</u>	G1: <u>Heather</u>	G2: _____
D.O.B: _____	Phone-Res: <u>(613) _____</u>	Phone-Bus: <u>(819) 953-1669</u>
DL No: _____	Prov/Terr: _____	
Address - Res: _____		
Officer(s) Taking Statement: <u>Ms. Lorraine Young</u> <u>Mr. Michael Bell</u>		
Taken at: <u>Place Vincent Massey -14<sup>th</sup> floor</u>		
Starting Time: <u>9:30</u> Finishing Time: <u>11:15</u>		

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- a sentence informing the recipient that a permit issued under the *Ozone-depleting Substances Regulations* does not remove your obligation to comply with other federal and provincial regulations
- a sentence informing the recipient that a request for a permit to import or export recovered, recycled or already used ozone-depleting substance may also be subject to section 43 of Canadian Environmental Protection Act (CEPA) and the *Export and Import of Hazardous Wastes Regulations* (EIHW Regulations)
- a paragraph, written by the group responsible for administrating the EIHW Regulations, indicating the fact that ozone-depleting substances (ODS) which are destined for any of the recycling/recovery operations listed in Part II of Schedule I of the EIHW Regulations and which exhibit a hazard according to the hazard characteristic criteria set out under the *Transportation of Dangerous Goods Regulations*, are considered a hazardous waste and export or import of such hazardous wastes must be done in accordance with the EIHW Regulations
- the procedures governing the submission of information under the EIWH Regulations are available from:

Transboundary Movements Division  
Environment Canada  
351 Saint Joseph Boulevard, 12<sup>th</sup> Floor  
Hull, Quebec K1A 0H3  
Tel: (819) 997-3377 Fax: (819) 997-3068

I have read this statement and it is true and correct to the best of my knowledge and belief.

Witness \_\_\_\_\_

Signature/Date Heather Atkinson Aug 3/99

VIM-Heather Atkinson - 1000

July 27/99 <sup>35</sup>

LY - tell us your involvement A. Richardson  
HA - been here since 1991

- said to him that he permitted to transit  
LY - What changed

HA - couldn't tell you off hand whether he  
asked

LY - Did A.R. request trans def

HA - Couldn't tell you don't remember  
don't recall him asking for the way  
have - if a company call up to ask  
confirm North West or South

LY - were you only one?

- yes or myself - yes or myself  
will deal with A. Richardson

LY - Is this the only trans shipment for CFS.

HA - wouldn't have known since we didn't  
track shipments

LY -  
HA - Bureau / I see decided to need for CFS  
in Canada - promote all legitimate uses

- no import of used material  
- AR said he needed to import for  
reclamation

- that's ~~part~~ to go to the States

- regulation changed based on his input  
Fielding things that he reclaimed

- CFS can reclaim it & return to country  
of origin

- We didn't say you could bring it in re claim & export according to regulations
- AK complained - gave letter to Michel Dyes + Michel said it could be allowed - rep can never meet to close borders
- proposed amendments on time use permit I don't know if they see it
- company in England was offering at a lower price than US
- could have bought recycled containers
- still needed a permit for import
- rep only said import for reclamation
- Yipeng wanted to do the same thing - put in bigger containers
- ~~gave a permit~~ sometimes before the
- Yipeng stop the process of permitting
- He only know when the annual report comes up - just on trust
- ~~just~~ both countries rely mostly on trust
- no time -
- permit is given freely no checking done
- no requirement for transit countries
- all we know is where it was received when → contact verify the shipment
- only in rare circumstances
- SAK familiar with rep - Yes!

- intent is no CFC or halon in Canada but don't want to shut down
- usually not much detail -> just a few calls to hazardous waste
- always a permit for import of reclaimed
- before bringing in reclaimed material no Hazard Waste reg'd
- calling to ask about permit
- once material is reclaimed no E1H (y)
- mentioned to Yves about Upernivik permit
- applied for permit -> ordered but no review
- tried to discourage Kuba on a way but didn't work - AR prevailed
- concurred once halon removed who's going to pay for destruction
- maybe no demand for halon
- > no destruction facilities in Canada
- Jean-Luc on way out, want to file
- telling people on the phone (fielding) that transshipments are more
- Superior Safety -> no transshipments
- applied for permit -> would have given it
- wouldn't tell them before asking but have told them - no permit
- > I talked to Scott as well as Yves.
- consultation -> not time for lawyer
- issue of transshipments discussed a couple of years ago.
- Wouldn't give the info out freely for the Reg'd
- > Upernivik / Superior Safety / Fielding / Control File



- summary summaries are available
- CFS drag net
- HA Don't know → could check
- only talking about this year → previous years & migratory birds
- purpose of rep
- Montreal protocol not concerned with fur shipments →
- country leaving & receiving are responsible
- US responsible once it starts sends non objection notice AOK
- 7

**STATEMENT OF:**

**Yves Bovet**  
**Acting Head, Use Patterns**  
**Environment Canada**  
**Headquarters**  
**819-**

- 
- I am Acting Head, Use Patterns Section, Environment Canada Headquarters in Hull Quebec.
  - I am involved in the administration of the various Ozone Depleting Substances Regulations including the issuing of permits for the import of halon and other substances.
  - I have been involved in the Ozone program since 1987 and am familiar with Canadian activities on the production, import and export of ozone depleting substances as they relate to the implementation of the Montreal Protocol.
  - As part of standard operating procedures, I inform all regulatees of the Export and Import of Hazardous Wastes Regulations and instruct them to contact the appropriate Division.

Environment  
CanadaEnvironnement  
Canada

PAGE 1 OF 1

## WITNESS STATEMENT

SURNAME	BOVET		G1:	YVES	G2:	
D.O.B.		PHONE-NBR	(719)		BUS:	(719) 953-1667
DL NO.		PROV/TER				
ADDRESS - RESIDENCE						
OFFICER TAKING STATEMENT: MIA LORRAINE YOUNG - AN. MIKEAL BELL						
TAKEN AT: PLACE VINCENT MASSÉY - 14 <sup>e</sup> BOARDROOM						
START TIME: 8:15				DATE: 9/17/23		
				FINISH TIME: 7:00		

s.19(1)

Verbal Paul Carol delivered his legal opinion on this matter. We never considered the need to issue pursuant to the Organics Substances Regulations (OSR Regulations) a permit to transport and export a substance which was in transit through Canada. I think after the second meeting of the Board of the Producers of natural, transshipment of natural substances was not permitted. Following that decision, we decided to exclude transport through Canada from our personal order. Even then, that a company regulated that kind of transportation, we indicated to them that action with will not proceed to obtain a permit. We told that statement to Carol. But in their legal opinion, if you had asked anybody of the division if a company had needed a permit, we not question the OSR Regulations to the transshipment, everything would answer a permit. I do not have any documents to prove that, but probably before our department, lawyers from P&S and people of the Organic program had discussions on the subject. There could be indication with the list of 16 persons regulation of the policy or recommendation in internal documents. That is place that we applied that interpretation that transit does not need any permits pursuant to the OSR Regulations.

When we come as a permit for record, receipt or bond substances, we indicate a paragraph that it mentions that the issuing of the permit does not relieve the obligation of the company to comply with other provincial or federal regulations. We did a couple of paragraphs on the existence of the E&IHW legislation (Export and Import of Hazardous Wastes Regulations) and indicate an address and phone number of the Hazardous Management Branch, which is responsible for the application of these Regulations. This group wrote that paragraph in 1995. Since that year, we are included those paragraphs in the permits that we issued under OSR Regulations. As a result, we issued several permits. Carol's permit, which indicated the statement of the existence of the Regulations and to contact other people of Environment Canada, to comply with export and import of wastes.

When a permit involves a regulated substance, we advise the company of the existence of the ISER legislation (Toxic Substances Export/Importation Regulations). And we issued a permit under the E&IHW Regulations. Carol's permit complied with that legislation.

I HAVE READ THIS STATEMENT AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

WITNESS

SIGNATURE/DATE

July 23 - PUM - Null

'8.25 - Yves Bovet - Mike Bell - Lorraine Perry

- Trans-shipment - Protocol decided to  
not count TS in any transaction - we  
decided not to cover any material in  
transit - I don't know if lawyers  
were spoken to - I don't know specific  
if anyone asked lawyers - 3 yrs  
ago another co on west coast - co  
bought - imported into Montreal - paid  
customs warehouse & were waiting for  
customer in US - when no final  
destination called trans-shipment  
when no customer considered import  
not the 1st time we asked for definition  
but the 1st time so complete maybe  
a false concept but a concept we apply  
with CFS Weather dealt more - I am  
pretty sure that's what I would tell  
him This is 1st case in 10 yrs that  
we have... if he wants import export -  
he doesn't know all the time what  
he's doing in Canada - he doesn't  
want the foreign importer to see  
the buyer? ULC standard checked  
there are 2 or 3 only CFS one of them  
we feel comfortable when US is country  
of destination EPA calls Cdn customs  
to check records we assume it's OK

problems with Indian -  
Hunting ODS & E.I.H.W group -  
Policy - when co requests ex-ems  
of URR we include para on Hay Warts  
when reclaimed we check TSEN  
one time reclaim then until the  
regs change. CFS aware about that  
I learned something from this case  
I didn't know about Hay Warts permit  
A call is easy to do - he knows both  
numbers - Policy in place a long  
time 4 yrs ago with 94 ODS regs  
Jan '94 phase out of balon Use pattern  
didn't deal with that - Can McDonald  
did - 95 it all started E.I.H.W - 4 yrs  
came back Sept 95 & para was  
included - not in reclaimed but  
should be in all others. Decided  
reclaimed not covered by E.I.H.W -  
like new material covered by TSEN  
Both depts were to include other reg.  
even mentioned TDC - co should be aware

**Page 3091**

**is withheld pursuant to section  
est retenue en vertu de l'article**

**19(1)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**STATEMENT OF:**

**Robert Bett**  
**Inspector**  
**Environment Canada**  
**Ontario Region**  
**(416) 739-5905**

- 
- I am an Inspector employed by Environment Canada for 10 years
  - I have been designated a CEPA Inspector pursuant to the Canadian Environmental Protection Act by the Minister of the Environment.
  - As part of my responsibilities I conduct annual verification audits of companies who are subject to the Ozone Depleting Substances Regulations. I conducted audits at Control Fire Systems Limited.
  - I am prepared to testify to the results of the inspection and to the conversations held with Adam Richardson regarding Export and Import of Hazardous Wastes Regulations.

**STATEMENT OF:**

**Jean Carboneau  
Regulation Engineer  
Environment Canada  
Ontario Region  
(416) 739-5905**

- 
- I am a Regulation Engineer employed by Environment Canada at Headquarters in Hull Quebec for eighteen years.
  - My responsibilities include participation in the Halon Round Table which is a government/industry group which meets regularly to discuss issues surrounding halon and halon management.
  - Adam Richardson also sits on the Round Table in his capacity as President of Control Fire Systems Limited.
  - I can give evidence as to the discussions held at those meetings and the participants involved.





MAY 14 '01 15:15 FR 0

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Divulgué en vertu de la Loi sur l'accès à l'information.Department of Justice  
CanadaMinistère de la Justice  
Canada

2520-14

LEGAL SERVICES  
ENVIRONNEMENT CANADA  
RECEIVEDFACSIMILE TRANSMISSION  
TRANSMISSION PAR TÉLÉCOPIEUR

2001 MAY 14 P 3:13

RECU

27/64

SEND TO / ENVOYER À		FROM / DE SERVICES JURIDIQUES ENVIRONNEMENT CANADA	
Name / Nom:		Name / Nom: Gina M. Scarcella Senior Counsel	
Address / Adresse: Joseph Keller, Counsel Environment Canada, Legal Services PVM, Floor: 06 351 St. Joseph Boulevard Hull, Quebec K1A 0H3		Address / Adresse: Ontario Regional Office The Exchange Tower 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur: (819) 953-9110	Tel. No. / No du Tél: (819) 953-1385	Fax # / No du télécopieur: (416) 973-5004	Tel. No. / No du Tél: (416) 954-8111
Comments / Commentaires: Re: Control Fire Systems Limited v. Bell et al			
TRANSMISSION			
Number of Pages / Nombre de page:	Date / La date:	Time / Heure:	
3	14/05/01	3:00 PM	
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice. Protected document / Document protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquez avec:

Name / Nom: Debbie Fairlie at / au: (416) 973-2590



**Department of Justice  
Canada**

Ontario Regional Office  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

**Ministère de la Justice  
Canada**

Bureau régional de l'Ontario  
la tour Exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Security classification -- Côte de sécurité

File number -- Numéro de dossier

Date

14/05/01

Telephone/FAX -- Téléphone/Télécopieur

(416) 954-8111 / (416) 973-5004

## MEMORANDUM / NOTE DE SERVICE

**TO / DEST:** Joseph Keller, Counsel  
Environment Canada, Legal Services

**FROM / ORIG:** Gina M. Scarcella  
Senior Counsel

**SUBJECT / OBJET:** Re: Control Fire Systems Limited v. Bell et al, Court File No. 00-CV-20711CM

Comments/Remarques

s.23

Please confirm who should be my contact on behalf of Environment Canada, in the regional office.

Thank you.

GMS:daf  
Encls.

Do not write in this space / Ne pas écrire dans cet espace

**Pages 3096 to / à 3099**  
**are not relevant**  
**sont non pertinentes**



Department of Justice  
Canada

Ministère de la Justice  
Canada

Legal Services  
Environnement Canada  
Place Vincent Massey  
6<sup>th</sup> floor  
351 St-Joseph Blvd.  
Hull, Québec K1A 0H3

Service juridique  
Environnement Canada  
Place Vincent Massey  
6<sup>e</sup> étage  
351 boul. Saint-Joseph  
Hull, (Qué.) K1A 0H3

Security classification -- Côte de sécurité

Protected/Solicitor-Client Privilege

Our file number -- Notre numéro de dossier

EN2520-14

Date

May 28, 2001

Telephone / FAX -- Téléphone / Télécopieur

953-1385

MEMORANDUM / NOTE DE SERVICE

TO / DEST:

Joanne Fox, Counsel  
Department of Justice, Ontario Regional Office

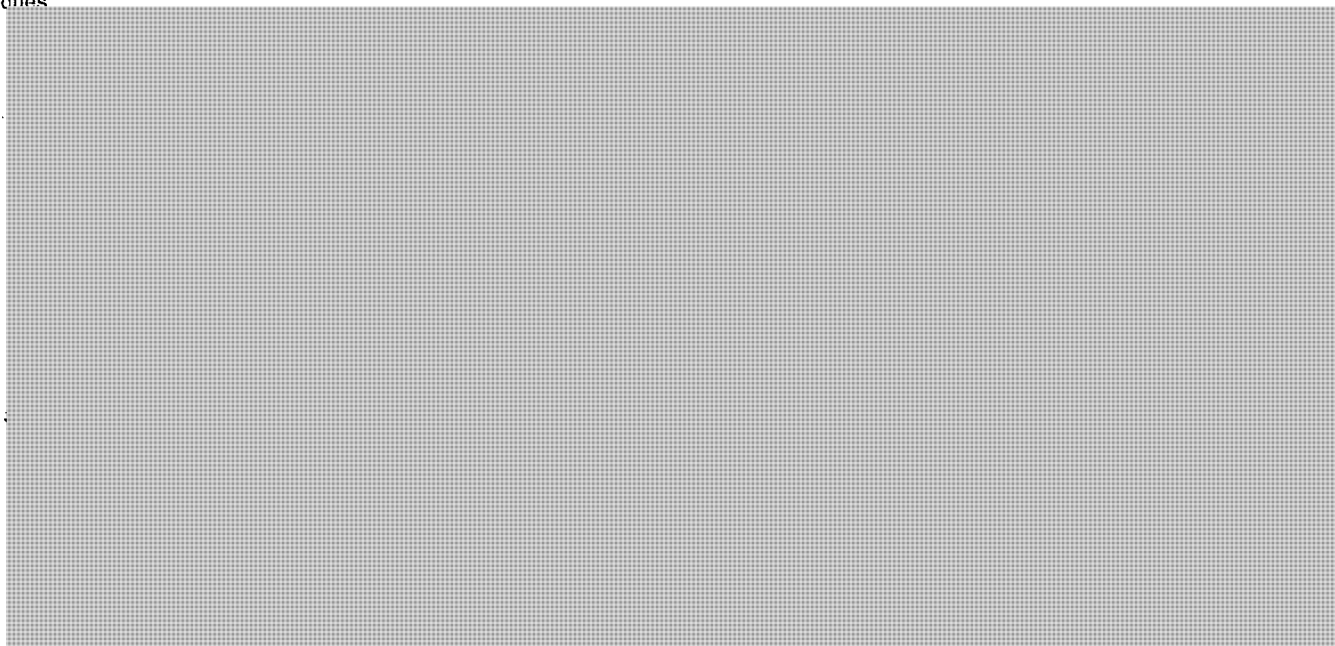
FROM / ORIG:

Joseph Keller, Legal Counsel  
EC, Legal Services


SUBJECT / OBJET:

**Control Fire Systems Limited v. Bell et al.**  
**Court File No. 00-CV-20711CM**  
**Our File No. ORO #2-475543**

Comments/Remarques



Thank you for your cooperation.

  
Joseph Keller

cc.: Gina Scarcella  
John Meaney

s.19(1)

s.23

Department of Justice  
Canada

Ministère de la Justice  
Canada

7520-14

**FACSIMILE TRANSMISSION**  
**TRANSMISSION PAR TÉLÉCOPIEUR**

LEGAL SERVICES  
ENVIRONMENT CANADA  
RECEIVED  
2001 MAY 24 P 2:08  
27201

<b>SEND TO / ENVOYER À</b>		<b>FROM / DE</b>	
Name / Nom: Joseph Keller Counsel		Name / Nom: Joanne R. Fox Counsel, Regulatory Section	
Address / Adresse: ENVIRONMENT CANADA Place Vincent-Massey 6th Floor 351 St. Joseph Boulevard Hull, Quebec K1A 0H3		Address / Adresse: DEPARTMENT OF JUSTICE The Exchange Tower 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur: (819) 953-9110	Tel. No. / No du Tél: (819) 953-1385	Fax # / No du télécopieur: (416) 973-5004	Tel. No. / No du Tél: (416) 973-8859
Comments / Commentaires: <b>RE: Control Fire Systems Limited v. Bell et al.</b> <b>Court File No. 00-CV-20711CM</b> <b>Our File No. ORO #2-475543</b> Please see attached.			
<b>TRANSMISSION</b>			
Number of Pages / Nombre de page: 2	Date / La date: May 24, 2001	Time / Heure:	
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
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**In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquer avec:**  
Name / Nom: Kathy at/au: 973-7477



Department of Justice  
Canada

Ministère de la Justice  
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Ontario Regional Office  
The Exchange Tower  
130 King Street West,  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

MEMORANDUM / NOTE DE SERVICE

Security classification – Côte de sécurité

Solicitor and Client Privilege

File number – Numéro de dossier

Date

May 24, 2001

Telephone/FAX – Téléphone/Télécopieur

(416)973-8859 / (416)973-5004

TO / DEST:

Joseph Keller, Counsel  
Environment Canada, Legal Services

FROM / ORIG:

Joanne Fox, Counsel  
Department of Justice, Ontario Regional Office

s.19(1)

s.23

SUBJECT / OBJET:

Control Fire Systems Limited v. Bell et al.  
Court File No. 00-CV-20711CM  
Our File No. ORO #2-475543

Comments/Remarques

Do not write in this space / Ne pas écrire dans cet espace

Thank you.

/jf

cc. G. Scarcella  
J. Meaney

Canada



Ministère de la Justice  
Canada

2520-14

LEGAL SERVICES  
ENVIRONMENT CANADA  
RECEIVED

# FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

2001 JUL 17 A 11:43

RECU 2757

<b>SEND TO / ENVOYER À</b>		<b>FROM / DE</b> SERVICES JURIDIQUES ENVIRONNEMENT CANADA	
Name / Nom: Joseph Keller Counsel		Name / Nom: Joanne R. Fox Counsel, Regulatory Section	
Address / Adresse: ENVIRONMENT CANADA Place Vincent-Massey 6th Floor 351 St. Joseph Boulevard Hull, Quebec K1A 0H3		Address / Adresse: DEPARTMENT OF JUSTICE The Exchange Tower 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur: (819) 953-9110	Tel. No. / No du Tél: (819) 953-1385	Fax # / No du télécopieur: (416) 973-5004	Tel. No. / No du Tél: (416) 973-8859
Comments / Commentaires: <b>RE: Control Fire Systems Limited v. Bell et al.</b> <b>Court File No. 00-CV-20711CM</b> <b>Our File No. ORO #2-475543</b> Please see attached.			
<b>TRANSMISSION</b>			
Number of Pages / Nombre de page:	Date / La date:	Time / Heure:	
15	July 17, 2001		
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
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**In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquer avec:**  
Name / Nom: Kathy at/au: (416) 973-7477

**Pages 3104 to / à 3117  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
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# FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

 LEGAL SERVICES  
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JUL -6 P 3:11

<b>SEND TO / ENVOYER À</b>		<b>FROM / DE</b> 27513	
Name / Nom: Joseph Keller Counsel		Name / Nom: Joanne R. Fox Counsel, Regulatory Section	
Address / Adresse: ENVIRONMENT CANADA Place Vincent-Massey 6th Floor 351 St. Joseph Boulevard Hull, Quebec K1A 0H3		Address / Adresse: DEPARTMENT OF JUSTICE The Exchange Tower 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur: (819) 953-9110	Tel. No. / No du Tél: (819) 953-1385	Fax # / No du télécopieur: (416) 973-5004	Tel. No. / No du Tél: (416) 973-8859
Comments / Commentaires: <b>RE: Control Fire Systems Limited v. Bell et al.</b> <b>Court File No. 00-CV-20711CM</b> <b>Our File No. ORO #2-475543</b> Please see attached.			
<b>TRANSMISSION</b>			
Number of Pages / Nombre de page: 3	Date / La date: July 4, 2001	Time / Heure:	
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquer avec:

Name / Nom: Kathy at/au: (416) 973-7477

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Toronto, Ontario  
M5X 1K6

Bureau régional de l'Ontario  
la tour exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 973-8859  
Fax: (416) 973-5004  
Internet: joanne.fox@justice.gc.ca

July 4, 2001

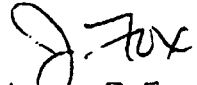
**VIA FAX (416) 595-0567**

Ms. Katherine McEachern  
GOODMAN AND CARR  
Barristers and Solicitors  
200 King Street West  
Suite 2300  
Toronto, Ontario  
M5H 3W5

Dear Ms. McEachern:

**RE: CONTROL FIRE SYSTEMS LIMITED v. BELL et al.  
Court File No. 00-CV-20711CM  
Your File No. 990287  
Our File No. ORO #2-475543**

Yours very truly,

  
Joanne R. Fox  
Counsel, Regulatory Section  
Ontario Regional Office

JRF/kt

s.23

Canada

JUL 04 '01 15:17 FR 0

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Divulgué(s) en vertu de la Loi sur l'accès à l'information.  
0 TO 18199539110 P.03/03

- 2 -

bcc. John Meaney  
Joseph Keller  
Dave Pascoe  
Michael Bell

Department of Justice  
CanadaMinistère de la Justice  
Canada

2520-14

**FACSIMILE TRANSMISSION**  
**TRANSMISSION PAR TÉLÉCOPIEUR**LEGAL SERVICES  
ENVIRONNEMENT CANADA  
RECEIVED

2001 JUN 22 P 1:33

<b>SEND TO / ENVOYER À</b>		<b>FROM / DE</b> <sup>RECU 27380</sup>	
Name / Nom: Joseph Keller Counsel		Name / Nom: Joanne R. Fox Counsel, Regulatory Section	
Address / Adresse: ENVIRONNEMENT CANADA Place Vincent-Massey 6th Floor 351 St. Joseph Boulevard Hull, Quebec K1A 0H3		Address / Adresse: DEPARTMENT OF JUSTICE The Exchange Tower 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6 s.23	
Fax # / No du télécopieur: (819) 953-9110	Tel. No. / No du Tél: (819) 953-1385	Fax # / No du télécopieur: (416) 973-5004	Tel. No. / No du Tél: (416) 973-8859

**Comments / Commentaires:**

**RE: Control Fire Systems Limited v. Bell et al.**  
**Court File No. 00-CV-20711CM**  
**Our File No. ORO #2-475543**  
 Please see attached.

**TRANSMISSION**

<b>Number of Pages / Nombre de page:</b>	<b>Date / La date:</b>	<b>Time / Heure:</b>
//	June 22, 2001	

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 Name / Nom: Kathy at/au: (416) 973-7477



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Canada

Ministère de la Justice  
Canada

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The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Bureau régional de l'Ontario  
la tour exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 973-8859  
Fax: (416) 973-5004  
Internet: joanne.fox@justice.gc.ca

June 22, 2001

**VIA FAX (819) 953-9110**

Mr. Joseph Keller  
ENVIRONMENT CANADA  
Place Vincent-Massey  
6th Floor  
351 St. Joseph Boulevard  
Hull, Quebec  
K1A 0H3

**VIA FAX (416) 739-4903**

Mr. Michael Bell  
Inspector  
ENVIRONMENT CANADA  
Emergencies and Enforcement  
4905 Dufferin Street  
Downsview, Ontario  
M3H 5T4

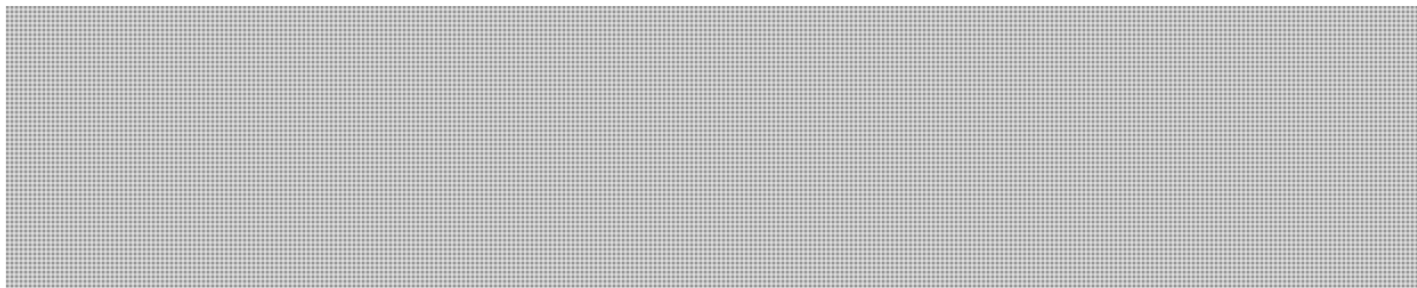
Dear Mr. Keller and Mr. Bell:

**RE: CONTROL FIRE SYSTEMS LIMITED v. BELL et al.**  
**Court File No. 00-CV-20711CM**  
**Your File No. 990287**  
**Our File No. ORO #2-475543**

---

s.23

- 2 -



Yours very truly,

A handwritten signature in dark ink, appearing to read 'J. Fox', is written over the typed name.

Joanne R. Fox  
Counsel, Regulatory Section  
Ontario Regional Office

s.23

JRF/kt

cc. John Meaney  
Dave Pascoe

**Pages 3124 to / à 3136**  
**are not relevant**  
**sont non pertinentes**

Department of Justice  
CanadaMinistère de la Justice  
Canada

2520-14

**FACSIMILE TRANSMISSION**  
**TRANSMISSION PAR TÉLÉCOPIEUR**LEGAL SERVICES  
ENVIRONMENT CANADA  
RECEIVED

7901 JUN 19 P 2:39

RECU

27357

<b>SEND TO / ENVOYER À</b>		<b>FROM / DE</b>	
Name / Nom: Joseph Keller Counsel		Name / Nom: Joanne R. Fox Counsel, Regulatory Section	
Address / Adresse: ENVIRONMENT CANADA Place Vincent-Massey 6th Floor 351 St. Joseph Boulevard Hull, Quebec K1A 0H3		Address / Adresse: DEPARTMENT OF JUSTICE The Exchange Tower 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur: (819) 953-9110	Tel. No. / No du Tél: (819) 953-1385	Fax # / No du télécopieur: (416) 973-5004	Tel. No. / No du Tél: (416) 973-8859
Comments / Commentaires: RE: Control Fire Systems Limited v. Bell et al. Court File No. 00-CV-20711CM Our File No. ORO #2-475543 Please see attached.			
<b>TRANSMISSION</b>			
Number of Pages / Nombre de page: 4	Date / La date: June 19, 2001	Time / Heure:	
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
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Name / Nom: Kathy at/au: 973-7477



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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

31230-7-5

Ethier, JoAnne [NCR]

**From:** Sims, Michael [Michael.Sims@justice.gc.ca]

**Sent:** August 12, 2011 10:00 AM

**To:** Jessome, Kimberley [NCR]

**Subject:**

**Attachments:**

s.23

Hi Kim,

Michael

**Michael J. Sims**

Counsel | Avocat

Department of Justice Canada | Ministère de la Justice Canada

Tel. / Tél.: (416) 952-7116

30/08/2011

003141



7-1295-11

FORM 301- Rule 301

## NOTICE OF APPLICATION

Federal Court of Canada

Between:

Patrick Whitty

Applicant

And

The Chief Enforcement Officer, Environmental Enforcement, Environment  
Canada and The Attorney General of Canada

Respondents

### NOTICE OF APPLICATION

#### TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on pages 6 and 7.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

2

AOUT 10 2011  
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**REGISTRY OFFICER**  
**AGENT DU GREFFE**

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TO:

The Chief Enforcement Officer  
Environmental Enforcement  
National Enforcement Headquarters  
Environment Canada  
200 Sacré-Coeur Blvd., 13th Floor  
Gatineau, Quebec  
K1A 0H3

The Attorney General of Canada  
Department of Justice  
284 Wellington St.  
Ottawa, ON  
K1A 0H8

## APPLICATION

This is an application for judicial review in respect of:

Environmental Enforcement, Environment Canada

The applicant, Patrick Whitty, requests the judicial review of the validity of Section 36 (herein after referred to as the "Section 36") of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations (herein after referred to as the "EIHWHMR") under the Canadian Environmental Protection Act, 1999 (herein after referred to as the "CEPA 1999").

This is a matter that consists of the prospect of persons in Canada facing the possibilities of imprisonment due to circumstances beyond their control and occurring outside Canada.

This matter also applies to Canadian entities, i.e. commercial, institutional, etc. (herein after referred to as the "entity"), facing other forms of punishment under the same circumstances.

Since the applicant has already faced such prospects, which occurred without precedence, the applicant is applying to the court for remedies.

The applicant is a Canadian citizen who co-owns and manages three corporations involved in the movement of hazardous and non-hazardous wastes.

The applicant makes reference to *R v. RPR ENVIRONMENTAL INC. AND PATRICK WHITTY* (Ontario Court of Justice) in which the Enforcement Branch of Environment Canada (herein after referred to as the "ECE") laid 63 counts of charges in 2008 involving summary conviction against the Canadian exporter of hazardous wastes and the applicant, a company director.

The ECE charges were based on that the RPR ENVIRONMENTAL INC. (herein referred to as the "Company") did not obtain "confirmations", i.e. "Certificates of Destruction" (herein referred to as the "Certificates"), within the time period prescribed by provisions of Section 36.

All of the Certificates described in the charges were to be drawn from authorized disposal facilities in the United States.

However, there are circumstances in the United States, such as facility closures, inefficiencies or apathy that may restrict or prevent the issuance or release of the Certificates.

American law or regulations or any relevant international agreement between Canada and the USA does not require the Certificates.

In this case, the applicant, residing within Canada, did suffer from the threat of the loss of liberty during a twelve-month period by the actions of a Canadian government body, ECE.

As well, the Company faced punitive penalties.

The applicant does not know if this occurrence has since been repeated elsewhere in Canada because a search in Environment Canada's registry did not reveal similar cases and also because requests for information through the Access to Information Act are still in process.

The below items are relevant to this matter:

1. Section 36. (1) of "EIHWHRMR" states:

*"Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled*

*(a) in accordance with the export or import permit;*

*(b) in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and*

*(c) Within the period referred to in paragraph 9(o) or 16(n)."*

(Note: the word "confirmation" in the fifth line of above Item 1 has been described in this document as a "Certificate of Destruction".)

2. Section 9. (o) of "EIHWHRMR" states:

*"In the case of operation D13, D14, or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days. or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the authorities of the jurisdiction in which the authorized facility is located require shorter time periods, in which case those time periods apply"*

3. Section 185(1) of "CEPA 1999" states:  
*"No person shall import, export or convey in transit a hazardous waste or hazardous recyclable material, or prescribed non-hazardous waste for final disposal, except*
  - (a) after notifying the Minister and paying the prescribed fee;*
  - (b) after receiving from the Minister which-ever one of the following permits is applicable:*
    - i. an import or export permit that, except in a case of a permit issued under subsection (4), states that the authorities of the country of destination and, if applicable, of the country of transit have authorized the movement, and that the authorities of the jurisdiction of destination have authorized the final disposal or recycling of the waste or material, or*
    - ii. a transit permit that states the Minister has authorized the movement; and*
    - iii. In accordance with the prescribed conditions."*
4. Section 272. (1) of "CEPA 1999" states:  
*"Every person commits an offence who contravenes*
  - (a) a provision of the Act or the regulations*
  - (b) an obligation or a prohibition arising from the Act or the regulations"*
5. Section 272. (2) of "CEPA 1999" states:  
*"Every person who commits an offence under subsection (1) is liable*
  - (a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both; and*
  - (b) on summary conviction, to a fine of not more than \$300,000 or to imprisonment for a term of not more than six months, or to both."*
6. Section 280(1) of "CEPA 1999" states:  
*"Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted."*
7. Section 280.1(1) of "CEPA 1999" states:  
*"Every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with*
  - (a) this Act and the regulations; and*
  - (b) orders and directions of, and prohibitions and requirements imposed by, the Minister and enforcement officers and review officers"*

8. Canada is a signatory to the following international agreements governing the transboundary movement of hazardous waste:

- (a) The United Nations Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1992);
- (b) The Organization for Cooperation and Economic Development (OECD) Council Decision concerning the control of Transfrontier movements of wastes destined for recovery operations (revised 2001);
- (c) The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992 (herein after referred to as the "Bilateral Agreement").

The applicant makes application for:

The applicant requests relief from the court as it deems necessary under the Canadian Charter of Rights and Freedoms (herein after referred to as the "Charter"), as per:

**24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.**

In addition, the applicant also requests relief from the court as it deems necessary under the *Federal Courts Act*, as per:

**18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction**

- (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
- (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Therefore, the applicant additionally requests relief as stated in S. 18. (1)(a) of the *Federal Courts Act* in the form of:

- (i) an injunction against Environment Canada Enforcement Branch's enforcement of Section 36 when the authorized receiver of hazardous and non-hazardous wastes is in the United States of America, and or



- (ii) declaratory relief that the enforcement of S. 36 in instances when the authorized receiver is in the USA is outside the rules of natural justice and procedural fairness, and
- (iii) any other form of relief that the Court deems fair and necessary.

### The grounds for the application are:

The applicant submits that the standard of review is based on correctness concerning questions of law and questions of jurisdiction (*Dunsmuir v. New Brunswick*, 2008 SCC 9, paragraph 50).

The applicant argues that:

#### A) Section 36 has the effect of violating a person's right to liberty as guaranteed under Section 7 of the "Charter"

If an American disposal facility, authorized to receive and dispose hazardous wastes from a Canadian exporter, is not able to, or chooses not to supply a Certificate of Destruction within the prescribed time period of Section 36 to the Canadian exporter, that same American facility has not violated any domestic law or international regulation that it is bound to.

Yet, in the case of the above, the provisions within Section 36 would place a Canadian exporter and any of its directors in the position of committing an offence under Sections 272(1), 272(2), 280(1) and 280.1(1) of CEPA 1999 which provide for the possibility of imprisonment.

Section 36 unfairly places the exporter and directors at fault for failing to submit the Certificates even though the exporter and directors have no provenance or Chain of Custody with those documents.

Canadian directors would then be subjected to the threat of their rights to liberty of persons as guaranteed by Section 7 of the "Charter".

#### B) Section 36 is not valid due to jurisdictional issues:

Extraterritorial jurisdiction is governed by international law, rather than being at the absolute discretion of individual states and that jurisdiction "*cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention*", see *R. v. Hape* SCC 26 (para. 65).

Therefore, Section 36 is invalid because it is not provided for and does not comply with the principles of the three relevant international agreements concerning the transboundary movement of hazardous waste.

The "Bilateral Agreement" which is used to bridge the other two international agreements, stipulates:

Article 2- General Obligation:

*"The parties shall permit the export, import, and transit of hazardous waste and other waste across their common border for treatment, storage, or disposal pursuant to the terms of their **domestic laws, regulations and administrative practices**, and the provisions of this agreement."*

The issuance of Certificates by an authorized American facility is not pursuant to any American domestic rules and the facility is not compelled to produce them.

Furthermore, if the American facility does not provide a Certificate to the Canadian exporter for whatever reason, that means that the Canadian exporter has never been involved in the Chain of Custody of the Certificate – a document that the Canadian exporter is not capable of authoring.

In fact, there is no standard form for Certificates under Section 36, EIHWHRM or CEPA 1999, which underlines their lack of importance.

Yet, Section 36 creates a situation where a company and its directors can be held liable for not obtaining a foreign document, whether it exists or not, outside its Chain of Custody.

In such cases, there is an absence of mens rea by the exporter and its directors to commit an offence while, at the same time, there is also an absence of actus reus by the only possible authors of the Certificates – the American facilities.

Therefore, Section 36 deems that a serious violation worthy of penal punishment has been committed outside of domestic laws and international agreements.

Furthermore, the requirement for Certificates from authorized American facilities is not necessary to achieve the objectives and principles of the three international agreements governing the transboundary shipment of hazardous wastes.

The reason for this is that one of the major components of the three international agreements is the "prior informed consent regime" (PIC).

For many years, the PIC has been very effective in achieving the principles of the three international agreements.

Under CEPA 1999 and EIHWHRM, a Canadian export notice needs to be completed by the exporter and to be submitted to Environment Canada.

Once the notice has been reviewed, as well as meeting the contract and insurance requirements, the notice is forwarded to the competent American authority for their consent.

In this case, no permit will be issued until the American authority has authorized the movement and has confirmed that the final disposal of the hazardous waste is authorized.

The PIC is an effective, time-tested process that has not required Certificates of Destruction before and is not recognized and used by the Americans now.

Therefore, there would be no loss of effect to protecting human health or the environment by applying the requested remedies.

The "Bilateral Agreement" also states:

Article 5 – Cooperative Efforts:

1. *The parties will cooperate to ensure, to the extent possible, that all transboundary shipments of hazardous waste and other waste comply with the **manifest requirements** of both countries.*
2. *The parties will cooperate in monitoring and spot-checking transboundary shipments of hazardous waste and other waste to ensure, to the extent possible, that such shipments conform to the requirements of the applicable legislation and of this Agreement.*
3. *To the extent any implementing laws and regulations are necessary to comply with this Agreement, the parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the Parties will make best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The Parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such laws and regulations."*

Certificates are not a "manifest requirement" under CEPA 1999 or EIHWHMR and, therefore, are not a requirement for any of the three relevant international agreements including the "Bilateral Agreement".

The "Bilateral Agreement" also states:

Article 7 – Enforcement:

*"The Parties shall ensure, to the extent possible, that within their respective jurisdictions, their domestic laws and regulations are enforced with respect to the transportation, storage, treatment and disposal of transboundary shipments of hazardous waste and other waste."*

The applicant contends that it is sufficient that the Americans apply their own enforcement of their local laws and their obligations under the three international agreements without the need of the intrusion of the provisions of Section 36.

C) Section 36 violates Canadians' expectations of fair justice

In *R. v. Gibbons, 2003 ABPC 114*, the court reiterated the legal concept of reasonable doubt (paragraph 20) namely,

- (i) *the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;*
- (ii) *the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;*
- (iii) *a reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense;*
- (iv) *it is logically connected to the evidence or absence of evidence;*
- (v) *it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and*
- (vi) *more is required than proof that the accused is probably guilty (emphasis added).*

The application of Section 36 clearly places an inference of guilt onto an exporter and a person in Canada when an American facility does not provide a Certificate for whatever the reason.

Therefore, under such conditions, the applicant should not have to face additional charges from ECE in the future that, again, threaten his liberty.

The same reasoning applies to his Company.

This is not fair.

This application will be supported by the following material:

1. Canada Gazette Part II, Volume 139, No. 11: Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations
2. The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992
3. Will Say of Joe Wittwer, Manager of EC Waste Management and Reduction Branch
4. Applicant's Book of Authorities

August 4, 2011



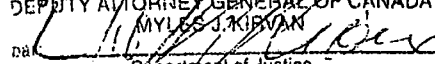
(Signature of applicant)

Patrick Whitty  
164 South Service Road  
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SOR/2004-283, ss. 35 and 38

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ON BEHALF OF THE  
DEPUTY ATTORNEY GENERAL OF CANADA  
MYLES J. KIRWAN  
DA   
Department of Justice

4:31

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Dated this \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_\_  
AUG 10 2011  
AUG 10 2011

  
**SHIRLEY AGIRO**  
REGISTRY OFFICER  
AGENT DU GREFFE

**Pages 3154 to / à 3160**  
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Address / Adresse: ENVIRONNEMENT CANADA Place Vincent-Massey 6th Floor 351 St. Joseph Boulevard Hull, Quebec K1A 0H3		Address / Adresse: DEPARTMENT OF JUSTICE The Exchange Tower 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur: (819) 953-9110	Tel. No. / No du Tél: (819) 953-1385	Fax # / No du télécopieur: (416) 973-5004	Tel. No. / No du Tél: (416) 954-8111
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October 3, 2001

**VIA FAX (819) 953-9110**

Mr. Joseph Keller  
ENVIRONMENT CANADA  
Place Vincent-Massey  
6th Floor  
351 St. Joseph Boulevard  
Hull, Quebec  
K1A 0H3

Dear Mr. Keller:

**RE: CONTROL FIRE SYSTEMS LIMITED v. BELL et al.**  
**Court File No. 00-CV-20711CM**  
**Your File No. 990287**  
**Our File No. ORO 2-475543**

Enclosed please find a copy of the Defendants' Statement of Issues for your records. A copy of the Statement has been served on the Plaintiff and Mediator and will be relied upon by the Defendants at the October 11<sup>th</sup> Mediation.

Yours very truly,



Gina M. Scarcella  
Senior Counsel, Regulatory Section  
Ontario Regional Office

GMS/kt  
Encl.

Canada

**Court File No.: 00-CV-201711 CM**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**CONTROL FIRE SYSTEMS LIMITED**

**Plaintiff**

**and**

**MICHAEL BELL AND THE ATTORNEY GENERAL OF CANADA**

**Defendants**

**DEFENDANTS' STATEMENT OF ISSUES**

1. The Plaintiff alleges that the Defendants are liable for the seizure, storage and sale of used Halon 1301 which belonged to the Plaintiff.
2. The Plaintiff is advancing claims for general, special and punitive damages totaling \$1.5 million dollars.
3. The Defendant Attorney General of Canada has counterclaimed against the Plaintiff claiming \$30,000 in damages resulting from the Plaintiff's non-compliance with its statutory obligations and its refusal to accept delivery of the Halon.

**I. THE DEFENDANTS**

4. The Attorney General of Canada represents the federal Crown in this proceeding in accordance with section 23 of the *Crown Liability and Proceedings Act*. The Department of the Environment ("Environment Canada") is a department of the federal Crown and is responsible for the administration and enforcement of the

- 2 -

*Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33 as amended ("CEPA, 1999")*, which came into force on March 31, 2000 and repealed the *Canadian Environmental Protection Act, R.S.C. 1985, c. 16 (4<sup>th</sup> Suppl.) as amended ("CEPA, 1985")* and the *Regulations* thereunder.

5. Michael Bell is employed by the federal Crown, appointed pursuant to the *Public Service Employment Act* and is an employee of Environment Canada, in the Ontario Regional Office. As an employee of Environment Canada he was designated as an inspector pursuant to section 99(1) of *CEPA, 1985* and continued as an enforcement officer designated under section 217(1) of *CEPA, 1999*.

6. The Defendants admit that at all material times Mr. Bell was acting within the scope of his employment and that the Crown is vicariously liable in respect of any torts committed by him, but deny that Mr. Bell or any servant or employee of Environment Canada committed any torts. The personal claim against Michael Bell should therefore be dismissed. This mediation brief is directed, therefore, to the Crown's liability.

## II. FACTS

### (a) **Seizure of the Halon**

7. The Plaintiff alleges that on May 14, 2001, the Defendant Michael Bell negligently seized a shipment of used bromotrifluomethane, commonly known as Halon 1301, which had arrived for the Plaintiff at the Canadian National Railway ("CN") Intermodal Yard in Brampton, Ontario, on the basis that the Plaintiff did not have proper import/export permits for the shipment. The Plaintiff alleges that export/import permits were not required and that Environment Canada, Commercial Chemicals Evaluation Branch ("CCEB"), in Ottawa had specifically provided this information to the Plaintiff and Michael Bell.

- 3 -

8. The Defendants deny this allegation and relies upon the following facts in support of its position:

- On May 14, 1999, Mr. Bell conducted an inspection of 75 cylinders of used Halon 1301 ("Halon") which had arrived at the CN Intermodal Yard in Brampton, Ontario. The shipment of Halon had arrived from Pakistan by ship at the Port of Halifax, Nova Scotia on May 6, 1999, and was to be transported through Canada by rail to Toronto and then by truck to the Plaintiff's warehouse facility in Niagara Falls, New York.
- On the same day, following Mr. Bell's inspection of the Halon, Mr. Bell seized the Halon at the CN Intermodal yard pursuant to statutory authority under section 104(1) of *CEPA, 1985* on the basis that he had reasonable grounds to believe that the Plaintiff had contravened sections 43(3) and 44 of *CEPA, 1985*, section 5(1) of the *Ozone-depleting Substances Regulations, 1998, as amended ("ODSR")* and section 13(b) (c) and (e) of the *Export and Import of Hazardous Waste Regulations, as amended ("EIHWR")* respecting in transit shipments of used Halon 1301 through Canada.
- Subsection 43(3) of the *CEPA, 1985* provides as follows:

A person who proposes to export or import a hazardous waste shall give notice of the proposed export or import in accordance with the regulations to the authority, body or person specified on the List of Hazardous Waste Authorities in respect of the country to or from which the export or import is proposed.

- Section 43(4) of *CEPA, 1985* provides:

For the purposes of subsection (3) and 44 and 45, "hazardous waste" means (b) any substance specified on the List of Hazardous Wastes Requiring Export or Import Notification in Part III of Schedule II.

- Section 44 of *CEPA, 1985* provides as follows:

- (1) Except in accordance with the prescribed conditions, no person shall export a toxic substance in respect of the export of which a notice is required to be given under section 42.
- (2) Except in accordance with the prescribed conditions, no person shall export or import a hazardous waste in respect of the export or import of which a notice is required to be given under section 43.

- Section 5(1) of the *ODSR* provides as follows:

No person shall import, without a permit issued under paragraph 33(1)(a), a controlled substance that is recovered, recycled, reclaimed, used or for destruction.

A "controlled substance" is defined in *CEPA, 1985* and includes used Halon 1301.

- Section 13 of the *EIHW* provides as follows:

For the purposes of subsection 44(2) of the Act, where Canada is only a country of transit, a person may import and subsequently export a hazardous waste only if

(b) the carrier of the hazardous waste, if other than Her Majesty in right of Canada or a province or Her agent, is insured in accordance with section 14;

(c) where the country of export and the country of import are not the same country, the competent authority in the country of export has provided to the Chief written confirmation that the competent authority in the country of import, and in each country of transit through which the hazardous waste is destined to pass before entering the country of import, consents, in accordance with the laws of the country of that authority with respect to giving that consent, to the proposed import into and, where applicable, export from that country;

(e) the conditions set out in paragraphs 12(j) to (m) are met.

- 5 -

- On May 21, 1999, Bell completed the form entitled "Receipt for Seized Articles" relating to the seizure of the Halon on May 14, 1999, which he forwarded to the Plaintiff for its records. These forms are completed by inspectors following seizure of articles as an administrative matter.
- Halon 1301, which is used in the fire suppression industry, is an ozone-depleting substance and its manufacture, use and reuse is controlled by States under International Conventions-the Montreal Protocol and the BASEL Convention. The Montreal Protocol allows for the recycling of ozone depleting substances. The permit system was initiated in order to accurately track the movement of the world's inventory of ozone depleting substances in order to use the remaining ozone depleting substances in an environmentally sound manner. The BASEL Convention is an international agreement which Canada has ratified and sets out standards for the international movement of hazardous wastes. The *EIHW*R was enacted by the Parliament of Canada to comply with the terms of the Convention. The *EIHW*R are intended to track the movement of hazardous waste from cradle to grave. The *EIHW*R requires pre notification and approval from Environment Canada before any shipment can commence (see also Tabs 1 and 2).
- Pursuant to *CEPA, 1985, CEPA, 1999* and the *Regulations* thereunder, permits/notices are required for in transit shipments of used Halon 1301 through Canada.
- The Plaintiff is an experienced/knowledgeable importer of Halon and therefore was aware that permits/notices were required for in transit shipments of used Halon 1301.
- Furthermore, Environment Canada, CCEB, had specifically advised the Plaintiff in the past that permits/notices were required under *CEPA, 1985* and the *Regulations* thereunder respecting shipments of Halon 1301 (see Tabs 9, 10, 11 and 12).

- 6 -

- In particular, the Plaintiff had received permits in the past from Environment Canada, CCEB, which advised the Plaintiff that permits under *ODSR* did not remove the Plaintiff's obligation to comply with other Canadian laws. For example, one permit sent to the Plaintiff on February 20, 1995 from Environment Canada, CCEB, stated:

A permit issued under the Ozone-depleting Substances Regulations does not remove your obligation to comply with other Federal and Provincial Regulations. A request for a permit to import or export used, recovered or recycled halons is also subject to section 43 of the Canadian Environmental Protection Act (CEPA) and the Export and Import of Hazardous Waste Regulations. These Regulations are administered by the Hazardous Waste Management Division of Environment Canada... (see Tab 10)

- Environment Canada is made up of several offices. CCEB is a branch of Environment Canada which is responsible for the administration and issuance of export/import permits pursuant to the *ODSR* only. Other regulations, such as *EIHW*, are administered by different branches. The Plaintiff was aware that different Environment Canada branches are responsible for the administration of different environmental regulations.
- The Defendants admit that the Plaintiff was told by Environment Canada, CCEB, that only permits under *ODSR* for in transit shipment of used Halon 1301 through Canada were not required at that time. At no time did employees from Environment Canada, CCEB, advise the Plaintiff that it did not require a permit/notice under *CEPA*, 1985 or *EIHW* with respect to in transit shipments of used Halon 1301.

**(b) Storage of the Halon**

9. The Plaintiff alleges that the Defendants continued to hold and store the Halon in a reckless and negligent fashion until August 2000, when the Defendants sold the Halon. More particularly, the Plaintiff alleges that the Defendants allowed the Halon

- 7 -

to remain in metal cargo containers in the direct sunlight in hot summer conditions resulting in a loss of Halon into the atmosphere.

10. The Defendants deny this allegation and relies upon the following facts in support of its position:

- It is the Defendants' position that upon arrival of the Halon from Pakistan that the cylinders of Halon contained less Halon than was indicated on the Commercial invoice from Noorani Trading Company and is claimed by the Plaintiff. More particularly, the Hazardous Material/Dangerous Goods Declaration Form, which is required to be completed under the *Transportation of Dangerous Goods Regulations* was completed by Hapag LLOYD, the shipper, upon arrival of the Halon in Canada. It was recorded in the Declaration Form that less Halon was contained in the cylinders than stated on the Commercial invoice, indicating that a loss of Halon occurred while the cylinders were travelling overseas (see Tabs 3,4,5, 6,7 and 8).
- Following seizure of the Halon, the Halon was kept at CN Intermodal Yard until approximately September 22, 1999 at which time the Halon was moved to Environment Canada, Ontario Regional Office's premises in Downsview, Ontario.
- Following complaints by the Plaintiff respecting the storage of the Halon, Environment Canada, Ontario Regional Office, sought advice by cylinder specialists and were advised that the cylinders were designed to withstand temperatures far exceeding Toronto summer temperatures.
- The fact that the cylinders were designed to withstand Toronto summer temperatures is further supported by the fact that upon sale of the Halon, as discussed below, it was determined that none of the discs on the cylinders ruptured indicating that no Halon had escaped due to high heat.



**(c) Sale of the Halon**

11. The Plaintiff alleges that the Defendants converted the Halon which they seized and later sold in August 2000, despite repeated objections of the Plaintiff. Furthermore, the Plaintiff alleges that the Defendants sold the remaining Halon at a price substantially less than market value causing the Plaintiff resulting losses.

12. The Defendants deny these allegations and rely upon the following facts in support of its position:

- Following seizure of the Halon in May 1999, the Plaintiff and its then owner Adam Richardson, were charged with a number of offences pursuant to *CEPA, 1985* and the *Regulations* thereunder. The Halon was detained by the Defendants pursuant to subsection 104(1) of *CEPA, 1985* as it afforded evidence of the contraventions.
- The charges against the Plaintiff and Mr. Richardson were withdrawn on January 14, 2000.
- Prior to withdrawal of the charges, counsel for the Plaintiff made inquiries about return of the Halon. Counsel for the Plaintiff was advised by the Crown that that the Plaintiff could apply pursuant to section 104 *CEPA, 1985* for return of the Halon. No application pursuant to section 104 of *CEPA, 1985* was ever made by the Plaintiff for return of the Halon.
- Shortly after the withdrawal of the charges, the Crown and counsel for the Plaintiff discussed arrangements for the Plaintiff to pick up the Halon.
- The Plaintiff was required to comply with all applicable regulations and requirements in order to take possession of the Halon (see Tab 17).

- 9 -

- On March 3, 2000, the Plaintiff received an export permit pursuant to the *ODSR* to export the used Halon to the United States (see Tab 13).
- On March 22, 2000, the Plaintiff received the required written confirmation for in transit shipment of the Halon through Canada pursuant to *EIHW* (see Tab 14).
- By the end of March 2000, the Plaintiff having complied with all necessary laws was able to take possession of the Halon.
- In early April 2000, it had become apparent to Environment Canada, Ontario Regional Office, based on pressure gauge readings, the pressure in some cylinders had decreased indicating that a potential loss of gas had either occurred or was thought to be imminent.
- In the following months, Environment Canada, Ontario Regional Office, requested on numerous occasions that the Plaintiff make arrangements to retrieve the Halon. However, the Plaintiff refused to take possession of the Halon (see Tabs 23,24, 26, 30 and 32).
- By notice dated July 6, 2000, Environment Canada, Ontario Regional Office, advised the Plaintiff that if it did not confirm by July 14, 2000 that it would accept delivery of the Halon, Environment Canada, Ontario Regional Office, would consider the Halon abandoned and the Halon would be disposed of by sale on July 17, 2000 (see Tab 26).
- On July 12, 2000, Environment Canada, Ontario Regional Office, provided the Plaintiff with an extension of time to July 17, 2000, in which to respond to its notice. The time was further extended to July 18, 2000 for the Plaintiff to accept delivery of the Halon (see Tabs 28 and 30).
- The Plaintiff failed to retrieve the Halon within the time required (see Tab 32).

- 10 -

- On July 19, 2000, Environment Canada, Ontario Regional Office, sold the Halon to Vipond Fire Protection Inc. ("Vipond"), a company in Mississauga, Ontario, for \$110,172.00 (see Tabs 36, 37 and 38).
- Prior to selling the Halon to Vipond, Environment Canada, Ontario Regional Office, obtained quotes for the purchase of the Halon from two Ontario companies. The Halon was sold to the highest bidder. Given the nature of the commodity, there are only three Ontario companies, including the Plaintiff, who purchase used Halon 1301 in Ontario.
- On August 1, 2000, Environment Canada, Ontario Regional Office, delivered to counsel for the Plaintiff a cheque in the amount of \$110,172.00 payable to Goodman & Carr, *in trust* (see Tabs 39 and 40).
- The decision to sell the Halon fell to the responsibility of management at Environment Canada. This decision was not made by Michael Bell, being outside the scope of his duties as an inspector an enforcement officer.
- The Defendants are not relying upon the letters sent by, or on behalf of, the Plaintiff with respect to the Plaintiff retrieving the Halon. However, these letters have been included in the Defendants' mediation brief so that the mediator has a complete set of correspondence relating to this issue. The Plaintiff's documents can be found at Tabs 16, 18, 19, 20, 21, 25, 29, 31, 33, 34 and 35.

**(d) Counterclaim**

13. The Defendants claim that as a result of the Plaintiff's non compliance with its statutory obligations and its refusal to accept re-delivery of the Halon, it has incurred expenses associated with: storing the Halon; transporting the Halon to Vipond; weighing the Halon prior to selling and related Customs and Excise duty and GST resulting from the sale of the Halon.

### III. FACTUAL AND LEGAL ISSUES IN DISPUTE

14. The Defendants state that the following legal issues are in dispute and need to be resolved:

- (a) Whether the Defendants owed any duty of care to the Plaintiff or in the alternative, if any such duty of care exists, whether the Defendants' actions and decisions were in the nature of policy decisions which do not give rise to a private law duty of care?;
- (b) Whether the Defendants negligently or wrongfully seized the Halon and/or whether the Defendants made negligent misrepresentations to the Plaintiff which the Plaintiff relied upon to its detriment?;
- (c) Whether the Defendants were negligent in storing the Halon?;
- (d) Whether the Plaintiff was negligent in refusing to accept delivery of the Halon and liable for the resulting damages suffered by the Crown?;
- (e) Whether the Defendants converted the Halon by selling it to a third party, and if they did convert the Halon, whether the defences of abandonment, estoppel or necessity apply?;
- (f) Whether the Plaintiff has waived its right to sue for conversion?; and
- (g) Damages, including whether damages for economic loss are recoverable.

### IV. THE DEFENDANTS' POSITION AND INTERESTS

#### General Principles Governing Tort Liability of Public Authorities

15. The federal Crown's liability in tort is statutory. Pursuant to sections 3 and 10 of the *Crown Liability and Proceedings Act*, the federal Crown can only be liable vicariously for the torts committed by its servants/employees. The federal Crown

- 12 -

cannot be directly liable in tort. To establish liability, the employee must be acting within the scope of his/her employment and there must be a cause of action in tort against the Crown servant personally.

16. The claims against the federal Crown, both in respect of seizure of the Halon and storage of the Halon, are based in negligence. As a result, the Plaintiff is required to establish the following:

- (i) the existence of a duty of care;
- (ii) a breach of that duty ; and
- (iii) damages resulting from that breach.

17. It is the Defendants' position that the Plaintiff has failed, as indicated below, to demonstrate that any employees or servants of Environment Canada were in any way negligent.

#### **Liability for Seizure of the Halon**

18. The Plaintiff alleges that the Defendants are liable for having wrongfully or negligently seized the Halon when no export/import permits were required to transport the Halon through Canada, or alternatively, that they were told by Environment Canada, CCEB, that no permits were required and that they relied on these statements to its detriment.

19. It is the Defendants' position that it is the Plaintiff's obligation to ensure that it was complying with all applicable Canadian laws respecting in transit shipment of used Halon 1301.

20. Further, it is the position of the Defendants, that all employees of Environment Canada, including Mr. Bell acted in good faith and pursuant to statutory authority in seizing the Halon, given the contraventions of CEPA, 1985 and the

- 13 -

*Regulations* thereunder. Accordingly, it is the Defendants' position that no duty of care was owed to the Plaintiff by the Defendants, as the decision whether or not to exercise powers conferred by statute are discretionary or policy decisions which do not give rise to a duty of care.

21. Additionally, it is the Defendants' position that any representation made by Environment Canada, CCEB, to the Plaintiff that there was no requirement for permits, was restricted to requirements for permits pertaining to the ODSR only. The Defendants' position is supported by these facts

- (i) the Plaintiff was a knowledgeable exporter/importer and was aware that permits/notices for in transit shipment of Halon was required pursuant to a number of environmental regulations in addition to ODSR;
- (ii) Environment Canada, CCEB, specifically advised the Plaintiff that regulations in addition to ODSR governed in transit shipments of Halon; and
- (iii) The Plaintiff was aware that different branches of Environment Canada govern environmental regulations and that CCEB only administers the ODSR.

#### **Liability for Storing the Halon**

22. The Plaintiff alleges that the Defendants are liable for storing the Halon in a negligent manner, particularly by leaving the Halon exposed to summer temperature.

23. The Defendants' deny that they owe a duty of care to the Plaintiff with respect to storage of the Halon. In any event, it is the Defendants' position that if such a duty of care was owed to the Plaintiff that it did not breach its duty to store the Halon in a reasonable and prudent fashion. In particular, Environment Canada, Ontario Regional

- 14 -

Office, consulted with cylinder experts and were advised that the cylinders were designed to withstand Canadian summer temperatures.

24. Accordingly, it is the Defendants' position that any loss in Halon was the direct cause of faulty cylinders or valving, poor maintenance, rough handling, and/or poor or improper loading and stowage of the cylinders during their shipment from Pakistan to Canada and were not caused by the Defendants' actions or inactions. This position is supported by the fact that when the cylinders of Halon had arrived in Canada a loss in Halon was documented and also by the fact that none of the discs on the cylinders ruptured indicating that no Halon escaped due to high heat.

25. Furthermore, it is the Defendant's position, that following the withdrawal of the Plaintiff's charges in January 2000, the Plaintiff should have taken possession of the Halon but refused to do so. Any loss of the Halon during this period was caused by the Plaintiff's actions, and accordingly, the Defendants cannot be held responsible for any loss of Halon during this period.

#### **Liability for Sale of the Halon**

26. The Plaintiff alleges that the Defendants converted the Halon when Environment Canada, Ontario Regional Office, sold the Halon to Vipond in August 2000.

27. Conversion is defined as "the wrongful dealing with a chattel in a manner inconsistent with another person's right to use and possession" (Klar, Remedies in Tort, volume 1, p. 4-10.3). The following three elements are essential in an action for conversion: (1) the property must be specific personal property; (2) the Plaintiff must have a possessory interest in the chattel; and (3) the defendant must commit an intentional and wrongful act in respect of the chattel (supra, at p. 4 - 14).

28. A number of defences are available to a defendant in an action for conversion. In this case, the Defendants rely upon three defences: abandonment; estoppel; and necessity.

**(i) Abandonment/Estoppel**

29. It is the Defendants' position that they are not liable in conversion as the Plaintiff abandoned or is estopped from asserting conversion based on its conduct. As stated earlier, the Plaintiff failed to remove the Halon in circumstances where Environment Canada, Ontario Regional Office, had expressly provided the Plaintiff with several notices of its intention to treat the Halon as abandoned unless the Halon was removed from its premises by a certain date.

30. Accordingly, it is the Defendants' position that the Plaintiff by its conduct either abandoned the Halon, or that by refusing to remove the Halon led the Defendants to adopt a course of action to its detriment and that the Plaintiff is estopped from suing the Defendants for having sold the Halon.

31. The rationale behind the defence of estoppel based on the conduct of a plaintiff, is that proprietors should not become involuntary custodians of another person's chattels.

**(ii) Necessity**

32. The defence of necessity is explained in Fleming, The Law of Torts, 7<sup>th</sup> ed (1987) at p.86 as follows;

In some circumstances, a person is privileged to infringe the interest of another for the purpose of preventing harm either to his own interests or those of third parties if the harm he intends is not out of proportion to that he seeks to avoid.

Any action taken in pursuance of this defence must be reasonable.



- 16 -

33. It is the Defendants' position that by August 2000, it had become apparent to Environment Canada, Ontario Regional Office, based on pressure gauge readings, that a loss of gas was imminent and that Environment Canada needed to dispose of the Halon in order to prevent any harm to the environment by virtue of any Halon venting into the atmosphere. Pursuant to *CEPA*, 1999, Environment Canada has an obligation to take all steps necessary to protect the environment.

34. Further, it is the Defendants' position that in order to protect the environment, the defendants' actions in selling the Halon, given the Plaintiff's refusal to take possession of the Halon, was reasonable.

35. Lastly, it is the Defendants' position that the Plaintiff has waived its right to sue for conversion given that it elected to claim the proceeds from the sale of the Halon.

### **Damages**

36. To date, the Plaintiff has received \$110,172.00 from the Crown representing the value of the Halon on the date that the Halon was sold to Vipond.

37. In addition to this amount the Plaintiff claims damages for:

- (a) Breach of obligations to third party contractors resulting from the seizure of the Halon;
- (b) Loss of the Halon resulting from the Halon venting into the atmosphere;
- (c) Selling the Halon at a price substantially less than market value; and
- (d) Punitive damages.

38. It is the Defendants' position that the Plaintiff's claim for damages for economic loss is not sustainable. Damages for economic loss are only recoverable if,

as a matter of statutory interpretation, it is the type of loss the statute intended to guard against.

39. The purpose of *CEPA, 1999* and the *Regulations* thereunder is not economic, but is for the protection of the environment and human health. The declaration in *CEPA, 1999* clearly states: "It is hereby declared that the protection of the environment is essential to the well-being of Canadians and that the primary purpose of this Act is to contribute to sustainable development through pollution prevention". Therefore, it is the Defendants' position that damages are not recoverable, as *CEPA, 1999* and the *Regulations* thereunder do not protect against economic loss.

40. In the alternative, it is the Defendants' position that the Plaintiff has not proved that it has suffered damages. The Plaintiff has not provided the Defendants with any documentation supporting its claim for damages. For example, no documentation has been provided supporting that the Plaintiff had entered into contracts with third parties for the purchase of the Halon. In fact, the evidence is to the contrary, and indicates that the Plaintiff was purchasing the Halon to store it in the event of a future contract (see Tabs 41 and 42), nor has the Plaintiff provided any documentation supporting its claim that the Halon was sold for substantially less than market value. The Defendants, on the other hand, have evidence demonstrating that Environment Canada, Ontario Regional Office, have received a fair and reasonable price for the Halon.

42. Lastly, it is the Defendants' position that the Plaintiff is not entitled to punitive damages as the facts do not demonstrate that any Crown employee or servant acted in a high-handed, arbitrary or oppressive manner meriting an award of punitive damages.

43. It is the Crown's position that it has suffered \$30,000 in damages as a result of the Plaintiff's failure to comply with federal legislation and by its refusal to take possession of the Halon in the spring/summer of 2000.

- 18 -

44. The particulars of the Crown's claim are as follows;

<b>CONTROL FIRE</b>			
<b>Date</b>	<b>Description</b>	<b>Supplier</b>	<b>Cost</b>
28-Jun-99	Pick up at CN Bramalea and deliver to Vipond	Canada Cartage	\$583.79
30-Jun-99	Pick up at Vipond and deliver to CN Bramalea	Canada Cartage	\$364.87
27-Oct-99	Pick up at CN Bramalea and deliver to Environment Canada	Canada Cartage	\$747.98
31-Oct-99	Pick up at CN Bramalea and deliver to Environment Canada	Canada Cartage	\$693.25
16-Jun-99	Lab services to conduct Halons Analysis	Integral Sciences Inc.	\$513.94
01-Aug-99	Lab services to conduct Halons Analysis	Integral Sciences Inc.	\$806.45
05-Jul-99	Labour Charges 2 day testing on Jun-10 and Jun-29	Vipond Fire Protection Inc.	\$1,400.00
Contract	Rental of Container from 31-March-99 to 31-Aug-00 at \$250 per month	Fisher Associates Env'l Engineers Ltd.	\$4,250.00
09-Jan-01	Crane Rental and lift/drop of container onto and off transport truck	Fisher Associates Env'l Engineers Ltd.	\$650.00
09-Jan-01	Transport and delivery of sea container to Fisher yard	Fisher Associates Env'l Engineers Ltd.	\$575.00
19-Jul-00	Custom Duties	William L Rutherford Ltd.	\$3,856.02
19-Jul-00	GST on Custom Duties of the Import	William L Rutherford Ltd.	\$7,981.96
31-Jul-00	Labour Charges on testing	Vipond Fire Protection Inc.	\$2,500.00
<b>Total</b>			<b>\$24,923.26</b>

The Defendants are also entitled to pre-judgment interest on this amount pursuant to the *Courts of Justice Act* (see Tabs 43 – 55).

#### **V. ATTACHED DOCUMENTS**

Attached to this form are the following documents that the Defendants consider of importance for this mediation:

- 19 -

**A. Canada Gazette**

1. Extract Canada Gazette, Part II, December 2, 1992, Export and Import of Hazardous Wastes Regulations
2. Extract Canada Gazette, Part II, January 6, 1999, Ozone-depleting Substances Regulations, 1998

**B. Shipping Documents and Hazardous Material /Dangerous Goods, Declaration Forms**

3. Noorani Trading Company Invoice, dated March 27, 1999
4. Hazardous Material/Dangerous Goods Declaration, dated May 6, 1999
5. Dangerous Cargo List, dated May 5, 1999
6. Canadian National Railways Straight Bill of Lading, dated May 6, 1999
7. Canadian National Railways Straight Bill of Lading, dated May 6, 1999
8. Hapag-Lloyd (Canada) Inc. Advice Note, dated May 5, 1999

**C. Permits**

9. Letter from J.A Buccini, Director, Commercial Chemicals Evaluation Branch, Pollution Prevention, On behalf of the Minister of Environment (Environment Canada) to Adam Richardson, President (Control Fire Systems Ltd.), dated May 26, 1994
10. Letter from J.A Buccini, Director, Commercial Chemicals Evaluation Branch Pollution Prevention, On behalf of the Minister of Environment (Environment Canada) to Eugene Wong, Controller (Control Fire Systems Limited), dated February 20, 1995
11. Letter from J.A Buccini, Director, Commercial Chemicals Evaluation Branch Pollution Prevention, On behalf of the Minister of Environment (Environment Canada) to Adam T. Richardson (Control Fire Systems Ltd.), dated January 22, 1996
12. Letter from J.A Buccini, Director, Commercial Chemicals Evaluation Branch Pollution Prevention, On behalf of the Minister of Environment (Environment Canada) to Adam T. Richardson (Control Fire Systems Limited), dated May 24, 1996

- 20 -

13. Letter from J.A Buccini, Director, Commercial Chemicals Evaluation Branch (Environment Canada) to Frances H. Richardson, Vice President (Control Fire Systems Ltd.), dated March 3, 2000
14. Letter from John Myslicki, Chief, Transboundary Movement Division (Environment Canada) to Frances H. Richardson, Vice President (Control Fire Systems Ltd.), dated March 22, 2000

**D. Correspondence**

15. Letter from Carole Sheppard, Counsel, Criminal Prosecutions Section (Department of Justice) to Joel Goldenberg (Goodman and Carr), dated January 26, 2000
16. Letter from Joel Goldenberg (Goodman and Carr) to Carole Sheppard (Department of Justice), dated March 9, 2000
17. Letter from Carole Sheppard, Counsel, Criminal Prosecutions Section (Department of Justice) to Joel Goldenberg (Goodman and Carr), dated March 10, 2000
18. Fax Cover Sheet from Frances H. Richardson (Control Fire Systems Ltd.) to Lorraine Young (Environment Canada), dated April 4, 2000
19. Letter from Joel Goldenberg (Goodman and Carr) to Carole Sheppard (Department of Justice) and Yves Bovet (Environment Canada), dated April 12, 2000
20. Letter from Joel Goldenberg (Goodman and Carr) to John Meaney (Department of Justice), dated May 2, 2000
21. Letter from Joel Goldenberg (Goodman and Carr) to John Meaney (Department of Justice), dated May 12, 2000
22. Letter from John Meaney (Department of Justice) to Joel Goldenberg (Goodman and Carr), dated May 16, 2000
23. Letter from John Meaney (Department of Justice) to Joel Goldenberg (Goodman and Carr), dated May 19, 2000
24. Letter from John Meaney (Department of Justice) to Joel Goldenberg (Goodman and Carr), dated June 12, 2000
25. Letter from Jonathan Eades (Goodman and Carr) to John Meaney (Department of Justice), dated June 16, 2000

- 21 -

26. Letter from John Meaney (Department of Justice) to Jonathan Eades (Goodman and Carr), dated July 6, 2000
27. Letter from Lorraine Young (Environment Canada) to Diana Vatri (Goodman and Carr), dated July 12, 2000
28. Letter from Lorraine Young (Environment Canada) to Joel Goldenberg (Goodman and Carr), dated July 12, 2000
29. Letter from Joel Goldenberg (Goodman and Carr) to John Meaney (Counsel) and Lorraine Young (Sr. Investigator), dated July 14, 2000
30. Letter from John Meaney (Department of Justice) to Jonathan Eades (Goodman and Carr), dated July 17, 2000
31. Letter from Jonathan Eades (Goodman and Carr) to John Meaney (Department of Justice), dated July 17, 2000
32. Letter from John Meaney (Department of Justice) to Jonathan Eades (Goodman and Carr), dated July 18, 2000
33. Letter from Jonathan Eades (Goodman and Carr) to John Meaney (Department of Justice), dated July 19, 2000
34. Letter from Jonathan Eades (Goodman and Carr) to John Meaney (Department of Justice), dated July 26, 2000
35. Letter from Frances Richardson and Adam Richardson (Control Fire Systems Ltd.) to John Meaney (Department of Justice), dated July 28, 2000
36. Letter from John Meaney (Department of Justice) to Jonathan Eades (Goodman and Carr), dated July 28, 2000

**E. Purchase of Halon**

37. Purchase Order of Vipond Fire Protection Inc., dated July 19, 2000
38. Environment of Canada Invoice, dated August 1, 2000
39. Cheque from Vipond Fire Protection Inc. made payable to Goodman and Carr, *in trust*, for the amount of \$110,172.00, dated July 27, 2000
40. Acknowledgement, executed August 1, 2000

- 22 -

**F. Damages**

41. Letter from Adam T. Richardson, President (Control Fire Systems Inc.) to Benjamin J. DeAngelo, Office of Atmospheric Programs (The United States Environmental Protection Agency, Stratospheric Protection Division), dated February 12, 1999
42. Letter from Adam T. Richardson, President (Control Fire Systems Inc.) to Benjamin J. DeAngelo, Office of Atmospheric Programs (The United States Environmental Protection Agency, Stratospheric Protection Division), dated February 18, 2001
43. Environment Canada Master Card Purchase Register from Period April 1 - July, 1998
44. Canada Cartage System Limited Straight Bill of Lading, dated June 10, 1999
45. Canada Cartage System Limited Invoice, dated June 28, 1999
46. Canada Cartage System Limited Invoice, dated June 30, 1999
47. Vipond Fire Protection Inc. Invoice, dated July 5, 1999
48. National Bank of Canada Statement of Account, dated July 27, 1999
49. National Bank of Canada Statement of Account, dated August 3, 1999
50. Canada Cartage System Limited Straight Bill of Lading, dated September 22
51. Canada Cartage System Limited Invoice, dated October 27, 1999
52. Canada Cartage System Limited Invoice, dated October 31, 1999
53. William L. Rutherford Limited - Canada Customs Coding Form, dated August 2, 2000
54. Fisher Associates Environmental Engineers Limited Revised Invoice, dated January 9, 2001
55. Environment Canada Investigations Section 2000-2001 - List of Expenditures, dated July 4, 2001

- 23 -

October 2, 2001

Paul J. Evraire, Q.C.  
DEPARTMENT OF JUSTICE  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Per: Gina M. Scarcella (LSUC 22213V)  
Tel: (416) 954-8111

Per: Joanne R. Fox (LSUC 342730)  
Tel: (416) 973-8859

Fax: (416) 973-5004  
File: ORO 2 - 475543

Solicitors for the Defendants

TO: GOODMAN AND CARR  
Barristers and Solicitors  
200 King Street West  
Suite 2300  
Toronto, Ontario  
M5H 3W5

Joel Goldenberg  
Katherine McEachern

Tel: (416) 595-2300  
Fax: (416) 595-0567

Solicitors for the Plaintiff



Cour

**CONTROL FIRE SYSTEMS LIMITED**

**and**

**MICHAEL BELL and THE ATTORNEYS**

**Plaintiff**

*(Short title of proceeding)*

**SUPERIOR COURT  
Proceedings  
T.C.**

**DEFENDANTS' STATEMENT  
(Form 4C)**

Paul J. Evraire, Q.C.  
DEPARTMENT OF JUSTICE  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Per: Gina M. Scott  
(LSUC #22)

Tel: (416) 954-8

Per: Joanne R. [unclear]  
(LSUC #34)

Tel: (416) 973-8

Fax: (416) 973-5

Our File: ORO 2 - 47

Solicitors for the Defendants

\*\* TOTAL PAGE.026 \*\*

Department of Justice  
CanadaMinistère de la Justice  
Canada

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<b>SEND TO / ENVOYER À</b>		<b>FROM / DE</b>	
Name / Nom: Joseph Keller Counsel		Name / Nom: Joanne R. Fox Counsel, Regulatory Section	
Address / Adresse: ENVIRONMENT CANADA Place Vincent-Massey 6th Floor 351 St. Joseph Boulevard Hull, Quebec K1A 0H3		Address / Adresse: DEPARTMENT OF JUSTICE The Exchange Tower 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur: (819) 953-9110	Tel. No. / No du Tél: (819) 953-1385	Fax # / No du télécopieur: (416) 973-5004	Tel. No. / No du Tél: (416) 973-8859
Comments / Commentaires: <b>RE: Control Fire Systems Limited v. Bell et al.</b> <b>Court File No. 00-CV-20711CM</b> <b>Our File No. ORO 2-475543</b> Please see attached.			
<b>TRANSMISSION</b>			
Number of Pages / Nombre de page:	Date / La date:	Time / Heure:	
20	January 7, 2002		
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquer avec:

Name / Nom: Kathy at / au: (416) 973-7477

Department of Justice  
CanadaMinistère de la Justice  
Canada

Security classification – Côte de sécurité

PRIVILEGED

File number – Numéro de dossier

Date

January 7, 2002

Telephone/FAX – Téléphone/Télécopieur

(416) 973-8859/ (416) 973-5004

## MEMORANDUM / NOTE DE SERVICE

## TO / DEST:

✓ John Meaney, ENVIRONMENT CANADA  
Joseph Keller, ENVIRONMENT CANADA

## FROM / ORIG:

Joanne Fox,  
Counsel, Regulatory Section, Ontario Regional OfficeSUBJECT /  
OBJET:RE: CONTROL FIRE SYSTEMS LIMITED v. BELL et al.  
Court File No. 00-CV-20711CM  
Our File No. ORO 2 – 475543

## Comments/Remarques

Would you kindly distribute the attached to the appropriate people at Environment Canada.  
Thank you.

s.23

JF/kt

Encls.

Form 77C

Court File No. 00-CV-201711CM

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:****CONTROL FIRE SYSTEMS LIMITED****Plaintiff****- and -****MICHAEL BELL and THE ATTORNEY GENERAL OF CANADA****Defendants**


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**CASE MANAGEMENT MOTION FORM**

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**JURISDICTION**☐ Case Management Judge☒ Case Management Master

**THIS FORM FILED BY** (Check appropriate boxes to identify the party filing this form as a moving/responding party on this motion AND to identify this party as plaintiff, defendant, etc. in the action.)

☐ Moving Party☒ Plaintiff/Petitioner/Applicant

Control Fire Systems Limited

☐ Responding Party☐ Defendant/Respondent name☐ Other-Specify kind of party and name**MOTION MADE**☒ On consent of all parties☐ On notice to all parties and unopposed☐ Without notice☐ On notice to all parties and expected to be opposed

Notice of this motion was served on:

by means of:

**METHOD OF HEARING REQUESTED**☐ By attendance☒ In writing only, no attendance☐ By fax☐ By telephone conference under rule 1.08☐ By video conference under rule 1.08

Date, time and place for attendance or for telephone or video conference:

DATE:

TIME:

PLACE:

**ORDER SOUGHT BY THIS PARTY** (*Responding party is presumed to request dismissal of motion and costs.*)☐ Extension of time☐ Serve claim/application ☐ File or deliver defence ☐ Complete discoveries ☒ Other - Amend Notice of Action in form attached☐ Assignment of the proceeding (and related proceedings, if applicable) to judge/s for Case Management☒ Other Relief - be specific: Dismissal of the action as against Michael Bell**MATERIAL RELIED ON BY THIS PARTY**☒ This form ☐ Pleadings ☐ Affidavits - Specify ☐ Transcript - Specify ☒ Other - Specify

Consent of Defendants

**GROUND IN SUPPORT OF/IN OPPOSITION TO MOTION (INCLUDING RULE AND STATUTORY PROVISIONS RELIED ON)**

1. The parties have agreed that the action against Michael Bell will be dismissed on a without costs basis.

**CERTIFICATION**

I certify that the above information is correct, to the best of my knowledge.

Signature of solicitor (If no lawyer, party must sign)

Date: November 21, 2001

**THIS PARTY'S LAWYER** (*If no lawyer, give party's address for service, telephone and fax number.*)

Name and Firm Katherine McEachern, Goodman and Carr LLP

Address Suite 2300  
200 King Street West  
Toronto ON M5H 3W5

Telephone 416-595-2300

Facsimile 416-595-0567

Solicitor for the:

**THIS PARTY'S LAWYER** (*If no lawyer, give party's address for service, telephone and fax number.*)

Name and Firm

Address

Telephone

Facsimile

Solicitor for the:

**OTHER LAWYER** (*If no lawyer, give other party's address for service, telephone and fax number.*)

Name and Firm Gina Scarcella, Department of Justice

Address Ontario Regional Office, The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, ON M5X 1K6

Telephone 416-973-8859

Facsimile 416-973-5004

Solicitor for the:

**OTHER LAWYER** (*If no lawyer, give other party's address for service, telephone and fax number.*)

Name and Firm

Address

Telephone

Facsimile

Solicitor for the:

**DISPOSITION BY CASE MANAGEMENT JUDGE/MASTER**☐ order to go as asked☐ order refused☐ adjourned to☒ order to go as follows:

Action against the defendant Michael Bell is  
hereby dismissed without costs

Hearing Method:

affidavit

Hearing duration:

15

min.

Heard in

☒ courtroom☐ office☐ Successful party **MUST** prepare formal order for signature☐ No copy of disposition to be sent to parties☐ Other directions - specifyNov. 22/01

Date:

DA SH

Judge's / Master's Name



Judge S / Master's Signature

Court File No. 00-CV-201711CM

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**CONTROL FIRE SYSTEMS LIMITED**

**Plaintiff**

**- and -**

**MICHAEL BELL and THE ATTORNEY GENERAL OF CANADA**

**Defendants**

**CONSENT**

The parties hereby consent to an Order dismissing this action as against Michael Bell, on a without costs basis.

No party affected by this Order is under disability.

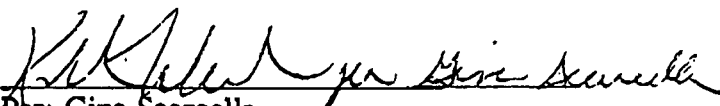
**GOODMAN AND CARR LLP  
Solicitors for the Plaintiff**

*Nov 13*, 2001

  
Per: Katherine McEachern

**Paul J. Evraire, Q.C.  
DEPARTMENT OF JUSTICE  
Solicitors for the Defendants**

*Nov 20*, 2001

  
Per: Gina Scarcella

DEC-05-01 03:22PM

FROM-CASE MANAGEMENT, MASTERS

4163255416

T-063 P.02/05 F-603

Form 77C

Court File No. 00-CV-201711CM

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:****CONTROL FIRE SYSTEMS LIMITED****Plaintiff****- and -****MICHAEL BELL and THE ATTORNEY GENERAL OF CANADA****Defendants**


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**CASE MANAGEMENT MOTION FORM**

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**JURISDICTION**☐ Case Management Judge☒ Case Management Master

**THIS FORM FILED BY** (Check appropriate boxes to identify the party filing this form as a moving/responding party on this motion AND to identify this party as plaintiff, defendant, etc. in the action.)

☐ Moving Party☒ Plaintiff/Petitioner/Applicant

Control Fire Systems Limited

☐ Responding Party☐ Defendant/Respondent name:☐ Other-Specify kind of party and name**MOTION MADE**☒ On consent of all parties☐ On notice to all parties and unopposed☐ Without notice☐ On notice to all parties and expected to be opposed

Notice of this motion was served on:

by means of:

**METHOD OF HEARING REQUESTED**☐ By attendance☒ In writing only, no attendance☐ By fax☐ By telephone conference under rule 1.08☐ By video conference under rule 1.08

Date, time and place for attendance or for telephone or video conference:



DEC-05-01 03:22PM FROM-CASE MANAGEMENT, MASTERS

4163265416

T-063 P.03/05 F-603

DATE:

TIME:

PLACE:

**ORDER SOUGHT BY THIS PARTY** (*Responding party is presumed to request dismissal of motion and costs.*)☐ Extension of time☐ Serve claim/application ☐ File or deliver defence ☐ Complete discoveries ☒ Other - Amend Notice of Action in form attached☐ Assignment of the proceeding (and related proceedings, if applicable) to judge/s for Case Management☒ Other Relief - be specific: Dismissal of the action as against The Attorney General of Canada**MATERIAL RELIED ON BY THIS PARTY**☒ This form ☐ Pleadings ☐ Affidavits - Specify ☐ Transcript - Specify ☒ Other - Specify

Content of Defendants

**GROUND(S) IN SUPPORT OF/IN OPPOSITION TO MOTION (INCLUDING RULE AND STATUTORY PROVISIONS RELIED ON)**

1. Minute of Settlement have been executed in which the parties have agreed inter alia to consent to a dismissal of the action without costs.

**CERTIFICATION**I certify that the above information is correct, to the best of my knowledge  
Signature of solicitor (If no lawyer, party must sign)

Date: November 28, 2001

**THIS PARTY'S LAWYER** (If no lawyer, give party's address for service, telephone and fax number.)Name and Firm: Katherine McEachern, Goodman and Carr LLP  
Address: Suite 2300  
200 King Street West  
Toronto ON M5H 3W5

Telephone: 416-595-2300

Facsimile: 416-595-0567

Solicitor for the:

**THIS PARTY'S LAWYER** (If no lawyer, give party's address for service, telephone and fax number.)

Name and Firm:

Address:

Telephone:

Facsimile:

Solicitor for the:

**OTHER LAWYER** (If no lawyer, give other party's address for service, telephone and fax number.)Name and Firm: Gina Scarcella, Department of Justice  
Address: Ontario Regional Office, The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, ON M5X 1K6

Telephone: 416-973-8859

Facsimile: 416-973-5004

Solicitor for the:

**OTHER LAWYER** (If no lawyer, give other party's address for service, telephone and fax number.)

Name and Firm:

Address:

Telephone:

Facsimile:

Solicitor for the:

**DISPOSITION BY CASE MANAGEMENT JUDGE/MASTER**☐ order to go as asked  
☐ order refused☐ adjourned to  
☒ order to go as follows:

- ① The Attorney General of Canada is hereby substituted as a party defendant in this action for the named defendant Environment Canada, who is hereby deleted as a party defendant and the Notice of Action shall be amended accordingly.
- ② The action herein as against the Attorney General of Canada is hereby dismissed without costs.

DEC-05-01 03:23PM FROM-CASE MANAGEMENT MASTERS

4163265416

T-063 P.04/05 F-603

Hearing Method:

afforded

Hearing duration:

15 min.

Heard in

☒ courtroom

☐ office

☐ Successful party **MUST** prepare formal order for signature

☐ No copy of disposition to be sent to parties

☐ Other directions - specify

---

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---

Nov 22/02  
Date:

DASH  
Judge's / Master's Name

[Signature]  
Judge's / Master's Signature

Court File No. 00-CV-201711CM

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**CONTROL FIRE SYSTEMS LIMITED**

**Plaintiff**

**- and -**

**MICHAEL BELL and THE ATTORNEY GENERAL OF CANADA**

**Defendants**

**CONSENT**

The parties hereby consent to an Order dismissing this action as against The Attorney General of Canada, on a without costs basis.

No party affected by this Order is under disability.


**GOODMAN AND CARR LLP  
Solicitors for the Plaintiff**

Nov 13, 2001

  
Per: Katherine McEachern

**Paul J. Evraire, Q.C.  
DEPARTMENT OF JUSTICE  
Solicitors for the Defendants**

Nov 20, 2001

  
Per: Gina Scarcella

**Pages 3197 to / à 3206  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**21(1)(a), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



Department of Justice  
Canada

Ministère de la Justice  
Canada

2520-14

LEGAL SERVICES  
ENVIRONMENT CANADA  
RECEIVED

# FACSIMILE TRANSMISSION TRANSMISSION PAR TÉLÉCOPIEUR

01 AUG -8 A 9:45

RECU 27692

<b>SEND TO / ENVOYER À</b>		<b>FROM / DE</b> SERVICES JURIDIQUES ENVIRONNEMENT CANADA	
Name / Nom: Joseph Keller Counsel		Name / Nom: Joanne R. Fox Counsel, Regulatory Section	
Address / Adresse: ENVIRONMENT CANADA Place Vincent-Massey 6th Floor 351 St. Joseph Boulevard Hull, Quebec K1A 0H3		Address / Adresse: DEPARTMENT OF JUSTICE The Exchange Tower 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur: (819) 953-9110	Tel. No. / No du Tél: (819) 953-1385	Fax # / No du télécopieur: (416) 973-5004	Tel. No. / No du Tél: (416) 973-8859
Comments / Commentaires: RE: Control Fire Systems Limited v. Bell et al. Court File No. 00-CV-20711CM Our File No. <u>ORO #2-475543</u> Please see attached.			
<b>TRANSMISSION</b>			
Number of Pages / Nombre de page: 17	Date / La date: August 8, 2001	Time / Heure:	
<b>SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ</b>			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice. Protected document / Document protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			

**NOTICE:**

This message is intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you have received this communication in error, please notify us immediately by telephone. Thank you.

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquer avec:

Name / Nom: Kathy at/au: (416) 973-7477



**Department of Justice  
Canada**

Ontario Regional Office  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

**Ministère de la Justice  
Canada**

Bureau régional de l'Ontario  
la tour exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 973-8859  
Fax: (416) 973-5004  
Internet: joanne.fox@justice.gc.ca

August 7, 2001

**VIA FAX (819) 953-9110**


Mr. Joseph Keller  
ENVIRONMENT CANADA  
Place Vincent-Massey  
6th Floor  
351 St. Joseph Boulevard  
Hull, Quebec  
K1A 0H3

Dear Mr. Keller:

**RE: CONTROL FIRE SYSTEMS LIMITED v. BELL et al.  
Court File No. 00-CV-20711CM  
Your File No. 990287  
Our File No. ORO #2-475543**

Please find enclosed the final copy of the Statement of Defence which was served on the Plaintiff and filed with the Court.

Yours very truly,

  
Joanne R. Fox  
Counsel, Regulatory Section  
Ontario Regional Office

JRF/kt  
Encls.

cc. John Meaney  
Dave Pascoe  
Michael Bell

**Canada**

Court File No. 00-CV-201711CM

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**CONTROL FIRE SYSTEMS LIMITED**

**Plaintiff**

**and**

**MICHAEL BELL and  
THE ATTORNEY GENERAL OF CANADA**

**Defendants**

**STATEMENT OF DEFENCE OF THE  
DEFENDANTS AND COUNTERCLAIM OF THE  
ATTORNEY GENERAL OF CANADA**

1. The Defendants admit the allegations contained in paragraphs 3, 4 and 7 (with respect to the second sentence) of the Amended Statement of Claim.
2. The Defendants deny the allegations contained in paragraphs 1, 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the Amended Statement of Claim.
3. The Defendants have no knowledge in respect of the allegations contained in paragraphs 2, 6, 7 (with respect to the first sentence) and 8 of the Amended Statement of Claim.

**The Parties**

4. The Attorney General of Canada represents the federal Crown in this proceeding in accordance with section 23 of the *Crown Liability and Proceedings Act*,

- 2 -

R.S.C. 1985 c. 30, as amended. The Department of the Environment (hereinafter referred to as "Environment Canada") is a department of the federal Crown and is responsible for the administration and enforcement of the *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33, as amended (hereinafter referred to as "CEPA, 1999"), which came into force on March 31, 2000 and repealed the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16, (4<sup>th</sup> Suppl.), as amended (hereinafter referred to as "CEPA, 1985") and the *Regulations* thereunder, on behalf of the Minister of the Environment. Regulations passed under CEPA, 1985 continue to be in force, subject to amendments.

5. Michael Bell (hereinafter referred to as "Bell") is employed by the federal Crown, appointed pursuant to the *Public Service Employment Act* and is an employee of Environment Canada, in the Ontario Regional Office. As an employee of Environment Canada he was designated as an inspector pursuant to the section 99(1) of CEPA, 1985 and continued as an enforcement officer designated under section 217(1) of CEPA, 1999.

6. The Crown admits that it is vicariously liable for the torts committed by her servants while acting within the scope of their employment, the commission of which is not admitted, but specifically denied. With respect to Bell, the Crown admits that at all material times, Bell was acting within the scope of his employment and that the Crown is vicariously liable in respect of any torts committed by Bell. The Defendants specifically deny, however, that Bell committed any of the torts as alleged by the Plaintiff in its Amended Statement of Claim, or at all.

### Facts

7. On or about May 14, 1999, following the receipt of a report from the Atlantic Regional Office of Environment Canada, Bell conducted an inspection of 75 cylinders of used bromotrifluoromethane, commonly known as used Halon 1301, which had arrived at the Canadian National Railway Intermodal Yard in Brampton, Ontario (hereinafter referred to as "Halon"). According to the shipping and Canadian Custom documents, the Halon



- 3 -

had arrived from Pakistan by ship at the Port of Halifax, Nova Scotia on or about May 10, 1999 and was to be transported through Canada by rail to Toronto and then by truck to its final destination of Niagara Falls, New York. The Defendants state that Fritz Starber Inc., at all material times was the Canadian agent for the Plaintiff, who was the consignee of the shipment.

8. Halon 1301, an ozone-depleting substance, is used in the fire suppression industry to displace air when discharged in the event of a fire. Since it does have an ozone-depleting potential, its manufacture, use and reuse is controlled by States under an International Convention-the Montreal Protocol. In developed countries, the manufacture of virgin product is strictly controlled. The only source of product for companies such as the Plaintiff is through reuse, recovery or reclamation of existing stock.

9. On or about the same day, following Bell's inspection of the Halon, Bell seized the Halon at the CN Intermodal Yard pursuant to statutory authority under section 104(1) of *CEPA, 1985* on the basis that he had reasonable grounds to believe that the Plaintiff had contravened sections 43(3) and 44 of *CEPA, 1985*, section 5(1) of the *Ozone-depleting Substances Regulations, 1998*, as amended (hereinafter referred to as "*ODSR*") and section 13(b) (c) and (e) of the *Export and Import of Hazardous Waste Regulations*, as amended (hereinafter referred to as "*EIHW*") respecting in transit shipments of used Halon 1301 through Canada.

10. Bell is also an inspector designated under the *Transport of Dangerous Goods Act, 1992*, S.C. 1992, C. 34 (hereinafter referred to as "*TDGA*"). During his inspection under *CEPA, 1985*, he also observed violations of sections 5 and 6 of *TDGA*. Bell reported these violations to Transport Canada inspectors who then initiated their own investigations under *TDGA*.

11. On or about May 21, 1999, Bell completed the form entitled Receipt for Seized Articles relating to the seizure of the Halon on or about May 14, 1999. The Defendants state that these forms are completed by employees following seizure as an

- 4 -

administrative matter and are not required under *CEPA, 1985*, *CEPA, 1999* or the *Regulations* thereunder. Following completion of the Receipt for Seized Articles a copy was sent to the Plaintiff for its records.

12. Pursuant to *CEPA, 1985*, *CEPA, 1999* and the *Regulations* thereunder, permits/notices are required for in transit shipments of used Halon 1301.

13. The Plaintiff had an obligation to ensure that it was complying with all applicable Canadian laws and the Plaintiff knew or ought to have known that several federal statutes and *Regulations* thereunder, govern in-transit shipments of used Halon in Canada. Further, or in the alternative, the Plaintiff, being a sophisticated and/or knowledgeable importer of Halon, knew that permits/notices were required. Furthermore, Environment Canada specifically advised the Plaintiff in the past that permits/notices were required under *CEPA, 1985* and the *Regulations* thereunder respecting shipments of Halon 1301 and that it was the Plaintiff's obligation to ensure it complied with all federal statutes and *Regulations* thereunder.

14. The Defendants deny that any employee from Environment Canada, Ontario Regional Office, and in particular the Defendant Bell, were ever told by employees from Environment Canada, Commercial Chemicals Evaluation Branch (hereinafter referred to as "CCEB"), that the Plaintiff did not require any permits/notices under *CEPA, 1985* and the *Regulations* thereunder, with respect to in transit shipments of used Halon 1301 through Canada, as alleged in paragraphs 10 and 16 of the Amended Statement of Claim. The Defendants further state that employees from Environment Canada, Ontario Regional Office, and in particular the Defendant Bell, were never told by CCEB that CCEB had told the Plaintiff that it did not require any permits/notices under *CEPA, 1985* or the *Regulations* thereunder, respecting in transit shipments of used Halon 1301 through Canada.

- 5 -

15. The Defendants specifically deny that the Plaintiff was told by CCEB, that it did not require a permit or any other notice under *CEPA, 1985* or *EIHR* with respect to in transit shipments of used Halon 1301 through Canada.

16. The Defendants state that the Plaintiff was told by CCEB, only that permits under *ODSR* for in transit shipments through Canada were not required at that time. The Defendant Bell states that on or about May 17, 1999, following seizure of the Halon, he was advised of this by CCEB after he made enquiries following discussions with the owner of the Plaintiff, Adam Richardson.

17. With respect to paragraphs 12 and 13 of the Amended Statement of Claim, Bell and other employees from Environment Canada promptly investigated the Plaintiff's concerns regarding potential venting of the Halon due to hot weather. Environment Canada dismissed those concerns after having receiving advice by cylinder specialists that the cylinders were designed to withstand temperatures far exceeding Toronto summer temperatures.

18. Any loss in Halon was the direct cause of faulty cylinders or valving, poor maintenance, rough handling, and/or poor or improper loading and stowage of the cylinders during their shipment from Pakistan to Canada and were not caused by the Defendants' actions or inactions.

19. With respect to paragraphs 11 and 14 of the Amended Statement of Claim, the Plaintiff could have, as of the date that the Plaintiff became aware of the seizure, applied to Bell or the Minister under section 104 of *CEPA, 1985* for release of the seized Halon or to have the Halon moved to its facility in Toronto. At no time did the Plaintiff make a request under section 104 of *CEPA, 1985* or section 223 of *CEPA, 1999*. Furthermore, on or about December 6, 1999, counsel for the Plaintiff was made specifically aware of section 104 of *CEPA, 1985* by counsel for the Crown.

- 6 -

20. In the following months, Environment Canada requested on several occasions that the Plaintiff make arrangements to retrieve the Halon. However, the Plaintiff refused to take possession of the Halon.

21. In or about mid March 2000, the Plaintiff had received the necessary permits/notices under *ODSR* and *EIWHR* and that the Plaintiff, having complied with all necessary *Regulations*, was now able to transport the Halon to the United States through Canada.

22. In or about early April 2000, it became apparent that based on pressure gauge readings, the pressure in some of the cylinders had decreased indicating that a loss of Halon had either occurred or was thought to be imminent and that it was therefore now imperative that the Plaintiff accept delivery of the Halon in order to prevent venting of the Halon into the ozone and damage to the environment.

23. By notice dated July 6, 2000, Environment Canada advised the Plaintiff that if it did not confirm by July 14, 2000 that it would accept delivery of the Halon, Environment Canada would consider the Halon abandoned and the Halon would be disposed of by sale on July 17, 2000.

24. On or about July 12, 2000, Environment Canada provided the Plaintiff with an extension of time to July 17, 2000, in which to respond to its notice. The time was further extended to July 18, 2000 for the Plaintiff to accept delivery of the Halon.

25. The Plaintiff, despite being provided with notice, failed to retrieve the Halon within the required time. Accordingly, on or about July 19, 2000, Environment Canada sold the Halon to Vipond, a company in Mississauga, Ontario, for \$110,172.00.

26. With respect to paragraphs 15 and 20 of the Amended Statement of Claim, at all material times the Crown, her employees, servants and agents and Bell, who has been named as a Defendant in this action, acted reasonably in the sale of the Halon,

- 7 -

which included obtaining quotes from Ontario companies for the purchase of the Halon prior to selling the Halon to Vipond. The Defendants specifically deny that the Halon was sold for substantially less than market value. The Defendants deny that the decision to sell the Halon was that of the Defendant Bell.

27. On or about August 1, 2000, Environment Canada delivered to counsel for the Plaintiff a cheque in the amount of \$110,172.00 payable to Goodman & Carr, *in trust*.

### **Allegations of Negligence /Conversion**

28. The Defendants deny any negligence, breach of duty or want of care on the part of anyone for whom the Crown is in law responsible, which may have caused or contributed to the damages allegedly sustained by the Plaintiff, which is not admitted but specifically denied. The Defendants state that they, performed their duties in a reasonable and prudent manner and exercised fairly and in good faith at all times their discretion and authority under *CEPA, 1985*, *CEPA, 1999* and the *Regulations* thereunder, in seizing the Halon and in the manner in which they stored the Halon while it was in their possession. Furthermore, the Defendants state that they acted reasonably at all times in both selling the Halon and in selling it to Vipond.

29. The Defendants further state that the relationship between the Plaintiff and the Defendants is not sufficiently proximate to create a duty of care owed by the Defendants to the Plaintiff. The Defendants further state that the statutory scheme constituting *CEPA, 1985*, *CEPA, 1999* and the *Regulations* thereunder, do not create a private law duty of care owed by the Defendants to the Plaintiff.

30. Furthermore, the Crown denies that any Crown employees, agents or servants made negligent misrepresentations to the Plaintiff as alleged in the Amended Statement of Claim and state that any representations to the Plaintiff were restricted to requirements for permits under *ODSR* only. Further, the Defendants state the Plaintiff has failed to meet the necessary requirements of the tort of negligent misrepresentation.

31. With respect to paragraph 20 of the Amended Statement of Claim, the Defendants deny that they converted the Halon which it seized and later sold on or about July 19, 2000 and state that the Plaintiff has failed to meet the necessary requirements of the tort of conversion.

32. Further, or in the alternative, the Defendants state that if they converted the Halon, which is not admitted but specifically denied, the Defendants plead and rely upon the defences of abandonment and estoppel given the Plaintiff's conduct in failing to remove the Halon after having received notice from Environment Canada requiring its removal.

33. Further, or in the alternative, the Defendants state that if they did convert the Halon, which is not admitted but specifically denied, the Defendants plead and rely upon the defence of necessity in that Environment Canada and its employees, servants and agents have a duty under *CEPA, 1999* and the *Regulations* thereunder to take appropriate measures to protect the environment, including ensuring that used Halon 1301 is not damaging the ozone.

34. Further in the alternative, the Defendants state that the Plaintiff waived its right to sue for the tort of conversion as the Plaintiff has elected to accept the proceeds from the sale of the Halon.

### Damages

35. The Defendants specifically deny the Plaintiff has suffered damages as alleged in the Amended Statement of Claim and puts the Plaintiff to the strict proof thereof. In the alternative, the Defendants state that the damages claimed by the Plaintiff are excessive, too remote and that the Plaintiff has failed to mitigate its damages. Furthermore, the Defendants state that if the Plaintiff has suffered damages, which is not

- 9 -

admitted but denied, that the damages were the direct result of the Plaintiff's refusal to accept delivery of the Halon.

36. Further, the Defendants state that damages for economic loss are not recoverable as the statutory scheme does not protect against economic loss.

37. The Defendants plead and rely upon *CEPA, 1985, CEPA, 1999, OSDR, EIHWR, TDGR*, the *Crown Liability and Proceedings Act*, R.S.C. 1985, Ch. C-50, as amended and the *Negligence Act*, R.S.O. 1990, Ch. N-1.

38. The Defendants further state that the Plaintiff's action is statute barred and plead and rely upon section 7 of the *Public Authorities Protection Act*, R.S.O. 1990, Ch. P-38, as amended.

39. The Defendants submit that this action shall be dismissed with costs on a solicitor and client basis.

## **COUNTERCLAIM**

40. The Attorney General of Canada (hereinafter referred to as the "Attorney General") counterclaims as follows:

- (a) Damages in the amount of \$30,000.00;
- (b) Pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, as amended;
- (c) Its cost of this counterclaim; and
- (d) Such further and other relief as to this Honourable Court may deem just.

41. The Attorney General repeats and relies upon the allegations contained in the Statement of Defence.

- 10 -

42. The Attorney General states that as a result of Control Fire Systems Limited refusing to accept delivery of the Halon that it incurred expenses associated with: storing the Halon; transporting the Halon to Vipond; weighing the Halon prior to selling; and related Customs and Excise duty and GST resulting from the sale of the Halon.

43. The Attorney General claims that it has therefore suffered damages as a result, the full particulars of which will be provided prior to trial.

August 1, 2001

Paul J. Evraire, Q.C.  
DEPARTMENT OF JUSTICE  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Per: Gina M. Scarcella  
Tel: (416) 954-8111  
LSUC:#22213V

Per: Joanne R. Fox  
Tel: (416) 973-8859  
LSUC:#342730

Fax: (416) 973-5004  
File: ORO 2 - 475543

Solicitors for the Defendants



- 11 -

**TO:** GOODMAN AND CARR  
Barristers and Solicitors  
200 King Street West  
Suite 2300  
Toronto, Ontario  
M5H 3W5

Joel Goldenberg  
Katherine McEachern

Tel: (416) 595-2300  
Fax: (416) 595-0567

Solicitors for the Plaintiff

BACKSHEET  
(Form 4C under the Rules)

Cour

**CONTROL FIRE SYSTEMS LIMITED**

**and**

**Plaintiff**

(Short title of proceeding)

**SUPERIOR C**  
**Proceeding**  
**TO**

**STATEMENT C**  
**DEFENDANTS AND**  
**ATTORNEY GE**  
(Form

DYE & DURHAM CO

Paul J. Evraire, Q.C.  
DEPARTMENT OF JUSTICE  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Per: Gina M. Scott  
Tel: (416) 954-8

Per: Joanne R.  
Tel: (416) 973-6

Fax: (416) 973-5  
File: ORO 2 - 4

Solicitors for the Defendant

/kt

003220

**Court File No. 00-CV-201711CM**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**CONTROL FIRE SYSTEMS LIMITED**

**Plaintiff**

**and**

**MICHAEL BELL and  
THE ATTORNEY GENERAL OF CANADA**

**Defendants**

**NOTICE OF DEFENCE**

On Wednesday, August 8, 2001, the Defendants served the Statement of Defence of the Defendants and Counterclaim of the Attorney General of Canada, along with the Notice of Defence herein.

August 8, 2001

Paul J. Evraire, Q.C.  
DEPARTMENT OF JUSTICE  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Per: Gina M. Scarcella  
Tel: (416) 954-8111  
LSUC: #22213V

Per: Joanne R. Fox  
Tel: (416) 973-8859  
LSUC: #342730

Fax: (416) 973-5004  
File: ORO 2 – 475543

Solicitors for the Defendants

- 2 -

**TO:** GOODMAN AND CARR  
Barristers and Solicitors  
200 King Street West  
Suite 2300  
Toronto, Ontario  
M5H 3W5

Joel Goldenberg  
Katherine McEachern

Tel: (416) 595-2300  
Fax: (416) 595-0567

Solicitors for the Plaintiff

**CONTROL FIRE SYSTEMS LIMITED**

and

**Cour**

**Plaintiff**

(Short title of proceeding)

**SUPERIOR C**  
Proceeding  
TO

**NOTICE C**  
(Form 4)

DYE & DURHAM CO

Paul J. Evraire, Q.C.  
DEPARTMENT OF JU  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Per: Gina M. Sca  
Tel: (416) 954-8

Per: Joanne R. F  
Tel: (416) 973-8

Fax: (416) 973-5  
File: ORO 2 - 475

Solicitors for the Defence



JUL 26 '01 16:39 FR 0

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0 TO 18199539110 P.01/15Department of Justice  
CanadaMinistère de la Justice  
Canada

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SEND TO / ENVOYER À		FROM / DE	
Name / Nom: Joseph Keller Counsel		Name / Nom: Joanne R. Fox Counsel, Regulatory Section	
Address / Adresse: ENVIRONMENT CANADA Place Vincent-Massey 6th Floor 351 St. Joseph Boulevard Hull, Quebec K1A 0H3		Address / Adresse: DEPARTMENT OF JUSTICE The Exchange Tower 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6	
Fax # / No du télécopieur: (819) 953-9110	Tel. No. / No du Tél: (819) 953-1385	Fax # / No du télécopieur: (416) 973-5004	Tel. No. / No du Tél: (416) 973-8859
Comments / Commentaires: RE: Control Fire Systems Limited v. Bell et al. Court File No. 00-CV-20711CM Our File No. ORO #2-475543 Please see attached.			
TRANSMISSION			
Number of Pages / Nombre de page:	Date / La date:	Time / Heure:	
15	July 26, 2001		
SECURITY INSTRUCTIONS / INSTRUCTIONS SÉCURITÉ			
Unclassified documents only VIA clear transmission. Protected information permitted within Justice secure FAX network. Documents non cotés à transmettre sans protection. Renseignements protégés par le réseau des télécopieurs protégés de la Justice. Protected document / Document protégés? <input type="checkbox"/> Yes / Oui <input checked="" type="checkbox"/> No / Non			

## NOTICE:

This message is intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you have received this communication in error, please notify us immediately by telephone. Thank you.

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In the event of transmission problems, kindly contact / Si cette liaison n'est pas claire, communiquer avec:

Name / Nom: Kathy at / au: (416) 973-7477



Department of Justice  
Canada

Ministère de la Justice  
Canada

Ontario Regional Office  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Bureau régional de l'Ontario  
la tour exchange  
130 rue King ouest  
Pièce 3400, CP 36  
Toronto (Ontario)  
M5X 1K6

Tel: (416) 973-8859  
Fax: (416) 973-5004  
Internet: joanne.fox@justice.gc.ca

July 26, 2001

**VIA FAX (819) 953-9110**

Mr. Joseph Keller  
ENVIRONMENT CANADA  
Place Vincent-Massey  
6th Floor  
351 St. Joseph Boulevard  
Hull, Quebec  
K1A 0H3

Dear Mr. Keller:

**RE: CONTROL FIRE SYSTEMS LIMITED v. BELL et al.**  
**Court File No. 00-CV-20711CM**  
**Your File No. 990287**  
**Our File No. ORO #2-475543**

Yours very truly,

Joanne R. Fox  
Counsel, Regulatory Section  
Ontario Regional Office

s.19(1)

s.23

JRF/kt  
Encl.

Canada

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0 TO 18199539110 P.03/15

- 2 -

cc. John Meaney  
Dave Pascoe  
Michael Bell



**Page 3227**  
**is not relevant**  
**est non pertinente**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**CONTROL FIRE SYSTEMS LIMITED**

**Plaintiff**

- and -

**MICHAEL BELL and ENVIRONMENT CANADA**

**Defendants**

---

**CASE MANAGEMENT MOTION FORM**

---

**JURISDICTION**

☐ Case Management Judge

☒ Case Management Master

**THIS FORM FILLED BY** (Check appropriate boxes to identify the party filing this form as a moving/responding party on this motion AND to identify this party as plaintiff, defendant, etc. in the action.)

☐ Moving Party

☒ Plaintiff/Petitioner/Applicant

Control Fire Systems Limited

☐ Responding Party

☐ Defendant/Respondent name

☐ Other-Specify kind of party and name

---

**MOTION MADE**

☒ On consent of all parties

☐ On notice to all parties and unopposed

☐ Without notice

☐ On notice to all parties and expected to be opposed

Notice of this motion was served on:

by means of:

---

**METHOD OF HEARING REQUESTED**

☐ By attendance

☒ In writing only, no attendance

☐ By fax

☐ By telephone conference under rule 1.08

☐ By video conference under rule 1.08



JUL 26 2001 3:24 PM FR GOODMAN AND CARR LLP295 0567 TO 5551979416973500 P.04

JUL-26-01 10:21AM FROM-CASE MANAGEMENT, MASTERS  
or for telephone or video conference:

DATE:

TIME:

PLACE:

**ORDER SOUGHT BY THIS PARTY** (*Responding party is presumed to request dismissal of motion and costs.*)

- ☒ Extension of time to serve and file Statement of Defence - 20 days following service of Amended Statement of Claim
- ☐ Serve claim/application ☐ File or deliver defence ☐ Complete discoveries ☐ Other
- ☐ Assignment of the proceeding (and related proceedings, if applicable) to judge/s for Case Management
- ☒ Other Relief - be specific: To Amend Statement of Claim in form attached

**MATERIAL RELIED ON BY THIS PARTY**

- ☒ This form ☒ Pleadings ☐ Affidavits - Specify ☐ Transcript - Specify ☒ Other - Specify
- Consent of Defendant Attorney General of Canada

**GROUND(S) IN SUPPORT OF/IN OPPOSITION TO MOTION (INCLUDING RULE AND STATUTORY PROVISIONS RELIED ON)**

1. The Plaintiff has brought an action against the Federal Department of the Environment.
2. The original Statement of Claim among other things, failed to name the Attorney General for Canada as the appropriate Defendant, and named "Environment Canada" in error.
3. The draft Amended Statement of Claim has been reviewed by counsel for the Attorney General of Canada, and counsel has consented to the amendment.
4. As the claim is being amended, counsel for the Attorney General requires 20 days from the delivery of the Amended Statement of Claim to deliver a Statement of Defence.

**CERTIFICATION**

I certify that the above information is correct, to the best of my knowledge.  
Signature of solicitor (If no lawyer, party must sign)

Date: July 18, 2001

**THIS PARTY'S LAWYER** (If no lawyer, give party's address for service, telephone and fax number.)

Name and Firm Katherine McEachern, Goodman and Carr LLP  
Address Suite 2300  
200 King Street West  
Toronto ON M5H 3W5

Telephone 416-595-2300

Facsimile 416-595-0567

Solicitor for the:

**THIS PARTY'S LAWYER** (If no lawyer, give party's address for service, telephone and fax number.)

Name and Firm

Address

Telephone

Facsimile

Solicitor for the:

**OTHER LAWYER** (If no lawyer, give other party's address for service, telephone and fax number.)

Name and Firm Joanne Fox, Department of Justice  
Address Ontario Regional Office, The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto, ON M5X 1K6

Telephone 416-973-8859

Facsimile 416-973-5006

Solicitor for the:

**OTHER LAWYER** (If no lawyer, give other party's address for service, telephone and fax number.)

Name and Firm

Address

Telephone

Facsimile

Solicitor for the:

JUL 26 '01 16:41 FR 0

JUL 26 2001 3:25 PM FR GOODMAN AND CARR LLP235 0567 TO 5551979416973500 P.05

JUL-26-01 10:21AM

FROM-CASE MANAGEMENT,MASTERS

MANAGEMENT JUDGE/MASTER

☒ order to go as asked  
☐ order refused

☐ adjourned to  
☐ order to go as follows:

Hearing Method:

*in writing*

Hearing duration:

*5*

min.

Heard in

☐ courtroom

☒ office

☐ Successful party MUST prepare formal order for signature

☐ No copy of disposition to be sent to parties

☒ Other directions - specify

*Copy of this Order to be served with  
Amended Statement of Claim.*

*July 26/01*

Date:

Judge's / Master's Name

*M. Kelly*

Judge's / Master's Signature

Master Michael Kelly

00-CV-201711CM

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CONTROL FIRE SYSTEMS LIMITED

PLAINTIFF

and

MICHAEL BELL and the ATTORNEY GENERAL OF CANADA

DEFENDANTS

**AMENDED STATEMENT OF CLAIM**  
(Notice of Action issued November 30, 2000)

1. THE PLAINTIFFS CLAIMS:

- (a) general damages in the sum of \$700,000.00 for the negligent and wrongful seizure, destruction, and conversion of raw materials belonging to the Plaintiff;
- (b) special damages in the sum of \$600,000.00 for the negligent and wrongful seizure, destruction, and conversion of raw materials belonging to the Plaintiff;
- (c) punitive damages in the sum of \$200,000.00;
- (d) prejudgment and postjudgment interest pursuant to the *Courts of Justice Act*;
- (e) its costs of this action on a solicitor and client scale; and
- (f) such further and other relief as this Court may permit.

## Parties

2. The Plaintiff, Control Fire Systems Limited ("CFS"), is an Ontario incorporated company which carries on business worldwide as a supplier of fire suppression products. CFS has a warehouse facility in Niagara Falls, New York.

3. The Defendant, Attorney General of Canada is the representative of the Federal Crown. The Federal Crown, on behalf of the Minister of the Environment for the Government of Canada, is responsible for the administration and enforcement of the Canadian Environmental Protection Act and carries out this function through the Department of the Environment. The Department of the Environment uses the trade name "Environment Canada". ("EC"). EC has various offices including a head office in Ottawa, Ontario ("EC Head Office") and an Ontario Regional Office in Toronto, Ontario ("EC Regional").

4. The Defendant, Michael Bell ("Bell"), is an individual employed by the Federal Crown pursuant to the Public Service Employment Act, as an employee of EC and who has at all times acted within the scope of his employment and under the control and authority of EC.

5. Pursuant to sections 3 and 10 of the Crown Liability and Proceeding Act, the Federal Crown is vicariously liable in tort for the acts and omissions of its employees and servants (in this case, those employed at and for EC at both EC Head Office and EC Regional), as described below herein.

### Facts

6. In the course of its business, CFS acquires raw materials for the production of fire suppression products.

7. One of the raw materials CFS uses is used Halon 1301 ("Halon"), a gas utilized in the production of fire suppression products. Halon is also a known ozone destroyer and contributor to global warming if released into the atmosphere.

8. On February 12, 1999, CFS Inc. petitioned the United States Environmental Protection Agency ("USEPA") for the import of a shipment (the "Shipment") of Halon from Pakistan. The USEPA thereafter agreed to the importation of the Shipment into the United States.

9. The Shipment arrived in due course by ship in Halifax, Nova Scotia, for bonded transshipment through Canada by rail to CFS Inc.'s warehouse facility in Niagara Falls, New York.

10. Bell and EC Regional intercepted the Shipment at the Brampton, Ontario Intermodal Yard of Canadian National Railways on or about May 14, 1999. Bell and EC Regional then seized the Shipment on May 21, 1999 on the basis that the Shipment had not cleared Canada Customs and did not have proper import and export permits and / or other regulatory notices (collectively "Permits") notwithstanding the advice of CFS to Bell and EC Regional that, in the experience of CFS, Permits

had never previously been required by EC Head Office for bonded transshipments. EC Regional was similarly advised by EC Head Office that Permits were not required for bonded transshipments.

11. Such Shipment was never, in fact, released to CFS from seizure and never arrived at its intended destination of Niagara Falls, New York.

12. Following the seizure, CFS raised serious environmental concerns, both verbally with Bell and EC Regional, and in writing with EC Head Office. CFS notified EC Head Office on or about July 8, 1999 that if EC Regional allowed the seized Shipment to remain in a metal cargo container in the direct sunlight in hot summer conditions, the cargo container would become like a "functional oven". CFS expressly warned EC Head Office that, with such a predictable rise in summer temperatures, the cylinders could potentially vent all of the Halon and cause damage to the atmosphere. CFS requested the assistance of EC Head Office in returning the Shipment to CFS to prevent further damage to the environment.

13. Notwithstanding these express warning and evident danger, EC Regional continued to hold and store the Shipment in a reckless and negligent fashion through until August 1, 2000.

14. CFS continued to seek the return of the shipment but, against the express wishes of CFS, EC Regional sold the shipment on or about August 1, 2000. At the time of sale, EC Regional elected to weigh the remaining Halon in the Shipment and, as CFS had warned, several thousand pounds of Halon had been vented into the atmosphere following the seizure by EC Regional.



15. EC Regional then sold the remaining Halon for substantially less than market value, causing CFS resulting losses.

#### Liability

16. Bell and EC Regional acted in a high-handed manner in seizing the Shipment on May 21, 1999 and retaining the Shipment up until August 1, 2000 notwithstanding the advice of officials in EC Head Office that the shipment was not being imported into Canada. Bell and EC Regional knew or ought to have known that bonded transshipments did not require Permits and should not have been seized.

17. As a result of this seizure, CFS was forced to breach previously agreed to obligations to third party contractors causing CFS resulting damages.

18. Furthermore, Bell and EC Regional were negligent between May 21, 1999 up to August 1, 2000 in ignoring the CFS's warnings about the critical necessity of safe storage of the Shipment. Such negligence resulted in permitting several thousand pounds of Halon, a known ozone depleting gas, venting into the atmosphere as CFS had warned. Bell and EC knew, or ought to have known that storing the shipment in a reckless and negligent manner could allow this highly dangerous substance to escape. The Federal Crown is vicariously liable for this negligence of the servants and employees of EC.

19. As a result of this negligence CFS has suffered damages from the loss of a valuable raw material.

20. Bell and EC Regional also negligently converted the remaining Halon from the seized Shipment by selling same to a third party against the repeated objections of CFS. EC Regional and Bell sold the remaining Halon at a price substantially less than market value causing CFS resulting losses. The Federal Crown is vicariously liable for these negligent acts of the servants and employees of EC.

21. The Plaintiff proposes that this action be tried at Toronto.

Date: May 10, 2001

**GOODMAN AND CARR LLP**

Barristers and Solicitors

200 King Street West

Suite 2300

Toronto ON M5H 3W5

**Joel Goldenberg**

**Katherine McEachern**

Tel.: (416) 595-2300

Fax: (416) 595-0567

**Solicitors for the Plaintiff**

JUL 26 '01 16:42 FR 0

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JUL 26 2001 3:25 PM FR GOODMAN AND CARR LLP295 0567 TO 5551979416973500 P.12

TO: Michael Bell  
c/o Environment Canada  
4905 Dufferin Street  
Downsview ON M3H 5T4

The Attorney General of Canada  
c/o The Department of Justice of Canada  
Toronto Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto ON M5X 1K6

**CONTROL FIRE SYSTEMS LIMITED**

and

**Plaintiff**

**SUPERIOR COURT**

**Proceeding commenced**

**AMENDED STATEMENT**

**GOODMAN**  
Barristers and Solicitors  
Suite 2300  
200 King Street West  
Toronto, Ontario M5X 1C3

**Joel Golder**  
**Katherine I.**  
Tel: 416/591-1111  
Fax: 416/591-1112

**Solicitors for the Defendant**

\*\* TOTAL PAGE 13 \*\*

\*\* TOTAL PAGE 13 \*\*

**Pages 3239 to / à 3261**  
**are not relevant**  
**sont non pertinentes**

Court File No. 00-CV-201711CM

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**CONTROL FIRE SYSTEMS LIMITED**

Plaintiff(s)

**AND**

**MICHAEL BELL and ENVIRONMENT CANADA**

Defendant(s)

**NOTICE OF ACTION**

**TO THE DEFENDANT**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the statement of claim served with this notice of action.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this notice of action is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$500.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$100.00 for costs and have the costs assessed by the court.

Date: 11/30/2000

Address of Court Office:  
393 University Avenue  
Toronto, Ontario  
M5G 1E6

To: MICHAEL BELL  
c/o Environment Canada  
4905 Dufferin Street  
Downsview, Ontario  
M3H 5T4

ENVIRONMENT CANADA  
c/o The Attorney General of Canada  
c/o The Department of Justice of Canada  
Toronto Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

## CLAIM

1. The Plaintiffs claim is as follows:

- (a) for the damages caused by the negligence of the Defendants from May 21, 1999 up to August 1, 2000 in ignoring warnings from the Plaintiff about the safe storage of Halon 1301 an ozone depleting substance, in failing to store the Halon 1301 in a safe manner, and in permitting a quantity of the Halon 1301 to escape into the atmosphere;
- (b) for the damages caused by the Defendants' negligence from May 21, 1999 up to August 1, 2000 in seizing and retaining a quantity of Halon 1301 belonging to the Plaintiff on the basis of an alleged importing into Canada, notwithstanding the advice of officials in Environment Canada's Ottawa office, that the shipment was not being imported into Canada;
- (c) for the damages caused by the Defendants by their unlawful sale and conversion of the balance of the Halon 1301 on August 1, 2000 at a price substantially below the amount necessary to replace the total volume of Halon 1301;
- (d) for the further consequential damages arising from the unlawful seizure and retention of the Halon 1301, and the loss of Halon 1301 into the atmosphere from May 21, 1999 up to the date of the issuance of this Notice of Action.



MAY.11.2001 1:10PM  
AY 11 01 10:52 FR U

Q TO 9416735 NO 2003

Date: November 30, 2000

**GOODMAN AND CARR LLP**  
Barristers and Solicitors  
200 King Street West  
Suite 2300  
Toronto ON M5H 3W5

**Joel Goldenberg**  
**Jonathan Eades**  
Tel.: (416) 595-2300  
Fax: (416) 595-0567

Solicitors for the Plaintiff

00-CV-201711CM

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**CONTROL FIRE SYSTEMS LIMITED**

**PLAINTIFF**

**and**

**MICHAEL BELL and ENVIRONMENT CANADA**

**DEFENDANTS**

**STATEMENT OF CLAIM**

(Notice of Action issued November 30, 2000)

**1. THE PLAINTIFFS CLAIMS:**

- (a) general damages in the sum of \$700,000.00 for the negligent and wrongful seizure, destruction, and conversion of raw materials belonging to the Plaintiff;
- (b) special damages in the sum of \$600,000.00 for the negligent and wrongful seizure, destruction, and conversion of raw materials belonging to the Plaintiff;
- (c) punitive damages in the sum of \$200,000.00;
- (d) prejudgment and postjudgment interest pursuant to the *Courts of Justice Act*;
- (e) its costs of this action on a solicitor and client scale; and
- (f) such further and other relief as this Court may permit.

2. The Plaintiff, Control Fire Systems Limited ("CFS"), is an Ontario incorporated company which carries on business worldwide as a supplier of fire suppression products. CFS has a warehouse facility in Niagara Falls, New York.

3. The Defendant, Environment Canada ("EC") is an agency of the Federal Government of Canada. EC has various offices including a head office in Ottawa, Ontario ("EC Head Office") and an Ontario Regional Office in Toronto, Ontario ("EC Regional").

4. The Defendant, Mike Bell ("Bell"), is an individual who provides services to EC Regional and who has purported to act under the control and authority of EC Regional.

5. In the course of its business, CFS acquires raw materials for the production of fire suppression products.

6. One of the raw materials CFS uses is used Halon 1301 ("Halon"), a gas utilized in the production of fire suppression products. Halon is also a known ozone destroyer and contributor to global warming if released into the atmosphere.

7. On February 12, 1999, CFS Inc. petitioned the United States Environmental Protection Agency ("USEPA") for the import of a shipment (the "Shipment") of Halon from Pakistan. The USEPA thereafter agreed to the importation of the Shipment into the United States.

8. The Shipment arrived in due course by ship in Halifax, Nova Scotia, for bonded transshipment through Canada by rail to CFS Inc.'s warehouse facility in Niagara Falls, New York.

9. Bell and EC Regional intercepted the Shipment at the Brampton, Ontario Intermodal Yard of Canadian National Railways on or about May 14, 1999. Bell and EC Regional then seized the Shipment on May 21, 1999 on the basis that the Shipment had not cleared Canada Customs and did not have proper import and export permits and / or other regulatory notices (collectively "Permits") notwithstanding the advice of CFS to Bell and EC Regional that, in the experience of CFS, Permits had never previously been required by EC Head Office for bonded transshipments. EC Regional was similarly advised by EC Head Office that Permits were not required for bonded transshipments.

10. Such Shipment was never, in fact, released to CFS from seizure and never arrived at its intended destination of Niagara Falls, New York.

11. Following the seizure, CFS raised serious environmental concerns, both verbally with Bell and EC Regional, and in writing with EC Head Office. CFS notified EC Head Office on or about July 8, 1999 that if EC Regional allowed the seized Shipment to remain in a metal cargo container in the direct sunlight in hot summer conditions, the cargo container would become like a "functional

oven". CFS expressly warned EC Head Office that, with such a predictable rise in summer temperatures, the cylinders could potentially vent all of the Halon and cause damage to the atmosphere. CFS requested the assistance of EC Head Office in returning the Shipment to CFS to prevent further damage to the environment.

12. Notwithstanding these express warning and evident danger, EC Regional continued to hold and store the Shipment in a reckless and negligent fashion through until August 1, 2000.

13. CFS continued to seek the return of the shipment but, against the express wishes of CFS, EC Regional sold the shipment on or about August 1, 2000. At the time of sale, EC Regional elected to weigh the remaining Halon in the Shipment and, as CFS had warned, several thousand pounds of Halon had been vented into the atmosphere following the seizure by EC Regional.

14. EC Regional then sold the remaining Halon for substantially less than market value, causing CFS resulting losses.

### Liability

15. Bell and EC Regional acted in a high-handed manner in seizing the Shipment on May 21, 1999 and retaining the Shipment up until August 1, 2000 notwithstanding the advice of officials in EC Head Office that the shipment was not being imported into Canada. Bell and EC Regional knew or ought to have known that bonded transshipments did not require Permits and should not have been seized.

s.23

16. As a result of this seizure, CFS was forced to breach previously agreed to obligations to third party contractors causing CFS resulting damages.

17. Furthermore, Bell and EC Regional were negligent between May 21, 1999 up to August 1, 2000 in ignoring the CFS's warnings about the critical necessity of safe storage of the Shipment. Such negligence resulted in permitting several thousand pounds of Halon, a known ozone depleting gas, venting into the atmosphere as CFS had warned, Bell and EC knew, or ought to have known that storing the shipment in a reckless and negligent manner could allow this highly dangerous substance to escape.

18. As a result of this negligence CFS has suffered damages from the loss of a valuable raw material.

19. Bell and EC Regional also negligently converted the remaining Halon from the seized Shipment by selling same to a third party against the repeated objections of CFS. EC Regional and Bell sold the remaining Halon at a price substantially less than market value causing CFS resulting losses.

20. The Plaintiff proposes that this action be tried at Toronto.

Date: May 10, 2001

**GOODMAN AND CARR LLP**

Barristers and Solicitors

200 King Street West

Suite 2300

Toronto ON M5H 3W5

**Joel Goldenberg**

**Jonathan Eades**

Tel.: (416) 595-2300

Fax: (416) 595-0567

Solicitors for the Plaintiff

TO: Michael Bell  
c/o Environment Canada  
4905 Dufferin Street  
Downsview ON M3H 5T4

Environment Canada  
c/o The Attorney General of Canada  
c/o The Department of Justice of Canada  
Toronto Regional Office  
130 King Street West  
Suite 3400, Box 36  
Toronto ON M5X 1K6

**CONTROL FIRE SYSTEMS LIMITED - and - BELL et al.**

Plaintiff

Com

**SUPERIOR COURT**

Proceeding comm

**STATEMENT**

**GOODMAN AND**  
Barristers and Solicitors  
200 King Street  
Suite 2300  
Toronto ON M5G 1C1

**Joel Goldenberg**  
**Jonathan Eades**  
Tel.: (416) 593-1111  
Fax: (416) 593-1111

Solicitors for the

Fax number, if  
document is to

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**MAY 10 2001**  
DEPARTMENT OF JUSTICE  
TORONTO



**Pages 3273 to / à 3281**  
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are withheld pursuant to section  
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**23**

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**23**

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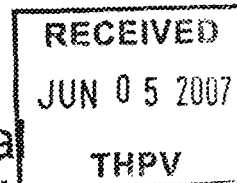
**Pages 3422 to / à 3429  
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## Environmental Appeal Board



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FROM: Alan Andison

TELEPHONE: 250.387.3464

FACSIMILE: 250.356.9923

RE: **Environmental Management Act Appeal – British Columbia Hydro and Power  
Authority v. June 12, 2006 Amended Approval in Principle for Site 0354 -  
Rock Bay Remediation Project**

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June 5, 2007

FILE: 2006-EMA-008

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**RE: *Environmental Management Act Appeal – British Columbia Hydro and Power Authority v. June 12, 2006 Amended Approval in Principle for Site 0354 – Rock Bay Remediation Project***

Attached is the decision of the Environmental Appeal Board.

Yours truly

Alan Andison  
Chair

Att.

cc Minister of Environment





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## Environmental Appeal Board

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### APPEAL NO. 2006-EMA-008(a)

In the matter of an appeal under the *Environmental Management Act*, S.B.C. 2003, c. 53.

<b>BETWEEN:</b>	BC Hydro and Power Authority	<b>APPELLANT</b>
<b>AND:</b>	Director, <i>Environmental Management Act</i>	<b>RESPONDENT</b>
<b>AND:</b>	Ocean Construction Supplies Ltd. 427958 B.C. Ltd. (dba the Super Save Group of Companies)	<b>THIRD PARTIES</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Alan Andison, Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on November 30, 2006	
<b>APPEARING:</b>	For the Appellant: David G. Perry, Counsel For the Respondent: Dennis Doyle, Counsel For the Third Party: 427958 B.C. Ltd.: James R. Kitsul, Counsel Ocean Construction Supplies Ltd.: Clifford G. Proudfoot, Counsel Sara J. Gregory, Counsel	

### PRELIMINARY ISSUE OF JURISDICTION

The BC Hydro and Power Authority ("BC Hydro") appealed the June 12, 2006 decision of Mike Macfarlane on behalf of the Director, *Environmental Management Act* (the "Director"), Ministry of Environment (the "Ministry"), to issue an amended approval in principle (the "Amended AIP"). The contentious amendments, conditions 2 and 3 in Schedule "B" of the Amended AIP, require BC Hydro to prepare a remediation plan and advise how it will remediate contamination that has migrated from its properties to adjacent parcels of land owned by 427958 BC Ltd., doing business as the Super Save Group of Companies ("Super Save"), and Ocean Construction Supplies Ltd. ("Ocean Construction").

Although it filed an appeal with the Board, BC Hydro states that the Board has no jurisdiction over the appeal because the issuance of the Amended AIP is not a "decision" as defined in section 99 of the *Environmental Management Act* (the "Act"). It explains that it is filing the appeal in order to protect its rights in the event that it is wrong, and the Board does have jurisdiction to hear the appeal.

Although the question of whether an AIP (or an amendment thereof) is an appealable decision has been raised in previous appeals, this question has never been decided by the Board with the benefit of full argument. Therefore, prior to accepting BC Hydro's appeal as filed, the Board must determine whether it has the jurisdiction to do so. The Board invited submissions from all of the parties on this issue.

This preliminary matter was heard by way of written submissions.

## BACKGROUND

Since 1996, BC Hydro and Transport Canada have worked together to develop a remediation strategy for a contaminated site comprised of three parcels of land which are owned by BC Hydro (the "BC Hydro Properties"). The BC Hydro Properties are located in the City of Victoria at or near Rock Bay, and are adjacent to property owned by the federal Crown and administered by Transport Canada.

The BC Hydro Properties, as well as much of the sediment within Rock Bay and portions of the Transport Canada property, are (or were, prior to remediation) contaminated with coal tar and coal tar components, as well as other materials such as ammonia liquors, cyanide, hydrocarbon fuels, oxide box wastes, wood waste, and metals. The contamination is largely a result of historical commercial and industrial activities in and around Rock Bay, including the operation of a coal gas manufacturing plant from 1862 to the late 1940's by a predecessor of BC Hydro.

~~Transport Canada's property is federal land~~, and is not subject to the Province's contaminated sites legislation. However, it entered into an agreement with BC Hydro to carry out remediation jointly, ~~and to meet provincial remediation standards~~. Their joint efforts ultimately resulted in a 2003 remedial action plan. This plan involved the excavation, disposal and replacement of all soil with contaminant concentrations exceeding the commercial and industrial land use standards set out in the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "CSR"), and the excavation/dredging and disposal of all sediments in the bay with contaminant concentrations exceeding the standards set out in the *Special Waste Regulation*, B.C. Reg. 63/88 (now called the *Hazardous Waste Regulation*). This plan became the basis for BC Hydro/~~Transport Canada's request~~ to the Ministry for ~~an approval in principle~~, which would allow them to begin remediation in accordance with the plan.

Approvals in principle are authorized under the Act by section 53(1), as follows:

53 (1) On application by a responsible person, a director, in accordance with the regulations, may issue an approval in principle stating that a remediation plan for a contaminated site

(a) has been reviewed by the director,

(b) has been approved by the director, and

(c) may be implemented in accordance with conditions specified by the director.

Additional provisions relating to approvals in principle are set out in the *CSR*. Specifically, section 47 states:

**Approval in principle**

**47** (1) A responsible person may apply for an approval in principle of a proposed remediation plan under section 53 (1) of the Act by submitting a request in writing to a director and attaching or ensuring the director already has

(a) copies of any preliminary and detailed site investigation reports prepared for the site,

(b) copies of any other site investigation and assessment reports prepared for the site, and

(c) the proposed remediation plan for which the approval in principle is sought.

...

(2) Before issuing an approval in principle under section 53 (1) of the Act, a director may request any additional information and reports the director considers necessary to assess whether the standards, criteria or conditions prescribed in section 17, 18 or 18.1 of this regulation are likely to be complied with when the proposed remediation plan has been implemented.

(3) When issuing an approval in principle under section 53 (1) of the Act, a director may specify conditions for any or all of the following:

(a) implementing some or all of the activities described in a proposed remediation plan;

(b) risk assessment and risk management measures which may be required for part or all of a site for any reason;

(c) preparation, registration, and criteria for final discharge of a covenant under section 219 of the *Land Title Act* as may be required under section 48;

(d) carrying out confirmatory sampling and analysis after treatment or removal of contamination;

(e) testing and monitoring to evaluate the quality and performance of any remediation measures;

(f) any financial security required by the director in accordance with section 48;

(g) any actions which the director could require in a permit under section 14 of the Act.

Thus, as the Board has observed in a previous case, the Director's role in the approval in principle process is to review the remediation proposal and decide whether it should be implemented, bearing in mind that the proposal should be consistent with the purposes of Part 4 of the Act (dealing with contaminated site remediation), including the protection of the environment and human health, as well as the expeditious remediation of contaminated sites: *427958 B.C. Ltd. (dba the Super Save Group of Companies) v. Deputy Director of Waste Management*, (Appeal No. 2004-WAS-007(a), November 2, 2004) (unreported).

After reviewing the 2003 remedial action plan, the Deputy Director of Waste Management issued the original approval in principle to BC Hydro on April 30, 2004 (the "AIP"). The AIP authorized BC Hydro to implement scenario 4 of the 2003 remedial action plan.

BC Hydro submits that, to date, it and Transport Canada have spent approximately \$35 million towards remediation of the site under this AIP.

The preliminary issue now before this Panel relates to the jurisdiction of the Board over BC Hydro's appeal of the Amended AIP, which addresses contamination that has migrated off the properties covered by the AIP; specifically, the properties of Super Save and Ocean Construction.

Super Save owns property adjacent to the BC Hydro Properties and has operated a gas station on that property for several years. Ocean Construction also owns property on or near Rock Bay, adjacent to the BC Hydro Properties. Investigations of both neighbouring properties have indicated that they are contaminated. Super Save and Ocean Construction have been asking the Ministry to investigate the migration of contamination to their properties, and have sought to have their properties included in BC Hydro and Transport Canada's remediation plan for some time. This finally occurred after studies were conducted that confirmed the contamination and its links to the BC Hydro Properties and the Director amended the AIP to add conditions 2 and 3. This came about as follows.

After a new 2004 remediation plan was prepared for BC Hydro and Transport Canada by Morrow Environmental Consultants Inc., BC Hydro consented to an amendment of the AIP. That amendment required BC Hydro to submit to the Director further information regarding a fourth parcel of land owned by BC Hydro. Specifically, it required:

A detailed technical characterization and summary report of soil and groundwater quality in area 1 (PID 009-742-565)... that existed immediately prior to and during site remediation activities. In addition

to any other information presented, this characterization shall specifically address the issue of migration of contaminants to and/or from the properties adjacent to this area.

[emphasis added]

A number of reports were prepared and submitted to the Ministry on behalf of Ocean Construction, Super Save and BC Hydro.

All of those reports are discussed in a Ministry report titled, *Technical Review, Approval in Principle Amendment*, dated June 9, 2006 (the "Technical Review"), prepared by Julia Brooke, P. Eng., Senior Contaminated Sites Officer with the Ministry. One of the report's conclusions is that the area of contamination associated with the former manufactured gas plant at Rock Bay extends beyond the property boundaries identified in the AIP – that "indicators strongly suggesting that neighbouring properties in locations to the north and west of Area 1, including the Super Save and Ocean Construction (Lehigh) properties, contain contamination originating at the fmgp [former manufactured gas plant] at Rock Bay."

The Technical Report also discussed the Director's authority to amend the AIP. There is no express authority for the Director to amend an approval in principle in either section 53 of the Act or section 47 of the CSR. However, the Technical Report points out that the AIP is a "permit" under section 47(6) of the CSR. Section 47(6) states:

- 47** (6) An approval in principle for a remediation plan issued under this section is a permit within the meaning of the Act for any facility which
- (a) is located on the site to which the remediation plan applies,
  - (b) is specifically identified in the remediation plan, and
  - (c) is used to manage any contamination which is located on the site for which the remediation plan applies.

[emphasis added]

Since the Director may amend a permit on his own initiative under section 16(1) of the Act, the Technical Report states that he can amend the AIP. Section 16(1) of the Act states:

#### **Amendment of permits and approvals**

- 16** (1) A director may, subject to section 14 (3) [permits], this section and the regulations, for the protection of the environment,
- (a) on the director's own initiative if he or she considers it necessary, or

**APPEAL NO. 2006-EMA-008(a)****Page 6**

(b) on application by a holder of a permit or an approval,  
amend the requirements of the permit or approval.

[emphasis added]

The Director issued the Amended AIP on June 12, 2006, which authorizes BC Hydro to implement remediation of certain contaminated lands in accordance with the 2004 remedial action plan. Schedule "B" of the Amended AIP contains two paragraphs that were not in the AIP as amended in November 2004. Those paragraphs state, in part, as follows:

2. A revised remediation plan, prepared by a qualified environmental consultant..., shall be submitted to the Director for approval on or before June 30, 2006. The revised remediation plan shall be inclusive of off site areas (adjacent to the original BC Hydro and Transport Canada Rock Bay Remediation Project boundaries), to include lands affected by contamination originating at and/or having migrated from the former manufactured gas plant previously located on the BC Hydro property...
3. The remediation plan prepared pursuant to clause 2 above shall clearly indicate how BC Hydro intends to undertake remedial activities in a timely manner such that the activities associated with off site contaminated areas are fully integrated with the timeline and proposed remedial activities for the presently designated Stage III area, or alternatively, how BC Hydro intends to facilitate remediation that shall be carried out in a manner to accommodate future use and development of the impacted lands.

A Ministry letter that accompanied the Amended AIP states, in part, as follows:

Please find enclosed an amended approval in principle for the lands referenced above. The approval has been amended taking into consideration *Contaminated Sites Regulation* section 47 (6) and *Environmental Management Act* section 16 (1).

...

The approval in principle is a decision that may be appealed under Part 8 of the *Environmental Management Act*.

Thus, in the Director's view, the Amended AIP was appealable to the Board.

Section 100 of the *Act* establishes the right of appeal to the Board. It states:

**100(1)** A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division...

[emphasis added]

"Decision" is defined in section 99 of the Act as follows:

**99** For the purpose of this Division, "**decision**" means

- (a) making an order,
- (b) imposing a requirement,
- (c) exercising a power except a power of delegation,
- (d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,
- (e) including a requirement or a condition in an order, permit, approval or operational certificate,
- (f) determining to impose an administrative penalty, and
- (g) determining that the terms and conditions of an agreement under section 115 (4) have not been performed.

On July 13, 2006, BC Hydro filed a Notice of Appeal regarding the Amended AIP. In its Notice of Appeal, BC Hydro submits that:

...the Amended AIP is not a "decision" as defined under the [Act] and cannot be appealed to the Environmental Appeal Board.

The present appeal is filed by BC Hydro to avoid loss of its appeal rights in the event that the issuance of the Amended AIP is subsequently held by the Environmental Appeal Board or a Court of competent jurisdiction to be a decision under the [Act].

BC Hydro also argues that the deeming of some aspects of an approval in principle to be a permit under section 47(6) of the CSR is of no force and effect, or alternatively, if section 47(6) of the CSR is valid, it should be read down such that only a "facility" mentioned in a approval in principle is subject to a permit, and in this case, no such facility is part of the Amended AIP.

Super Save and Ocean Construction submit that the Board has jurisdiction over the appeal. Super Save provided no further submissions on the issue. However, Ocean Construction argues that the Amended AIP is a decision within the meaning of section 99(b) of the Act because it is the "imposition of a requirement."

Alternatively, Ocean Construction submits that it is a decision under sections 99(d) and (e) of the Act because it is amending or imposing a requirement to an approval or a permit.

The Director took no position on the Board's jurisdiction over the appeal and ~~Transport Canada did not respond~~ to the invitation to provide submissions.

## **ISSUES**

This primary issue raised by the parties is whether the Amended AIP is a "decision" for the purposes of section 99 of the Act.

## **RELEVANT LEGISLATION**

Although most of the relevant legislation is cited in the text of this decision, it is of assistance to set out the full section in the Act that deals with approvals in principle. Section 53 provides as follows:

### **Approvals in principle and certificates of compliance**

- 53** (1) On application by a responsible person, a director, in accordance with the regulations, may issue an approval in principle stating that a remediation plan for a contaminated site
- (a) has been reviewed by the director,
  - (b) has been approved by the director, and
  - (c) may be implemented in accordance with conditions specified by the director.
- (2) For the purpose of subsection (1), if a director has issued an approval in principle with respect to a proposed remediation plan for a site, the site is considered to be a contaminated site at the time the approval in principle was issued, despite the absence of a determination under section 44 (1) [determination of contaminated sites].
- (3) A director, in accordance with the regulations, may issue a certificate of compliance with respect to remediation of a contaminated site if
- (a) the contaminated site has been remediated in accordance with
    - (i) the numerical or risk based standards prescribed for the purposes of the definition of "contaminated site",
    - (ii) any orders under this Act,
    - (iii) any remediation plan approved by the director, and



- (iv) any requirements imposed by the director,
  - (b) information about the remediation and any substances remaining on the site has been recorded in the site registry,
  - (c) a plan has been prepared for the purpose of monitoring any substances remaining on the site and works have been installed to implement the plan, if required by the director,
  - (d) any security in relation to the management of contamination, which security may include real and personal property in the amount and form and subject to the conditions specified by the director, has been provided and the requirements respecting that security prescribed in the regulations have been met, and
  - (e) the responsible person, if required by the director in prescribed circumstances or for prescribed purposes, has prepared and provided to the director proof of registration of a restrictive covenant under section 219 of the Land Title Act acceptable to the director.
- (4) For the purpose of subsection (3) if a director has issued a certificate of compliance with respect to remediation of a site, the site is considered to have been a contaminated site at the time remediation of the site began, despite the absence of a determination under section 44 (1) [determination of contaminated sites].
- (5) A director may withhold or rescind an approval in principle or a certificate of compliance if
- (a) conditions imposed on the approval or certificate are not complied with, or
  - (b) any fees payable under this Part or the regulations are outstanding.
- (6) A director may issue an approval in principle or a certificate of compliance for a part of a contaminated site.

## **DISCUSSION AND ANALYSIS**

### **Whether the Amended AIP is a "decision" for the purposes of section 99 of the Act.**

This jurisdictional issue arises because neither an approval in principle, nor an amendment to an approval in principle, are expressly included in the definition of "decision" in section 99 of the Act, and it is well established that the only decisions that may be appealed to the Board are those listed in section 99 of the Act; the definition of "decision" in the Act is a complete code for determining what matters may be appealed to the Board (e.g., *Imperial Oil Ltd. v. Ron Driedger*, 2002 BCSC 219 (hereinafter *Imperial Oil*), which approved the Board's decision in *McPhee v.*

**APPEAL NO. 2006-EMA-008(a)****Page 10**

*Deputy Director of Waste Management* (Appeal No. 98/08, December 14, 1995), [1995] BCEA No. 52 (hereinafter *McPhee*); *Beazer East Inc. v. Director of Waste Management* (Appeal Nos. 2002-WAS-016(a) and 2002-WAS-017(a), October 23, 2002)(unreported)).

If the definition of decision had included "approval in principle" and "amending an approval in principle", BC Hydro would clearly be able to appeal the Director's decision to include conditions 2 and 3 in Schedule B, and the appeal would proceed in the normal course. However, these words are not included and therefore, to be appealable, one must be able to fit this amendment into one of the other categories in the definition.

It is clear that the Ministry was of the view that the AIP was a permit, based on section 47(6) of the *CSR*. The Ministry was also of the view that the Director had jurisdiction to amend the AIP based on his power under section 16 of the *Act* to amend permits. Because amending a permit is clearly appealable under subsection 99(d), and including a requirement or a condition in a permit is appealable under subsection 99(e), according to the Ministry's analysis, the amendments at issue in this case are appealable to the Board.

In a somewhat unusual twist, the Appellant in this case, BC Hydro, disagrees. Although it filed an appeal, it argues that the Director's decision is not an appealable decision for various reasons. At the heart of its argument, BC Hydro disagrees that *all* approvals in principle are permits for the purposes of the *Act*. It submits that this is not what is intended or authorized by the wording of the section of the *CSR*. Moreover, to the extent that the section deems certain approvals in principle (for defined facilities) as permits, the section is *ultra vires* the *Act*. BC Hydro submits that on the facts, and in law, its AIP is not a permit and, therefore, the Director had neither the authority to unilaterally amend the AIP, nor the authority to impose the additional conditions.

As background to its arguments, BC Hydro states that permits and approvals in principle are entirely different statutory instruments: a permit exempts its holder from the broad prohibition in the *Act* against introducing waste into the environment, whereas an approval in principle is an agreement between a remediating party and the Ministry which sets out certain criteria for remediating a contaminated site.

BC Hydro explains that an approval in principle is just one method for remediating contaminated sites. It points out that the *Act* contemplates a variety of methods for remediation of contaminated sites, including remediation orders, voluntary remediation agreements, approvals in principle, and independent remediation. BC Hydro further explains that approvals in principle require significant investigation before remediation commences, and a director's approval of the remediation plan. It states approvals in principle are distinct from other methods of remediation because the remediating parties are not compelled to remediate, and the process allows for certificates of compliance as an incentive. It states that these certificates

are valuable because they offer proof that the Ministry is unlikely to take further regulatory steps regarding a property, and they are often required before banks will extend mortgage financing on contaminated or previously contaminated properties. BC Hydro submits that approvals in principle also provide benefits to directors in the form of administrative efficiencies.

In this case, BC Hydro and Transport Canada have voluntarily developed a remediation plan to address the contamination, sought an approval in principle for the plan (the AIP) and have spent millions of dollars on remediation to date. BC Hydro submits that remediating parties will have less incentive to pay the fees and endure the lengthy reviews associated with approvals in principle if the approval in principle can be unilaterally amended by a director, especially, as in this case, where the amendment expands the scope of the area being remediated.

BC Hydro submits that responsible persons will instead choose other remediation options such as independent remediation (under section 54 of the Act), which requires minimal reporting to the Ministry and typically proceeds without Ministry approval of the remediation plan, or a voluntary remediation agreement (under section 51 of the Act). At the end of the day, the Ministry will issue a certificate of compliance for sites remediated in accordance with any of these options (including approvals in principle), provided that the remediation meets the standards required under the Act. Alternatively, responsible persons may delay clean-up until the Ministry issues a remediation order requiring them to do so.

Turning to the wording of the legislation, BC Hydro submits that section 47(6) should not be read to deem an approval in principle, in its entirety, to be a permit. BC Hydro submits that, properly read, an approval in principle is only a permit "for any facility" that meets the criteria listed in section 47(6); specifically, facilities that are located on a contaminated site, are specifically identified in the remediation plan, and are used to manage contamination. "Facility" is defined in section 1 of the Act to include "any land or building, and any machinery, equipment, device, tank, system or other works".

BC Hydro argues that this section is intended to make it easier to remediate contaminated sites by exempting the holders of approvals in principle from the requirement to obtain a permit for certain remediating facilities. For example, in some cases, remediation will require the installation of groundwater treatment or soil treatment facilities. If such facilities introduce waste into the environment, they would normally require a permit to operate. An approval in principle that contemplates such facilities would not require an additional permit because section 47(6) deems the approval in principle itself to be a permit for the purposes of that facility.

When read in this manner, BC Hydro submits that the section is consistent with the purposes of the Act, which include encouraging the remediation of contaminated sites. It relieves the holder of an approval in principle from the "red tape" associated with applying for and paying for a permit for certain facilities, and

relieves the Ministry from the burdens of issuing additional permits when the facility is covered by an approval in principle.

On the facts of this case, BC Hydro submits that the Amended AIP does not deal with a "facility" described in section 47(6); therefore, no appeal lies to the Board. In particular, the contentious amendments require BC Hydro to develop a remediation plan, and have nothing to do with a "facility". Moreover, the amendments deal with properties that are outside of the site identified in Schedule "A" of the Amended AIP, whereas section 47(6) deals with facilities "on the site".

Finally, BC Hydro argues that there are far-reaching implications and unintended consequences if the Board interprets this section of the regulation to deem all approvals in principle to be permits for the purposes of the Act. For example, it means that section 47(6) of the CSR:

- creates appeal rights with respect to "issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend" an approval in principle (see section 99(d) of the Act);
- allows a director to amend an approval in principle on his or her own initiative; and,
- creates an offence for failing to comply with the terms of an approval in principle, with related enforcement powers including restraining orders, administrative penalties, and forced inspection of vehicles.

BC Hydro submits that this cannot be the intention and, if it is, it is contrary to the wording of the legislation, is without statutory authority, conflicts with the Act, and would be *ultra vires* the Act.

Ocean Construction submits that section 47(6) of the CSR does not conflict with the Act, because section 47(6) is not compelling something that the Act forbids, nor is it telling those to whom it applies to do inconsistent things. Rather, approvals in principle may be considered a different class of permit from permits issued under section 14 of the Act, with different rules governing them. Ocean Construction submits that many aspects of approvals in principle are analogous to permits. For example, both regulate activities in relation to the environment, and section 47(3)(g) of the CSR states that, when issuing an approval in principle, a director may specify conditions including "any actions which the director could require in a permit". Additionally, section 47(7) of the CSR exempts approvals in principle from the public notice that is normally required for permits:

- 47 (7)** In relation to an application for an approval in principle described in subsection (6), the *Public Notification Regulation* does not apply with respect to the facility, except for a hazardous waste treatment or disposal project under that regulation.

In support of those submissions, Ocean Construction cites a number of judicial decisions regarding the presumption against internal conflict in statutory interpretation, including *Friends of the Old Man River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

Ocean Construction notes that the Act defines "facility" broadly, to include "land" itself. Therefore, contrary to BC Hydro's assertion, there are, in fact, facilities (i.e., the land) on the site encompassed by the AIP that are, or will be, used to manage contamination on the site, pursuant to the terms of the AIP as amended.

Finally, Ocean Construction submits that BC Hydro's policy rationale is flawed. Ocean Construction maintains that, while the legislature may have intended to encourage the use of approvals in principle, it did not do so at the cost of ensuring comprehensive remediation by responsible persons. Moreover, Ocean Construction notes that the AIP, and its subsequent amended forms, expressly states that the Ministry reserves the right to add requirements or make amendments. Ocean Construction submits that this includes the amendments in this case, which address contamination on adjacent properties.

#### *The Panel's Findings*

Section 47(6) states that an approval in principle is a "permit within the meaning of the Act for any facility" [underlining added] that meets the criteria listed. In the Panel's view, this language indicates that an approval in principle is a permit only insofar as it applies to such facilities; namely, those that are located on a contaminated site, specifically identified in the remediation plan, and used to manage contamination. Thus, the provisions in the Act that relate to permits, including the definition of "decision" in section 99 and the power to amend permits in section 16, only apply to the aspects of an approval in principle that serve as a permit for such a facility. Consequently, the Panel finds that the purpose of section 47(6) is limited to exempting the holders of approvals in principle from the requirement under the Act to hold a permit for such a facility.

The Panel agrees with BC Hydro that there are policy reasons to limit application of the word "permit" in the section and this interpretation does not lead to an absurd result.

The Panel agrees with BC Hydro's characterization of the difference between permits and approvals in principle. They are entirely different statutory instruments. A permit exempts its holder from the broad prohibition in the Act against introducing waste into the environment – it allows someone to, in simplistic terms, "pollute". An approval in principle addresses the opposite: the clean-up of pollution. An approval in principle is essentially a director's endorsement, subject to any conditions specified by the director, of a remediation plan that has been proposed by a remediating party.

**APPEAL NO. 2006-EMA-008(a)****Page 14**

The Panel finds that the purpose of section 47(6) of the CSR is to make it easier for holders of approvals in principle to remediate its contaminated site by exempting them from the requirement to obtain a permit for certain facilities. As noted by BC Hydro, remediation of a site may require the installation of groundwater treatment or soil treatment facilities. If such facilities introduce waste into the environment, they would normally require a permit to operate. Section 47(6) allows for faster and less costly remediation because the holders of approvals in principle need not also obtain a permit for those facilities.

In addition, limiting appeals to the "permit" aspects of an approval in principle ensures that remediation is not delayed by an appeal of the entire approval in principle. The ability to appeal the "permit" aspects of an approval in principle protects the rights of those who may be aggrieved by the discharge of waste from the "facility" while not unduly delaying other aspects of the remediation process. In this sense, section 47(6) is consistent with one of the primary purposes of Part 4 of the Act: it encourages the timely remediation of contaminated sites.

Finally, the Panel notes that if section 47(6) is interpreted as deeming an approval in principle, in its entirety, to be a permit, it would lead to a number of conflicts with the Act. For example, it would effectively amend the definition of "permit" to include approvals in principle issued under section 53 of the Act. It would add approvals in principle, and all of the matters contained within them, to the list of matters in section 99 that may be appealed to the Board, despite the fact that the legislature chose not to include the phrase "approval in principle" in section 99.

In addition, this interpretation would create confusion when applying the offence provisions. Under section 120(6) of the Act, it is an offence if a permit holder "introduces waste into the environment without having complied with the requirements of the permit". However, the primary purposes of approvals in principle pertain to the remediation of contaminated sites, not the discharge of waste into the environment. It is also notable that section 120(17) of the Act lists a number of offences pertaining to contaminated sites, yet it does not mention approvals in principle. For example, under sections 120(17)(c), (f), and (h), respectively, it is an offence if a person "fails to comply with a remediation order", "fails to comply with the requirements of a director in a voluntary remediation agreement", or "fails to comply with requirements of a director... regarding independent remediation". If the legislature had intended for it to be an offence to breach any aspect of an approval in principle, it could have expressly done so in the Act.

The Panel's interpretation is also internally consistent with other sections of the CSR. In particular, it provides an explanation for section 47(3)(g) of the CSR, which authorizes a director, when issuing an approval in principle, to specify conditions including "any actions which the director could require in a permit under section 14 of the Act."

Additionally, the exemption in section 47(7) of the *CSR* of applications for approvals in principle from the public notification requirements of the *Public Notification Regulation* (which normally applies to permits) is consistent with the fact that the "permit" aspects of an approval in principle are ancillary to the primary purpose of remediation.

In summary, the Panel finds that the provisions in the *Act* that relate to permits only apply to the aspects of an approval in principle that serve as a permit for a "facility" described section 47(6). Thus, a director's powers under the *Act* in relation to permits only apply to those aspects of an approval in principle.

Turning to the facts in this case, the Panel finds that the amendments made by the Director are not concerned with a "facility" contemplated in section 47(6) of the *CSR*. It is clear to the Panel that the "facility" in question must be covered by an *existing* remediation plan. Section 47(6) states that the approval in principle issued for a remediation plan is a permit for any facility that:

- (a) is located on the site to which the remediation plan applies,
- (b) is specifically identified in the remediation plan, and
- (c) is used to manage any contamination which is located on the site for which the remediation plan applies.

[emphasis added]

Since an approval in principle is the Ministry's endorsement of what is, in essence, a type of voluntary remediation, it makes sense that it is the parties' remediation plan which is the basis for the approval, and it is a facility covered by the plan that is considered a "permit" within the meaning of the *Act*.

On the facts of this case, the contentious amendments do not apply to the contaminated site defined in the remediation plan, as approved in Schedule "A" of the AIP, as amended. Rather, the amendments would require a new or revised remediation plan to cover a new site, beyond the site which is covered by the existing remediation plan. Therefore, the Panel finds that the amendments do not amount to amending a portion of an approval in principle that serves as a "permit" for a facility described in section 47(6) of the *CSR*.

For all of these reasons, the Panel finds that the amendments in this case were not "amending a permit" within the meaning of section 99(d) of the *Act* or "including a requirement or a condition in a permit" within the meaning of section 99(e) of the *Act*. Accordingly, the Panel agrees with BC Hydro that the Amended AIP is not an amended permit, as set out in subsection 99(d) of the *Act*, and, therefore, is not an appealable decision.



At this point, it should be noted that BC Hydro also made thorough and compelling arguments on the *vires* of section 47(6) of the *CSR*. However, upon a careful review of the submissions, it does not appear that BC Hydro gave notice to the Attorney General of British Columbia as required under section 8(3) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. Although one of the lawyers working for the Ministry of Attorney General was counsel to the Director, this does not satisfy the notice requirement and the Panel was unable to consider that argument further.

Although the Panel accepts BC Hydro's position that the Director's decision is not appealable as a permit, or amended permit, Ocean Construction suggested that the Director's decision should be characterized in a different manner, thus bringing it within one of the other subsections of section 99 of the *Act*.

Ocean Construction submits that section 99 was not intended to exclude significant, conclusive actions taken by a director from the appeal process, and that the issuance of the Amended AIP is the type of action that is caught by section 99. It submits that the legislature chose to set up the Board as a specialized tribunal with jurisdiction to decide environmental appeals, and that the appeal process is designed to counterbalance the broad powers conferred on directors by giving parties an opportunity to assert their rights before a specialized tribunal as quickly as possible: *Swamy v. Tham Demolition Ltd.*, [2000] B.C.J. No. 1734 (hereinafter *Swamy*). It further submits that the legislature did not intend to limit the Board's jurisdiction to hearing appeals on a purely formal or technical basis: *Houweling Nurseries Ltd. v. Greater Vancouver (Regional District) District Director*, [2005] B.C.J. No. 1347 (hereinafter *Houweling*).

With these points in mind, Ocean Construction submits that the decision at issue should be characterized as either the imposition of a *requirement* under subsection 99(b) of the *Act*, or as the amendment of an *approval*, or the imposition of a requirement to an *approval*, under subsections 99(d) and (e) of the *Act*.

Is the Amended AIP an "approval" for the purposes of subsections 99(d) and (e) of the *Act*?

The word "approval" appears in section 99, but that word is defined in section 1(1) of the *Act* as follows:

"**approval**" means an approval under section 15 or under a regulation;

Ocean Construction maintains that the Amended AIP is an approval issued under a regulation, because it was "approved" by the Director under the provisions of the *CSR*.



The Panel finds that an approval in principle is not an "approval" for the purposes of section 99 of the Act. "Approval" is defined in section 1(1) of the Act, whereas "approval in principle" is defined in section 39 of the Act. Section 39 states:

**"approval in principle"** means an approval in principle under section 53 [approvals in principle and certificates of compliance];

Ocean Construction argues that the definition of "approval" includes approvals issued under a regulation. However, the Panel finds that approvals in principle are not issued under a regulation or under section 15 of the Act; rather, they are issued under section 53 of the Act. Although the use of the word "approval" in section 53(5) of the Act may be confusing, the Panel finds that it is used in that context to mean an "approval in principle". It is not indicative of an intention for approvals in principle, issued under Part 4 of the Act, to be an "approval" as defined in section 1(1).

Thus, the Panel concludes that the word "approval" in section 99 of the Act was not intended to include "approval in principle" and the Amended AIP is neither "amending an approval", within the meaning of section 99(d) of the Act nor "including a requirement or a condition in an approval" within the meaning of section 99(e) of the Act.

Is the Amended AIP the imposition of a "requirement" for the purposes of subsection 99(b) of the Act?

Ocean Construction argues that the word "requirement" should be given its ordinary meaning because the word is not defined in the Act. It relies upon the following dictionary definitions of "requirement", cited in the *Shorter Oxford English Dictionary*, (2<sup>nd</sup>. Ed.)(Oxford: Oxford University Press, 2002) and *The Dictionary of Canadian Law*, (3<sup>rd</sup>. Ed.)(Toronto: Thomson, 2004), respectively:

Something to be called for or demanded, a condition which must be complied with.

Any demand, direction, order subpoena or summons.

Ocean Construction further submits that the wording of section 99 as a whole provides direction as to the proper interpretation of the term "imposing a requirement". Specifically, it submits that each of the actions listed in section 99 is intended to have different meanings. Therefore, the action of "imposing a requirement" in section 99(b) must have a different meaning than the action of "including a requirement... in an order, permit, approval or operational certificate" set out in section 99(e). In other words, section 99(b) must be interpreted to include a different set of requirements than those in section 99(e). Applying that reasoning to the present case, Ocean Construction argues that Schedule "B" of the

**APPEAL NO. 2006-EMA-008(a)****Page 18**

Amended AIP imposes clear requirements, or conditions, with which BC Hydro must comply.

BC Hydro submits that Ocean Construction's interpretation of "requirement" in section 99(b) of the Act, is so broad that it would encompass virtually any action by a director, thereby making the remainder of section 99 redundant. It submits that the meaning of "requirement" must be informed by reference to specific steps that a director can take. For example, section 99(e) refers to the inclusion of a "requirement" in various instruments such as permits and orders. BC Hydro submits that the "requirements" set out in sections 14 through 16 of the Act are elements of a permit or approval. Section 16(1) states that:

A director may, subject to section 14 (3), this section and the regulations, for the protection of the environment... amend the requirements of the permit or approval.

[underlining added]

BC Hydro also identified a variety of other sections which specifically refer to a "requirement" (sections 19(1), 20(5)(b), 53(3)(a)(iv) and 54(3)(d)). Although the Act contemplates many situations where a director may impose requirements that could be appealed under section 99(b), none of those situations occurred in the subject case.

Additionally, BC Hydro submits that requirements are compulsory, whereas an approval in principle is a voluntary agreement between a director and the remediating party. If the remediating party fails to carry out the constituent parts of an approval in principle, then it may be rescinded or the director may withhold issuing a certificate of compliance. BC Hydro also notes that the constituent parts of an approval in principle set out in section 53(5), are called "conditions", not "requirements":

(5) A director may withhold or rescind an approval in principle or a certificate of compliance if

(a) conditions imposed on the approval or certificate are not complied with, or

(b) any fees payable under this Part or the regulations are outstanding.

BC Hydro submits that, when the Act allows a director to impose compulsory measures such as "requirements", an appeal will lie to the Board. However, it characterizes an approval in principle as being contractual, or quasi-contractual in nature and that the remediating parties are not compelled to remediate. BC Hydro submits that where the arrangement is voluntary and quasi-contractual, as with an approval in principle, there is no need for an appeal because there is no infringement of the remediating party's rights that would require an appeal. If the

remediating party is unsatisfied with the terms offered by the Ministry, then it can pursue independent remediation or do nothing. If a director is unsatisfied with remediation conducted under an approval in principle, then he or she can rescind it, and the remediating party may not receive a certificate of compliance after remediation is completed. If nothing is done, the Ministry may issue a remediation order to the responsible persons.

BC Hydro argues that there is no need for a director to impose compulsory requirements in the context of remediation under an approval in principle because the remediating party stands to lose the incentive that it sought by remediating under an approval in principle; namely, a certificate of compliance.

### *The Panel's Findings*

It is a principle of statutory interpretation that "the words in an Act are to be read in their entire context and in their grammatical and ordinary sense, harmonious with the scheme of the Act, the intention of the Act and the intention of the legislature": *Haida Nation v. British Columbia (Minister of Forests)* (1997), 45 B.C.L.R. (3d) 80 (C.A.); and *Houweling* at paragraphs 26 to 28, citing *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 S.C.R. 915.

The Panel agrees with Ocean Construction that each of the actions listed in section 99 of the Act are intended to have a different meaning. In order for all of the subsections in section 99 to have a purpose, the action of "imposing a requirement" in subsection (b) must have a different meaning than the action of "including a requirement... in an order, permit, approval or operational certificate" in subsection (e). The question is whether the amendments that were made to Schedule "B" of the Amended AIP constitute imposing "requirements" within the meaning intended under the Act.

In ascertaining whether the act of amending the AIP was "imposing a requirement" within the meaning of the Act, the Panel has considered the words in section 99(b) in the context of other relevant provisions of the Act, including the sections that relate to approvals in principle, as well as other sections which contemplate a director "imposing a requirement".

Section 53(1) of the Act sets out the authority for issuing approvals in principle. It states:

53 (1) On application by a responsible person, a director, in accordance with the regulations, may issue an approval in principle stating that a remediation plan for a contaminated site

(a) has been reviewed by the director,

(b) has been approved by the director, and

(c) may be implemented in accordance with conditions specified by the director.

[underlining added]

The language in section 53(1)(c) indicates that a director may, when issuing an approval in principle, specify "conditions" that apply to implementing the remediation plan. This leads to the question of whether there is any substantive difference between "specifying a condition" under section 53 and "imposing a requirement" within the meaning of section 99. It also leads to the question of whether such action is only authorized when an approval in principle is issued at first instance, or whether further conditions may be specified after an approval in principle has been issued, thereby amending the approval in principle.

Sections 47(1) through (5) of the CSR set out further powers of directors regarding applications for, and the issuance of, approvals in principle. For example, section 47(3) sets out a list of "conditions" that a director "may specify" "when issuing" an approval in principle. Section 47(5) states that a director "may issue" an approval in principle for a wide area site remediation plan if certain criteria are met. It should be noted that sections 47(1.4) and (1.41) expressly state that a director may "impose" certain "requirements" in relation to applications for approvals in principle. Those sections state as follows:

47(1.4) A director may require that an application for an approval in principle in relation to a contaminated site, including a wide area site, that is classified under a director's protocol as a low or moderate risk site include a report and the recommendation of an approved professional that the application be approved.

(1.41) If the director does not impose a requirement under subsection (1.4), the application may include a report and the recommendation of an approved professional in respect of whether the application should be approved and, if so, section 49.1 applies.

[underlining added]

The Panel has reviewed section 53 of the Act and section 47 of the CSR, the legislative provisions governing all aspects of approvals in principle. When these sections are considered together, it is clear that a director, when considering an application for an approval in principle or issuing an approval in principle, may "impose" or "specify" "conditions" or "requirements".

It is also clear from the relevant provisions that the conditions or requirements are specified or imposed by a director unilaterally. An applicant submits their remediation plan to the director for approval, and the director reviews the plan. The director may approve the plan or not, and approval may be subject to the conditions that the director specifies. The applicant's agreement with any

conditions specified by the director is not required. The director's conditions form a part of the approval in principle, and must be complied with before a certificate of compliance will be issued. This indicates that approvals in principle are not quasi-contractual agreements that are negotiated between a director and a remediating party, as suggested by BC Hydro.

Neither the Act nor the CSR indicate whether the power to impose requirements or specify conditions in relation to an approval in principle may be exercised after issuing an approval in principle. In the present case, the Director's action occurred after the AIP was issued. Other sections of the Act clearly distinguish between issuing and amending a statutory instrument, or set out express powers to impose requirements after an instrument has been issued. For example, section 14 of the Act sets out a director's powers in relation to issuing a permit, but section 16 authorizes a director to amend a permit. Section 48(1) of the Act authorizes a director to issue a remediation order, whereas section 48(12) authorizes a director to "amend or cancel" a remediation order. Similarly, section 54(3)(d) of the Act states that a director may "at any time during independent remediation... impose requirements that the director considers are reasonably necessary to achieve remediation. [underlining added]" Presumably, if the legislature had intended for a director to be able to amend an approval in principle, or specify a condition in (or impose a requirement in) an approval in principle at any time, it would have expressly provided directors with that power. The legislature has not done so.

The Panel notes that the only possible exception to the above analysis may be for a director to amend, pursuant to section 16 of the Act, the aspects of an approval in principle that function as a permit pursuant to section 47(6) of the CSR. Given the Panel's findings that an approval in principle serves as a permit only insofar as it pertains to a "facility" specified in section 47(6), section 16 may only apply to the "permit" aspects of an approval in principle. However, the Panel has already found that the clauses that were added to the AIP in this case do not pertain to a "facility" contemplated in section 47(6).

The Panel has reviewed other possible sections (e.g. section 60), and finds that none of them provide the necessary authority to add conditions after the approval in principle has been issued.

In addition, the Panel notes that, according to section 53 of the Act, a director's powers in relation to approvals in principle pertain to considering applications, reviewing the applicant's materials, issuing, withholding, and rescinding approvals in principle. This would suggest that a director seeking to specify further conditions or requirements in an approval in principle, after it has been issued, would have to first rescind the existing approval in principle, and then go through the application and review process before issuing a new approval in principle. Such a procedure did not occur in this case, and would be onerous and time consuming for both the Ministry and the remediating party. Given that there are less onerous alternatives available to both the Ministry and remediating parties if either is unsatisfied with an approval in principle, it seems unlikely that this would occur.

**APPEAL NO. 2006-EMA-008(a)****Page 22**

The Panel acknowledges that there may be valid reasons why a director would want to impose new conditions or requirements after an approval in principle has been issued, such as new information that indicates the approved remediation plan will not adequately address serious threats to human health or the environment. However, there are other remedies available to a director in such circumstances. For example, if a contaminated site is found to extend beyond the site boundaries defined in an approval in principle, and the holder of the approval in principle refuses to remediate the areas that are outside of the area defined in the approval in principle, a director could rescind the approval in principle. Alternatively, the director could leave the approval in principle in effect for that part of the site, and issue a remediation order for the remainder of the site. The Panel notes that section 53(6) of the Act expressly authorizes a director to issue an approval in principle for part of a contaminated site.

For all of these reasons, the Panel finds that, the legislature has not provided directors with the power to amend an approval in principle after it has been issued, or to impose new requirements or conditions in an approval in principle after it has been issued. If the legislature had intended otherwise, it could have expressly done so, given that it has done so in other sections of the Act.

Accordingly, the Panel finds that the Amended AIP is not "imposing a requirement" within the meaning of section 99(b) of the Act.

**Summary**

In summary, the Panel has found that the Director's issuance of the Amended AIP

- is not "amending a permit" within the meaning of section 99(d) of the Act, or "including a requirement or a condition in a permit" within the meaning of section 99(e) of the Act;
- is not "amending an approval" within the meaning of section 99(d) of the Act, or "including a requirement or a condition in an approval" within the meaning of section 99(e) of the Act; and
- is not "imposing a requirement" within the meaning of section 99(b) of the Act.

Based upon the arguments presented, the Panel finds that the issuance of the Amended AIP is not a "decision" for the purposes of section 99 of the Act.

The Panel notes that in coming to this decision, it has also dealt with the merits of BC Hydro's appeal; that is, the question of the Director's jurisdiction to unilaterally amend an existing approval in principle.

**APPEAL NO. 2006-EMA-008(a)****Page 23****DECISION**

In making this decision, the Panel has considered all of the evidence before it, whether or not specifically reiterated herein.

For all of the reasons set out above, the Panel finds that the Amended AIP is not a "decision" for the purposes of section 99 of the Act. Therefore, the Board has no jurisdiction over the appeal.

Accordingly, the appeal is dismissed for lack of jurisdiction.



Alan Andison, Chair  
Environmental Appeal Board

June 5, 2007

**Pages 3455 to / à 3468  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



**Pages 3469 to / à 3479**

**are not relevant**

**sont non pertinentes**

T-2112-10

FORM 301- Rule 301

**NOTICE OF APPLICATION**

Federal Court of Canada

Between:

Anthony Bratschitsch

Applicant

And

The Attorney General of Canada and The Chief Enforcement Officer,  
Environmental Enforcement, Environment Canada

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on page 6.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

2

Date: DEC 20 2010

Issued by: ABIGAIL GRIMES  
(Registry Officer) REGISTRY OFFICER  
AGENT DU GREFFE

Address of local office: 180 Queen Street West 180, rue Queen Ouest  
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TO:

The Chief Enforcement Officer  
Environmental Enforcement  
National Enforcement Headquarters  
Environment Canada  
200 Sacré-Coeur Blvd., 13th Floor  
Gatineau, Quebec  
K1A 0H3

The Attorney General of Canada  
Department of Justice  
284 Wellington St.  
Ottawa, ON  
K1A 0H8

## APPLICATION

This is an application for judicial review in respect of:

The Canadian Environmental Protection Act, 1999 and Environmental Enforcement, Environment Canada

The applicant, Anthony Bratschitsch, requests the judicial review of the validity of Section 36 (herein after referred to as the "Section 36") of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations (herein after referred to as the "EIHWHRMR") under the Canadian Environmental Protection Act, 1999 (herein after referred to as the "CEPA 1999").

This is a matter that consists of the prospect of persons in Canada facing the possibilities of imprisonment due to circumstances beyond their control and occurring outside Canada.

This matter also applies to Canadian entities, i.e. commercial, institutional, etc. (herein after referred to as the "entity"), facing other forms of punishment under the same circumstances.

Since at least one Canadian and at least one entity have already faced such prospects, which occurred without precedence, the applicant is applying to the court for remedies.

The applicant seeks public interest standing as established by the Supreme Court of Canada in cases such as *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 and *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147 in that:

1. The issue raises serious legal questions;
2. The applicant has a genuine interest as a citizen in the resolution of the questions; and
3. That there is no other reasonable and effective means in which the questions may be brought to court.

The applicant is a Canadian citizen employed as a consultant in the industry affected by Section 36.

The applicant makes a reference to *R v. RPR ENVIRONMENTAL INC. AND PATRICK WHITTY* (Ontario Court of Justice) in which the Enforcement Branch of Environment Canada (herein after referred to as the "ECE") laid 63 counts of charges in 2008 involving summary conviction against the Canadian exporter of hazardous wastes and a company director, Patrick Whitty.

The ECE charges were based on that the RPR ENVIRONMENTAL INC. (herein referred to as the "Company") did not obtain "confirmations", i.e. "Certificates of Destruction" (herein referred to as the "Certificates"), within the time period prescribed by provisions of Section 36.

All of the Certificates described in the charges were to be drawn from authorized disposal facilities in the United States.

However, there are circumstances in the United States, such as facility closures, inefficiencies or apathy that may restrict or prevent the issuance or release of the Certificates.

American law or regulations or any relevant international agreement between Canada and the USA does not require the Certificates.

In this case, a Canadian citizen, Patrick Whitty, residing within Canada did suffer from the threat of the loss of liberty during a twelve-month period by the actions of a Canadian government body, ECE.

As well, the Company faced punitive penalties.

The applicant does not know if this occurrence has since been repeated elsewhere in Canada because a search in Environment Canada's registry did not reveal similar cases and also because requests for information through the Access to Information Act are still in process.

The below items are relevant to this matter:

1. Section 36. (1) of "EIHWHRMR" states:

*"Within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material is completed, the exporter or importer must provide the Minister with a written, dated and signed confirmation indicating that the waste has been disposed of or the material has been recycled"*

- (a) in accordance with the export or import permit;*
- (b) in a manner that protects the environment and human health against the adverse effects that may result from the waste or material; and*
- (c) Within the period referred to in paragraph 9(o) or 16(n)."*

(Note: the word "confirmation" in the fifth line of above Item 1 has been described in this document as a "Certificate of Destruction".)

2. Section 9. (o) of "EIHWHRMR" states:  
*"In the case of operation D13, D14, or D17 of Schedule 1 or operation R12, R13 or R16 of Schedule 2, the operation is completed within 180 days, or in all other cases, within one year, after the day on which the hazardous waste or hazardous recyclable material is accepted by the authorized facility, unless the authorities of the jurisdiction in which the authorized facility is located require shorter time periods, in which case those time periods apply"*
3. Section 185(1) of "CEPA 1999" states:  
*"No person shall import, export or convey in transit a hazardous waste or hazardous recyclable material, or prescribed non-hazardous waste for final disposal, except*
  - (a) after notifying the Minister and paying the prescribed fee;*
  - (b) after receiving from the Minister which-ever one of the following permits is applicable:*
    - i. an import or export permit that, except in a case of a permit issued under subsection (4), states that the authorities of the country of destination and, if applicable, of the country of transit have authorized the movement, and that the authorities of the jurisdiction of destination have authorized the final disposal or recycling of the waste or material, or*
    - ii. a transit permit that states the Minister has authorized the movement; and*
    - iii. In accordance with the prescribed conditions."*
4. Section 272. (1) of "CEPA 1999" states:  
*"Every person commits an offence who contravenes*
  - (a) a provision of the Act or the regulations*
  - (b) an obligation or a prohibition arising from the Act or the regulations"*
5. Section 272. (2) of "CEPA 1999" states:  
*"Every person who commits an offence under subsection (1) is liable*
  - (a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both; and*
  - (b) on summary conviction, to a fine of not more than \$300,000 or to imprisonment for a term of not more than six months, or to both."*

6. Section 280(1) of "CEPA 1999" states:  
*"Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted."*
7. Section 280.1(1) of "CEPA 1999" states:  
*"Every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with*
  - (a) this Act and the regulations; and*
  - (b) orders and directions of, and prohibitions and requirements imposed by, the Minister and enforcement officers and review officers"*
8. Canada is a signatory to the following international agreements governing the transboundary movement of hazardous waste:
  - (a) The United Nations Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1992);
  - (b) The Organization for Cooperation and Economic Development (OECD) Council Decision concerning the control of Transfrontier movements of wastes destined for recovery operations (revised 2001);
  - (c) The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992 (herein after referred to as the "Bilateral Agreement").

### The applicant makes application for:

The applicant requests relief from the court as it deems necessary under the Canadian Charter of Rights and Freedoms (herein after referred to as the "Charter"), as per:

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The applicant also requests a remedy that, within Section 36 of the EIHWHMR under CEPA 1999, the phrase "*exporter or importer*" be removed and that the words "*authorized facility of disposal or recycling*" be added in its place or, simply, that Section 36 be struck in its entirety from EIHWHMR.

## The grounds for the application are:

The applicant submits that the standard of review is based on correctness concerning questions of law and questions of jurisdiction (*Dunsmuir v. New Brunswick*, 2008 SCC 9, paragraph 50).

Concerning the request for a judicial review for potential matters of the same nature, the applicant cites *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147, paragraph 69:

"Moreover, the absence of a "decision" is not an absolute bar to an application for judicial review under the *Federal Courts Act*, and the role of the court has been found to extend beyond the review of formal decisions, and to include the review of a "diverse range of administrative action that does not amount to a 'decision or order' ..."

The applicant argues that:

### A) Section 36 has the effect of violating a person's right to liberty as guaranteed under Section 7 of the "Charter"

If an American disposal facility, authorized to receive and dispose hazardous wastes from a Canadian exporter, is not able to, or chooses not to supply a Certificate of Destruction within the prescribed time period of Section 36 to the Canadian exporter, that same American facility has not violated any domestic law or international regulation that it is bound to.

Yet, in the case of the above, the provisions within Section 36 would place a Canadian exporter and any of its directors in the position of committing an offence under Sections 272(1), 272(2), 280(1) and 280.1(1) of CEPA 1999 which provide for the possibility of imprisonment.

Section 36 unfairly places the exporter and directors at fault for failing to submit the Certificates even though the exporter and directors have no provenance or Chain of Custody with those documents.

Canadian directors would then be subjected to the threat of their rights to liberty of persons as guaranteed by Section 7 of the "Charter".



B) Section 36 is not valid due to jurisdictional issues:

Extraterritorial jurisdiction is governed by international law, rather than being at the absolute discretion of individual states and that jurisdiction "cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention"; see *R. v. Hape* SCC 26 (para. 65).

Therefore, Section 36 is invalid because it is not provided for and does not comply with the principles of the three relevant international agreements concerning the transboundary movement of hazardous waste.

The "Bilateral Agreement" which is used to bridge the other two international agreements, stipulates:

Article 2- General Obligation:

*"The parties shall permit the export, import, and transit of hazardous waste and other waste across their common border for treatment, storage, or disposal pursuant to the terms of their domestic laws, regulations and administrative practices, and the provisions of this agreement."*

The issuance of Certificates by an authorized American facility is not pursuant to any American domestic rules and the facility is not compelled to produce them.

Furthermore, if the American facility does not provide a Certificate to the Canadian exporter for whatever reason, that means that the Canadian exporter has never been involved in the Chain of Custody of the Certificate – a document that the Canadian exporter is not capable of authoring.

In fact, there is no standard form for Certificates under Section 36, EIHWHRM or CEPA 1999.

Yet, Section 36 creates a situation where a company and its directors can be held liable for not obtaining a foreign document, whether it exists or not, outside its Chain of Custody.

In such cases, there is an absence of mens rea by the exporter and its directors to commit an offence while, at the same time, there is also an absence of actus reus by the only possible authors of the Certificates – the American facilities.

Therefore, Section 36 deems that a serious violation worthy of penal punishment has been committed outside of domestic laws and international agreements.

Furthermore, the requirement for Certificates from authorized American facilities is not necessary to achieve the objectives and principles of the three international agreements governing the transboundary shipment of hazardous wastes.

The reason for this is that one of the major components of the three international agreements is the "prior informed consent regime" (PIC).

For many years, the PIC has been very effective in achieving the principles of the three international agreements.

Under CEPA 1999 and EIHWHRM, a Canadian export notice needs to be completed by the exporter and to be submitted to Environment Canada.

Once the notice has been reviewed, as well as meeting the contract and insurance requirements, the notice is forwarded to the competent American authority for their consent.

In this case, no permit will be issued until the American authority has authorized the movement and has confirmed that the final disposal of the hazardous waste is authorized.

The PIC is an effective, time-tested process that has not required Certificates of Destruction before and is not recognized and used by the Americans now.

Therefore, there would be no loss of effect to protecting human health or the environment by applying the requested remedies.

The "Bilateral Agreement" also states:

Article 5 – Cooperative Efforts:

1. *The parties will cooperate to ensure, to the extent possible, that all transboundary shipments of hazardous waste and other waste comply with the **manifest requirements** of both countries.*
2. *The parties will cooperate in monitoring and spot-checking transboundary shipments of hazardous waste and other waste to ensure, to the extent possible, that such shipments conform to the requirements of the applicable legislation and of this Agreement.*
3. *To the extent any implementing laws and regulations are necessary to comply with this Agreement, the parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the Parties will make best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The Parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such laws and regulations."*

Certificates are not a "manifest requirement" under CEPA 1999 or EIHWHRM and, therefore, are not a requirement for any of the three relevant international agreements including the "Bilateral Agreement".

Should the remedy of replacing the phrase "*exporter or importer*" within Section 36. (1) of EIHWHRM with the words "authorized facility of disposal or recycling", the Canadian party to the "Bilateral Agreement" would have to comply with Article 5, section 3 (above).

The "Bilateral Agreement" also states:

Article 7 – Enforcement:

*"The Parties shall ensure, to the extent possible, that within their respective jurisdictions, their domestic laws and regulations are enforced with respect to the transportation, storage, treatment and disposal of transboundary shipments of hazardous waste and other waste."*

The applicant contends that it is sufficient that the Americans apply their own enforcement of their local laws and their obligations under the three international agreements without the need of the intrusion of the provisions of Section 36.

---

C) Section 36 violates Canadians' expectations of fair justice

In *R. v. Gibbons, 2003 ABPC 114*, the court reiterated the legal concept of reasonable doubt (paragraph 20) namely,

- (i) *the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;*
- (ii) *the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;*
- (iii) *a reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense;*
- (iv) *it is logically connected to the evidence or absence of evidence;*
- (v) *it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and*
- (vi) *more is required than proof that the accused is probably guilty (emphasis added)*

The application of Section 36 clearly places an inference of guilt onto an exporter and a person in Canada when an American facility does not provide a Certificate for whatever the reason.

This is not fair.

This application will be supported by the following material:

1. Canada Gazette Part II, Volume 139, No. 11: Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations
2. The Canada-USA Agreement on the Transboundary Movement of Hazardous Waste, amended 1992

December 19, 2010

  
(Signature of applicant)

Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel (289) 260-1153

SOR/2004-283, ss. 35 and 38

1-800-416-0161 COPY 1001

DEC 23 2010

*L. J. P. P. P.*  
4:09

DEC 20 2010

DEC 20 2010

ABIGAIL GRIMES  
REGISTRY OFFICER  
AGENT DU GREFFE

FORM 301- Rule 301

**NOTICE OF APPLICATION**

Court File No. T-2176-10

Federal Court

Between:

Anthony Bratschitsch on his own behalf  
and on behalf of 876947 Ontario Limited o/a RPR Environmental  
and Patrick Whitty

Applicants

And

The Attorney General of Canada  
as represented by the Minister of the Environment  
and Renzo A. Benocci and Bradley May

Respondents

**NOTICE OF APPLICATION**

Application under sections 17, 18, 18.1 and 18.1(1) of the *Federal Courts Act*  
R.S.C. 1985, c. F-7 and Rule 302 of the Federal Court Rules, 1998.

**TO THE RESPONDENTS:**

The Attorney General of Canada as represented by the Minister of Environment;  
and Renzo A. Benocci and Bradley May

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief  
claimed by the applicant appears on page 3.

THIS APPLICATION will be heard by the Court at a time and place to be  
fixed by the Judicial Administrator. Unless the Court orders otherwise, the place  
of hearing will be as requested by the applicant. The applicant requests that this  
application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any  
step in the application or to be served with any documents in the application, you  
or a solicitor acting for you must prepare a notice of appearance in Form 305  
prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or

where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Court's Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: DEC 29 2010

Issued by: JOHN GORNICK  
REGISTRY OFFICER  
AGENT DU GREFFE

(Registry Officer) 180 Queen Street West 180, rue Queen Ouest  
Suite 200 bureau 200  
Toronto, Ontario Toronto, Ontario  
Address of local office: M5V 3L6 M5V 3L6

TO:

The Attorney General of Canada  
Department of Justice  
284 Wellington St.  
Ottawa, Ontario K1A 0H8

The Minister of Environment  
The Honourable John Baird  
Les Terrasses de la Chaudière  
10 Wellington Street, 28<sup>th</sup> Floor  
Hull, Quebec K1A 0H3

Mr. Renzo A. Benocci  
c/o National Director of Environmental Enforcement Directorate  
Enforcement Branch Headquarters, Environment Canada  
351, St-Joseph Blvd., 17<sup>th</sup> Floor  
Gatineau, Quebec K1A 0H3

Mr. Bradley May  
c/o Manager, Investigation Services  
Environment Canada  
4905 Dufferin Street,  
Toronto, Ontario M3H 5T4

## APPLICATION

This is an application for judicial review in respect of a matter commencing on January 11, 2008, with no decision or result being received, by the National Director of Environmental Enforcement Directorate, Enforcement Branch of Environment Canada ("ECE"), on behalf of the Minister of Environment, regarding 876947 Ontario Limited operating as RPR Environmental ("RPR") and Patrick Whitty and Bailey Mylleville pursuant to Section 17 of the *Canadian Environmental Protection Agency, 1999 Act* ("CEPA 1999").

The applicants make application for:

- (a) an order setting aside the matter commenced by the Minister of Environment on January 11, 2008, to investigate RPR and Patrick Whitty and Bailey Mylleville pursuant to Section 17 of CEPA 1999;

or, in the alternative,

- (b) an order for *mandamus* compelling the Minister of Environment to send a copy of the final report of the investigation to RPR and Patrick Whitty pursuant to Section 21.(2) of CEPA 1999;

and

- (c) a declaration that the investigation was time barred under Section 275.(1) of CEPA 1999;

and

- (d) an order to void a Warrant to Search signed on March 25, 2008 and executed on March 27, 2008;

or, in the alternative,

- (e) a declaration that the search was illegal;

and

- (f) a declaration that Renzo A. Benocci, then National Director of Environmental Enforcement Directorate, Enforcement Branch of Environment Canada ("ND-EED"), was in violation of his responsibilities as detailed in the *Procedures relating to section 17: Requests for Investigation of alleged offences under the Canadian Protection Act, 1999* ("Procedures") and pursuant to Section 2.(1) and Section 2.(1)(o) of CEPA 1999;



and

- (g) a declaration that Renzo A. Benocci committed an error of law by disregarding evidence of which he had knowledge of;

and

- (h) a declaration that Bradley May, then Manager, Investigation Section, Ontario Region - Toronto, Environment Canada, committed an error of law by disregarding evidence of which he had knowledge of, and of acting contrary to law by providing misleading information;

and

- (i) an order or writ to a competent authority to verify the legal status of the complainant of the Section 17 Application dated December 12, 2007, in the possession of the ND-EED;

and

- (j) a declaration that Patrick Whitty's right to liberty under Section 7 of the Canadian Charter of Rights and Freedoms ("Charter") had been infringed upon;

and

- (k) relief from the court as it deems necessary under Section 24.(1) of the Charter;

and

- (l) such other relief as this Honourable Court may deem appropriate;

and

- (m) costs.

The grounds for the application are:

1. Anthony Bratschitsch is a Canadian citizen and resident. He is employed as a consultant working in the environmental industry. He has unique knowledge of information directly affecting the other applicants regarding this application and, having its permission, seeks to act on behalf of RPR. He also seeks public interest standing as established by the Supreme Court of Canada in cases such as *Chaouilli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 and *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147 in that:
  - (a) The issue raises serious legal questions;
  - (b) The applicant has a genuine interest as a citizen in the resolution of the questions; and
  - (c) That there is no other reasonable and effective means in which the questions may be brought to court.
2. Patrick Whitty is a Canadian citizen and resident. He is the co-owner, director and general manager of 876947 Ontario Limited o/a RPR Environmental, located in Stoney Creek, Ontario, one of three related companies involved in the handling of hazardous and non-hazardous materials. At the time of the commencement of the Section 17 investigation, he was in business for eighteen years.
3. Renzo A. Benocci was the then National Director of Environmental Enforcement Directorate, Enforcement Branch of Environment Canada ("ND-EED"). By virtue of paragraph 24(2)(d) of the *Interpretation Act*, and for the purpose of Sections 17 to 21 of CEPA 1999, he acted for and behalf of the Minister of Environment and also in his own name.
4. Bradley May was the then Manager, Investigation Section, Ontario Region – Toronto, Environment Canada Enforcement Branch ("ECE").
5. The application for judicial review is based on the standard of correctness of the matter regarding the investigation, which concerns questions of law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, paragraph 50).
6. Section 17. (1) of CEPA 1999 allows an eligible Canadian resident to submit a request for an investigation if that resident believes that an offence under the Act has occurred. The Procedures emphasize a strict adherence to the principles of CEPA 1999 and assign specific responsibilities to ECE officials. EC Legal Services is also required to confirm that the application meets all legal requirements and statutes. The ND-EED and other members of the Directorate must initial their approval of a Section 17 investigation request after due diligence has been exercised.

7. A Section 17 application was sent to the attention of the ND-EED on December 14, 2007. The complainant requested anonymity per Section 16.(2) of CEPA 1999.
8. On the same day, Bradley May withdrew information concerning Patrick Whitty and one of the RPR companies on charges that were laid in September, 2007.
9. On the same day, Bradley May also decided to lay new information against RPR and Patrick Whitty regarding other alleged violations.
10. A few days earlier, November 29, 2007, Bradley May also approved another separate investigation of the same parties on an incident that occurred in 2006.
11. The Section 17 application was regarding an incident that occurred in The Township of Wainwright, Alberta, on December 1, 2000. Background information concerning this occurrence can be obtained at <http://www.canlii.org/en/ab/abca/doc/2010/2010abca23/2010abca23.html>.
12. The complainant wrote in his application "*Environment Canada personnel were made aware of the offences on March 31, 2006...*"
13. However, on January 21, 2008, the Manager of the EC Intelligence Unit in Edmonton, Alberta emailed Bradley May that the occurrence file had actually been forward to Bradley May in early 2001.
14. In his reply, Bradley May wrote that, for the purposes of a 2-year summary conviction timeline, he would use the complainant's information. He also wrote that the Section 17 investigation target date was before March 31, 2008.
15. On March 10, 2008, Renzo Benocci wrote a Progress Report to the complainant and, in the letter, stated, "*The Ontario Region has located a file related to the complaint last dated January 22, 2002.*" This is a confirmation of the earlier discoverability date that was presented to Bradley May by the Intelligence Unit.
16. On March 27, 2008, just within a few days of the March 31 deadline, ECE executed a search of RPR's facilities.
17. However, the Section 17 investigation was not presented in the Warrant or Information to Obtain when it was given to the justice for signing on March 25. The justice approved the warrant based on information provided concerning an unrelated investigation.

18. On March 26, 2008, one day after the signing of the warrant and one day before its execution, ECE added the Section 17 investigation and two other investigations onto the search warrant through an Enforcement Action Briefing Note (EAB) without the justice's knowledge and approval.
19. The applicants of this application for judicial review state that those three additional investigations would have been time barred at that date.
20. On July 5, 2010, RPR Environmental Inc. received an information disc from Environment Canada through the *Access to Information Act*. The disc contained 568 portable file documents, which, in turn, contained approximately 8,000 documents of varying size and matters.
21. On July 7, 2010, Anthony Bratschitsch, obtained the information disc from RPR for the purposes of researching new evidence concerning the known ECE investigations of RPR and Patrick Whitty.
22. It was during that research, that Anthony Bratschitsch first came across references to the Section 17 investigation.
23. On August 30, 2010, when Anthony Bratschitsch presented his preliminary findings of the investigation to Patrick Whitty, Mr. Whitty expressed that, until then, he was unaware of the investigation and of Section 17, itself.
24. On November 19, 2010, Anthony Bratschitsch provided a summary of his research of the information disc regarding the Section 17 investigation to Patrick Whitty.
25. In that summary, Anthony Bratschitsch expressed a suspicion that the complainant was not a legal Canadian resident. Although the Section 17 complainant did request anonymity as per Section 16.(2) of CEPA 1999 and although it appears that great effort was made to accommodate that request, Anthony Bratschitsch believed that he found a "partial" name on one of the PDF documents from the disc that belonged to the complainant. After a scope analysis was done on the complainant's letter, the applicants have reason to believe that the complainant is an American known to Patrick Whitty and that, if so, was not a legal resident of Canada, at least at the time of the complaint. In respect of privacy and confidentiality, and with awareness that these suspicions and findings may be wrong, the applicants would only provide this information to the Court, if it deemed so.
26. Considering that the search of March 27, 2008, was for a combined four investigations and that there were also two other investigations approved at the time and another approved later, the applicants state that RPR and Patrick Whitty were suffering from significant prejudice at the time from ECE.

27. Furthermore, the timing of the Section 17 complaint is suspiciously close to the actions described in paragraphs 8, 9 and 10 that were performed by Bradley May.
28. Also taking into account that Bradley May ignored the evidence provided by EC's Intelligence Unit (paragraph 13) in favour of the complainant's, the applicants believe that they have reason to suspect foul play.
29. The applicants are currently unaware of the status of the investigation with the most recent information dating to 2009.
30. Concerning the nature of this matter for an application for judicial review, the applicants cite *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147, paragraph 69:

*"Moreover, the absence of a 'decision' is not an absolute bar to an application for judicial review under the Federal Courts Act, and the role of the court has been found to extend beyond the review of formal decisions, and to include the review of a 'diverse range of administrative action that does not amount to a 'decision or order' ..."*

- 
31. The applicants allege that the Minister had made errors of law, as follows:
    - (a) Renzo Benocci ignored evidence (paragraph 15) regarding the discoverability date of the matter despite providing that evidence, himself, in his letter of March 10, 2008;
    - (b) Bradley May ignored evidence (paragraph 13) despite receiving it from EC's Intelligence Unit on January 21, 2008;
    - (c) ECE acted contrary to law by adding three other investigations onto a signed warranted search without the justice's knowledge or approval;
    - (d) ECE acted contrary to the law by contravening Section 275.(1) of CEPA by proceeding with the Section 17 investigation beyond two-years after the Minister became aware of the matter;
    - (e) ECE acted contrary to the law by failing to respect the Constitution and laws of Canada pursuant to Section 2.(1) and to apply and enforce the Act in a fair, predictable and consistent manner pursuant to Section 2.(1)(o) of CEPA 1999;
    - (f) ECE failed to observe a principle of natural justice by neglecting to advise RPR and Patrick Whitty that they were under investigation (the "hearing rule");
    - (g) ECE violated a principle of natural justice by adding the three investigations, as per paragraph 31.(c) (the "bias rule").

32. The applicants allege that the Minister infringed Patrick Whitty's right to liberty under Section 7 of The Canadian Charter of Rights and Freedoms ("Charter"). Even though Patrick Whitty was not aware that he was being investigated, as a director of RPR, he was at risk of being charged for an offence under Sections 272(1), 272.(2), 280(1) and 280.1(1) of CEPA 1999 which provides for the possibility of imprisonment.

The following material will support this application:

1. Information disc obtained from Environment Canada through the Access to Information Act (note: this disc contains 568 portable file documents (PDF) that were given an alphanumeric identity by Environment Canada. All of the below attachments that the applicants have drawn from this disc have the corresponding EC alphanumeric identity and page numbers.)
2. Memorandum to Associate Deputy Minister 04945-A0079618 p. 66-68
3. Application To the Minister For An Investigation Of An Offence(s) Under CEPA, i.e. "Complaint". 02641-A0079622 pages 33-34
4. WILL SAY of Bradley May 05811-A0079115 page 3
5. WILL SAY of Bradley May 04543-A0079608 pages 11-12
6. Procedures relating to section 17: Requests for Investigation of alleged offences under the Canadian Protection Act, 1999 (CEPA 1999) draft 04945-A0079618 pages 73-85
7. Email from Bradley May: initiate investigation 04945-A0079618 page 56
8. Enforcement Action Briefing Note 2008/01/17 06344-A0079589 p 26-27
9. Chain of email messages on discoverability 04945-A0079618
10. Progress Report, March 10: discoverability date 04731-A0079616 p. 84
11. Enforcement Action Briefing Note 05220-A0079112 pages 67-68
12. Warrant To Search and Information To Obtain A Search Warrant
13. Enforcement Action Briefing Note: 4 investigations 07032-A0079110 pages 1-3
14. ECE email confirmation of search warrant execution on March 27, 2008 05220-A0079112 page 74
15. ECE email indicating section 17 investigation ongoing in 2009

December 28, 2010



Anthony Bratschitsch  
163 Governors Road  
Dundas, Ontario  
L9H 6L6  
Tel (289) 260-1153

SOR/2004-283, ss. 35 and 38

SERVICE OF A TRUE COPY ADMITTED ON

DEC 30 2010

RECEIVED BY THE  
GOVERNMENT OF CANADA

*[Signature]*

3:51

I HEREBY CERTIFY that the above document is a true copy of  
the original *[initials]* DEC 29 2010

day of \_\_\_\_\_

Dated this \_\_\_\_\_ day of DEC 29 2010

*[Signature]*

31230-7-3

**Ethier, JoAnne [NCR]**

---

**From:** Sousa, Michael [NCR]  
**Sent:** January 4, 2011 5:34 PM  
**To:** Bombardier, Manon [NCR]  
**Cc:** Mercier, Melanie-Anne [NCR]; Jessome, Kimberley [NCR]; Owen, Gord [NCR];  
Vanderlaan, Mark [Burlington]  
**Subject:** RE: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

Will do.

Talk soon.

Cheers,

Mike

Michael Sousa  
Avocat général/General Counsel  
Directeur adjoint/Deputy Director  
Service juridique, Environnement Canada/Environment Canada Legal Services Justice  
Canada 351, boul. St-Joseph Gatineau, QC K1A 0H3  
Tel: 819 934-6642  
Fax: 819 953-9110

-----Original Message-----

**From:** Bombardier, Manon [NCR]  
**Sent:** January 4, 2011 5:33 PM  
**To:** Sousa, Michael [NCR]  
**Cc:** Mercier, Melanie-Anne [NCR]; Jessome, Kimberley [NCR]; Owen, Gord [NCR];  
Vanderlaan, Mark [Burlington]  
**Subject:** Re: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

s.23

Mike, all the best to you as well for 2011!



Thanks again. Manon

----- Message d'origine -----

**De :** Sousa, Michael [NCR]  
**Envoyé :** Tuesday, January 04, 2011 05:09 PM **À :** Bombardier, Manon [NCR] **Cc :**  
Mercier, Melanie-Anne [NCR]; Jessome, Kimberley [NCR]; Sousa, Michael [NCR] **Objet :**  
Bratschitsch v. AGC and Bratschitsch, et al. v. AGC



Hello Manon and happy new year: See below and attached.



Cheers,

Mike

Michael Sousa  
Avocat général/General Counsel  
Directeur adjoint/Deputy Director  
Service juridique, Environnement Canada/Environment Canada Legal Services Justice  
Canada 351, boul. St-Joseph Gatineau, QC K1A 0H3  
Tel: 819 934-6642  
Fax: 819 953-9110

s.23

-----Original Message-----

From: Roussel, Kathleen [NCR]

Sent: January 4, 2011 5:03 PM

To: Boothe, Paul [NCR]; Hamilton, Bob [NCR]

Cc: Boudreault, Felix [NCR]; Klenavic, Nancy [NCR]; Sousa, Michael [NCR]

Subject: FW: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC



Cheers,

K.

Kathleen Roussel  
Avocate générale principale/Senior General Counsel Directrice exécutive/Executive  
Director Environment Canada Legal Services/Service juridique, Environnement Canada  
Justice Canada 351, boul. St-Joseph Gatineau, QC K1A 0H3  
Tel: 819 953-8680  
Fax: 819 953-9110

-----Original Message-----

From: Sousa, Michael [NCR]

s.23

Sent: 4 janvier 2011 16:54

To: Roussel, Kathleen [NCR]

Subject: RE: Bratschitsch v. AGC and Bratschitsch, et al. v. AGC

Kathleen: FYI



Michael Sousa  
Avocat général/General Counsel  
Directeur adjoint/Deputy Director  
Service juridique, Environnement Canada/Environment Canada Legal Services Justice  
Canada 351, boul. St-Joseph Gatineau, QC K1A 0H3  
Tel: 819 934-6642  
Fax: 819 953-9110

NAME  
NOM

## Counsel Notes

No

*BRATSCHITSCH et al. v. AGC et al*

File No. 2-595439



**Oxford**

**No. R609**

If Slimtrim Fasteners are to be included, please specify.  
Spécifiez si vous voulez des agrafes Slimtrim.



Mississauga, Ontario L5R 3Z9

**Pages 3506 to / à 3584  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 3585 to / à 3597**  
**are not relevant**  
**sont non pertinentes**

**Pages 3598 to / à 3665  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 3666 to / à 3688**  
**are not relevant**  
**sont non pertinentes**

**Pages 3689 to / à 3690  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



Message

**Jessome, Kimberley [NCR]**

**From:** Tingley, Linda [NCR] s.21(1)(a)  
**Sent:** 4 octobre 2011 16:37 s.21(1)(b)  
**To:** Sousa, Michael [NCR] s.23  
**Cc:** Jessome, Kimberley [NCR]  
**Subject:** [REDACTED]  
**Attachments:** [REDACTED]

Hi Michael,

[REDACTED]

Linda

---

**From:** Laframboise, Nadine [NCR]  
**Sent:** Tuesday, October 04, 2011 2:48 PM  
**To:** Tingley, Linda [NCR]; Daigle, Robert [Montreal]; McCready, Heather [NCR]  
**Cc:** Bombardier, Manon [NCR]; Villeneuve, Catherine [NCR]  
**Subject:** [REDACTED]

Hi Linda,

[REDACTED]

Thank you.

**Nadine Laframboise**

Agent de rapport | Briefing Officer  
Bureau du responsable de la mise en application de la loi | Office of the Chief Enforcement Officer  
Direction générale de l'application de la loi | Enforcement Branch  
Environnement Canada | Environment Canada  
Téléphone | Telephone 819-997-2055  
Cellulaire | Mobile 819-210-3548  
Télécopieur | Facsimile 819-997-0086  
Gouvernement du Canada | Government of Canada  
Site Web | Website [www.ec.gc.ca](http://www.ec.gc.ca)

**Pages 3692 to / à 3707  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

31230-7-5

**Ethier,JoAnne [NCR]**

**From:** Sousa,Michael [NCR]  
**Sent:** October 5, 2011 10:00 AM  
**To:** Jessome,Kimberley [NCR]; Sims,Michael: JUSTICE  
**Subject:**

**Attachments:**



Michael,

Cheers,

Mike

s.23

Michael Sousa  
Avocat général/General Counsel  
Directeur adjoint/Deputy Director  
Service juridique, Environnement Canada/Environment Canada Legal Services  
Justice Canada  
351, boul. St-Joseph Gatineau, QC K1A 0H3  
Tel: 819 934-6642  
Fax: 819 953-9110

**Pages 3709 to / à 3742  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 3743 to / à 3746**  
**are not relevant**  
**sont non pertinentes**

**Pages 3747 to / à 3778  
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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 3779 to / à 3796**  
**are not relevant**  
**sont non pertinentes**

**Pages 3797 to / à 3821  
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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



**Page 3822**  
**is not relevant**  
**est non pertinente**

**Pages 3823 to / à 3856  
are withheld pursuant to section  
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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 3857 to / à 3878**  
**are not relevant**  
**sont non pertinentes**

**Pages 3879 to / à 4031  
are withheld pursuant to section  
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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

31230-7-3

**Ethier, JoAnne [NCR]**

**From:** Jessome, Kimberley [NCR]  
**Sent:** January 25, 2011 3:02 PM  
**To:** Martineau, Diane [NCR]  
**Cc:** Jessome, Kimberley [NCR]  
**Subject:** RE: Sommaire JR1 - RPR

s.21(1)(a)

s.21(1)(b)

Oui, :) Merci!

Merci beaucoup et je t'envoie le deuxième sous peu!

En même temps, voici les numéros de dossiers:

JR #1: 31230-7-3  
JR #2: 31230-7-4

Merci!

---

**From:** Martineau, Diane [NCR]  
**Sent:** January 25, 2011 2:29 PM  
**To:** Jessome, Kimberley [NCR]  
**Subject:** FW: Sommaire JR1 - RPR

Très bonne idée. J'ai finalisé le premier et j'ai des questions:

Dans l'intitulé de l'action (style of cause) j'ai ajouté (RPR Environmental) sans gras (bold) afin d'indiquer que le dossier a rapport au dossier RPR. Il est certain que quelques personnes (membres du Comité) ne feront pas le lien. C'est pour cette raison que je l'ai ajouté. Aussi, j'ai changé ce qui suit:

**Environmental Environment, Environment Canada à Environmental Enforcement,  
Environment Canada**

Je crois c'est ce que tu voulais dire.

<< File: Summary RPR Judicial Review (1).doc >>

---

**From:** Jessome, Kimberley [NCR]  
**Sent:** Tuesday, January 25, 2011 2:10 PM  
**To:** Martineau, Diane [NCR]  
**Cc:** Jessome, Kimberley [NCR]  
**Subject:** RE: Sommaire JR1 - RPR

Je crois que dans l'optique de garder tout le "dossier" RPR en ordre, et compréhensible (c'est déjà difficile à suivre de même), je vais ouvrir 2 nouveaux dossiers séparés; i.e. un pour chaque JR.

Je demande à Christine et je te transmets les numéros de dossier dans quelques instants. Merci!

Jim

---

**From:** Martineau, Diane [NCR]  
**Sent:** January 25, 2011 2:08 PM  
**To:** Jessome, Kimberley [NCR]  
**Subject:** FW: Sommaire JR1 - RPR

Excellent Kim. Pourrais-tu me dire sous quel(s) dossier(s) ceux-ci seront classés?

---

**From:** Jessome, Kimberley [NCR]

**Sent:** Tuesday, January 25, 2011 2:05 PM s.21(1)(a)  
**To:** Martineau, Diane [NCR] s.21(1)(b)  
**Cc:** Jessome, Kimberley [NCR] s.23  
**Subject:** Sommaire JR1 - RPR

<< File: JR 1.doc >>

Diane,

***Kim Jessome-Lortie***

Avocate | Legal Counsel  
Ministère de la Justice Canada | Department of Justice Canada  
Service juridique, Environnement Canada | Environment Canada Legal Services  
351, boul. St-Joseph | 351 St-Joseph Blvd.  
Gatineau QC K1A 0H3  
Téléphone (819) 934-5192 | Fax (819) 953-9110  
Gouvernement du Canada | Government of Canada

**Avis** - Le présent message et les documents qui y sont joints sont destinés exclusivement au destinataire indiqué et leur teneur peut être confidentielle ou privilégiée. Il est strictement interdit à quiconque d'en prendre connaissance, de les utiliser ou de les divulguer. Si vous recevez le présent message par erreur, veuillez nous en aviser immédiatement et le détruire, ainsi que les documents qui y sont joints. Merci.

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**Pages 4036 to / à 4039**  
**are not relevant**  
**sont non pertinentes**



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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 5057 to / à 5058**  
**are not relevant**  
**sont non pertinentes**

**UPDATE ON STATUS  
CONTROL FIRE SYSTEMS - POSSIBLE CIVIL LITIGATION  
DATED May 31, 2001**

**ISSUE**

- The status of the Control Fire Systems case as of May 31, 2001

**CURRENT STATUS**

- As part of an investigation of illegal importation, cylinders of ozone-depleting substances (ODS) products were seized by Environment Canada inspectors. s.23
- Charges were laid on July 30, 1999 against Control Fire Systems Inc (CFS) and Adam Richardson, President of CFS, for illegal importation of 75 cylinders of used Bromotrifluoromethane (Halon 1301) under EIHWS Regulations.

•

- Since the charges were withdrawn, the Crown has made all reasonable efforts to re-deliver the seized cylinders of Halon 1301 to CFS.
- CFS is claiming that Environment Canada had not stored the cylinders properly. They refused to accept redelivery of the cylinders.
- On November 20th, 2000 Control Fire Systems (CFS), through its legal counsel, advised of its intent to file a "Notice of Action" to commence civil litigation against the Department.

•

- The results of the weighing indicate a difference between the weights declared in Pakistan prior to importation and at the time the cylinders were sold. There is no practical way to determine where or when the loss took place, if indeed there was any loss.

•

- On May 10, 2001, CFS served a statement of claim against the defendants Environment Canada and Michael Bell. The action was commenced in the Ontario Superior Court of Justice with CFS claiming:
  - a) damages caused by the defendants' negligence
    - ⇒ for ignoring warnings from CFS about the safe storage of Halon 1301, in failing to store the Halon in a safe manner, and in permitting a quantity of Halon to escape into the atmosphere; and
    - ⇒ in seizing and retaining a quantity of Halon belonging to CFS on the basis of an alleged importing into Canada, notwithstanding the advice of officials in Environment Canada's Ottawa office, that the shipment was not being imported into Canada;
  - b) damages caused by the defendants by their unlawful sale and conversion of the balance of Halon 1301 at a price substantially below the amount necessary to replace the total volume of Halon 1301;
  - c) further consequential damages arising from the unlawful seizure and retention of the Halon 1301, and the loss of Halon 1301 into the atmosphere from the date of seizure up to the date of the issuance of a Notice of Action.

CFS seeks the following damages:

- a) general damages of \$700,000 for the negligent and wrongful seizure, destruction and conversion of raw material belonging to the plaintiff;
- b) special damages of \$600,000 for the negligent and wrongful seizure, destruction and conversion of raw material belonging to the plaintiff;
- c) punitive damages of \$200,000;
- d) prejudgment and postjudgment interest; and
- e) costs on a solicitor & client scale

s.23

#### NEXT STEPS

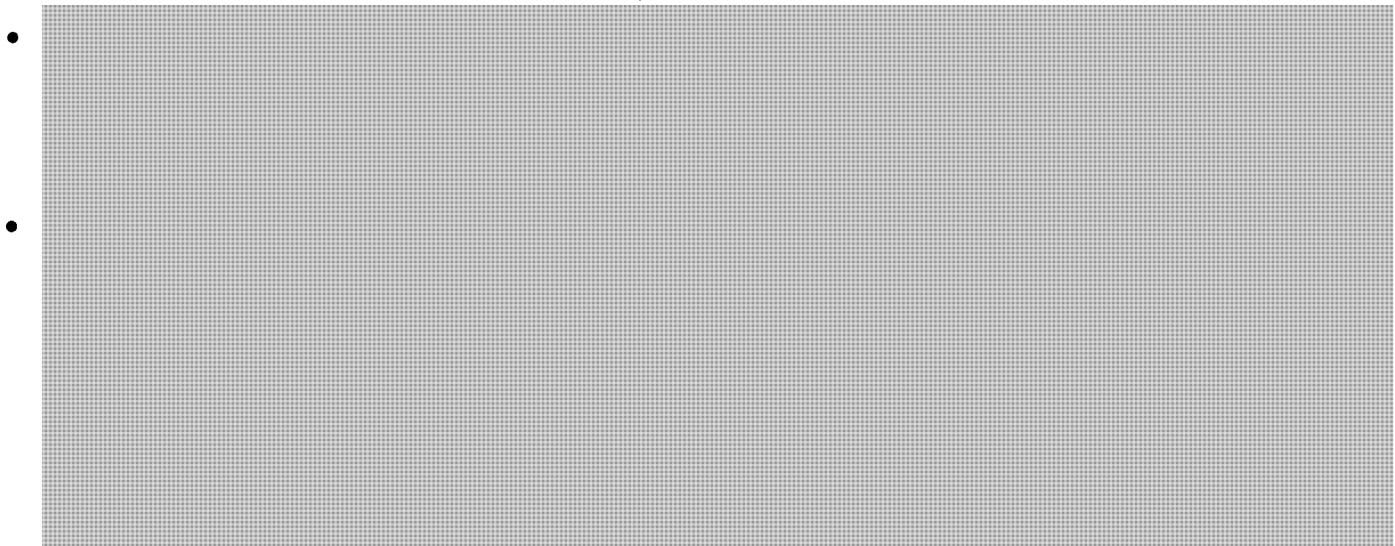
- The co-defendants have until July 27, 2001 to file a defence.

• 

John Meaney  
Department of Justice @  
Environmental Protection Branch - Ontario Region  
(416) 739-4815  
May 31, 2001

## BACKGROUND

- In May 1999, information was received from Atlantic Region that two sea containers of used ODS Halon 1301 had arrived in Halifax from Pakistan enroute to Toronto without all the necessary notices having been given or permits obtained under ODS or EIHW Regulations. The importer was identified as Control Fire Systems (CFS).
- The shipment was seized by Environmental Protection Branch-Ontario Region (EPB-OR) inspectors on May 13, 1999 and later moved to a storage container at Environment Canada's 4905 Dufferin Street site.



- After the charges were dropped, the Crown made all reasonable efforts to re-deliver the seized cylinders of Halon 1301 to CFS. However, CFS placed a number of conditions on its acceptance of redelivery:

s.23

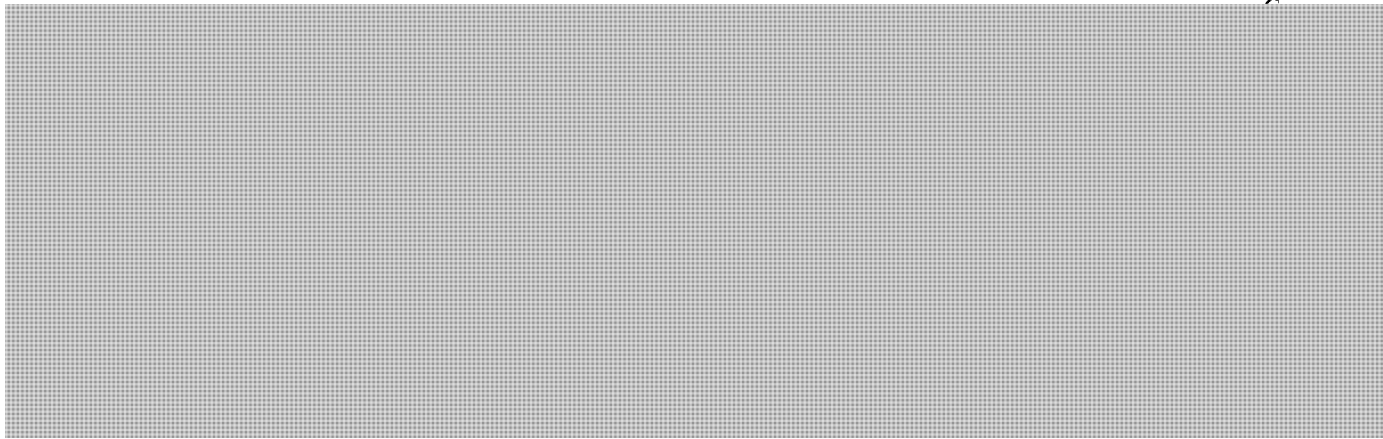
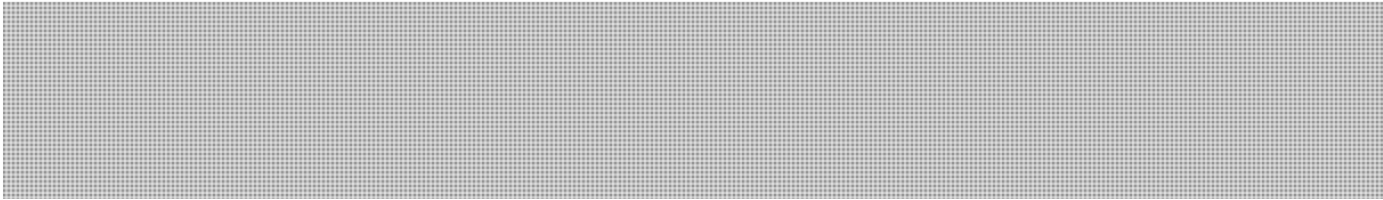
1. In a letter dated April 12, from the law firm representing CFS, CFS alleged "considerable losses" of the Halon since seizure. It alleged that the cylinder valves state a threshold temperature of 130° F and that the temperature in the storage container has exceeded that during summer weather. CFS also advised of its intention to commence proceedings to recover damages for the lost Halon.
  2. In a letter dated May 12, CFS demanded that the Crown supply it with a list of all persons who had handled the cylinders since seizure, and that the cylinders be weighed by the Crown, but not by any of CFS' competitors.
  3. In a letter dated June 16, CFS alleged "regulatory ambiguity" in the permits it was issued to move the seized cylinders to its New York facility. CFS wanted assurances from the federal Crown that it met all applicable regulations and requirements to ship the Halon.
- In corresponding with CFS, the Crown has held the position that the return of the seized cylinders and Halon 1301 is not linked to any of the issues raised by CFS.
  - The most serious concern is that the cylinders have been leaking Halon while under seizure. Transport Canada officials advise that:

(a) even though the cylinders may state a threshold of 130° F, they can

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withstand pressures in excess of their market service pressure; and,  
(b) any loss of integrity would have to involve substantial overpressuring,  
exposure to extreme temperature conditions and excessive corrosion or  
damage. None of the above appears to have occurred while under seizure.

- 
- A four page summary of CFS's position with regard to damages was provided to the DOJ by the solicitor for CFS in a meeting on October 23, 2000.
- The summary sets out damages in the amount of approximately \$1.2 million and is directed at EC, and inspector Michael Bell. EC stands behind Mr. Bell in the manner in which he performed his enforcement functions in relation to this case. CFS also seeks an apology from Environment Canada, to be broadly published, for taking enforcement action (e.g. seizing the Halon, laying the charges and selling the Halon).
- 

**Pages 5063 to / à 5072**

**are not relevant**

**sont non pertinentes**

31230-7-5

**Ethier, JoAnne [NCR]**

---

**From:** Sousa, Michael [NCR]  
**Sent:** August 12, 2011 10:20 AM  
**To:** Jessome, Kimberley [NCR]; Sims, Michael: JUSTICE  
**Cc:** Martineau, Diane [NCR]; Tingley, Linda [NCR]  
**Subject:** [REDACTED]  
**Attachments:** [REDACTED]

s.23

[REDACTED]  
Diane:

Linda:

Mike:

Cheers,

Mike

Michael Sousa  
Avocat général/General Counsel  
Directeur adjoint/Deputy Director  
Service juridique, Environnement Canada/Environment Canada Legal Services  
Justice Canada  
351, boul. St-Joseph Gatineau, QC K1A 0H3  
Tel: 819 934-6642  
Fax: 819 953-9110

---

**From:** Jessome, Kimberley [NCR]  
**Sent:** August 12, 2011 10:16 AM  
**To:** Sousa, Michael [NCR]  
**Cc:** Jessome, Kimberley [NCR]  
**Subject:** FW: [REDACTED]

Mike,

[REDACTED]

30/08/2011

005073



Thanks,

Kim

---

**From:** Sims, Michael [mailto:Michael.Sims@justice.gc.ca]

**Sent:** August 12, 2011 10:00 AM

**To:** Jessome, Kimberley [NCR]

**Subject:** FW: [REDACTED]

Hi Kim,

[REDACTED]

Michael

**Michael J. Sims**

Counsel | Avocat

Department of Justice Canada | Ministère de la Justice Canada

Tel. / Tél.: (416) 952-7116

s.23

30/08/2011

005074

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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

31230-7-5

Ethier, JoAnne [NCR]

**From:** Jessome, Kimberley [NCR]  
**Sent:** August 17, 2011 3:40 PM  
**To:** Martineau, Diane [NCR]  
**Cc:** Jessome, Kimberley [NCR]  
**Subject:** [REDACTED]  
**Attachments:** [REDACTED]

s.23

Diane,

Puis-je avoir un gabarit de sommaire pour le ECLC, svp?

Merci,

Kim

---

**From:** Sousa, Michael [NCR]  
**Sent:** August 12, 2011 10:20 AM  
**To:** Jessome, Kimberley [NCR]; Sims, Michael: JUSTICE  
**Cc:** Martineau, Diane [NCR]; Tingley, Linda [NCR]  
**Subject:** [REDACTED]

Diane.

Diane:

Linda:

Mike:

Cheers,

Mike

Michael Sousa  
Avocat général/General Counsel  
Directeur adjoint/Deputy Director  
Service juridique, Environnement Canada/Environment Canada Legal Services  
Justice Canada  
351, boul. St-Joseph Gatineau, QC K1A 0H3  
Tel: 819 934-6642

30/08/2011

005087

Fax: 819 953-9110

s.23

---

**From:** Jessome, Kimberley [NCR]  
**Sent:** August 12, 2011 10:16 AM  
**To:** Sousa, Michael [NCR]  
**Cc:** Jessome, Kimberley [NCR]  
**Subject:** [REDACTED]

Mike,

[REDACTED]

Thanks,

Kim

---

**From:** Sims, Michael [mailto:Michael.Sims@justice.gc.ca]  
**Sent:** August 12, 2011 10:00 AM  
**To:** Jessome, Kimberley [NCR]  
**Subject:** [REDACTED]

Hi Kim,

[REDACTED]

Michael

**Michael J. Sims**  
Counsel | Avocat  
Department of Justice Canada | Ministère de la Justice Canada  
Tel. / Tél.: (416) 952-7116

30/08/2011

005088

**Pages 5089 to / à 5106  
are withheld pursuant to section  
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**23**

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NAME  
NOM

CLIENT DOCUMENTS

NO

*WHITTY v. AGC et al.*

File No. 2-596385

08/26/2011 09:02 9056455372

OSCJ/OCJ-HAMILTON

PAGE 04/10

Date

Accused's Date of Birth

Arrest Officer's Name

Badge No.

Occurrence No.

008

Edward N. Wells

551

3007-2007-12-19-014

Page 1

CANADA  
PROVINCE OF ONTARIO  
PROVINCE DE L'ONTARIO

Central West

(Region/Région)

Information of Edward N. Wells  
Dénonciation de:

Environment Canada, Environmental Enforcement Division.

Enforcement Officer

(Occupation/Profession)

The informant says  
Le dénonciateur

that he/she believes on reasonable grounds that  
déclare qu'il a des motifs raisonnables de croire

- (1) that RPR Environmental Inc. and Patrick Whitty (Director) of  
que 164-166 South Service Road  
Stoney Creek, Ontario, L8E 3H6

on or about the 1st day of December in the year 20 07, at the City  
le ou vers le jour de dans le/dite région  
of Hamilton in the said region  
de dans le/dite région

Count 1

and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of November 1, 2005 and November 30, 2005, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RU55347-7 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations and did thereby commit an offence pursuant to subsection 272(1) of the Canadian Environmental Protection Act, 1999.

Count 2

and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of November 1, 2005 and November 30, 2005, did unlawfully fail to submit the required documentation to wit: fail to submit a copy of the movement document; RU55347-7 with Parts A and B completed, as required by subsections 11(1) and 11(2) of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations, within three working days after the hazardous waste or hazardous recyclable material was shipped to the authorized facility, to the Minister, contrary to section 11(3)(a) of the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations and did thereby commit an offence pursuant to subsection 272(1) of the Canadian Environmental Protection Act, 1999.

Count 3 through to Count 63-- attached within Appendix "A"

(Long Form - One or More Accused,  
Formule complète - Un ou plusieurs acc.)

(Continued on Page 2 within)  
(Suite à la page 2 ci-incluse)

CC 0935 (rev. 05/93)

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INFORMATION SERVICE FOR BARRIER FREE COURTS  
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TORONTO AREA 326-0111

OFFICE DES AFFAIRES DES PERSONNES HANDICAPÉES  
SERVICE D'INFORMATION SUR LES TRIBUNAUX À ACCESS FACILE  
1-800-387-4456  
RÉGION DE TORONTO 326-0111

APPEARANCES - ADJOURNMENTS  
COMPARUTIONS - ADJOURNEMENTS

Date Date	Clerk Greffier	Reporter Sténographe	For Crown pour la Couronne	For Accused pour l'accusé(s)
FEB 09 2008	Dumas	Dias	Antonians	Murphy <sup>M</sup> R P W
APR 17 2008	Stone	Zuidema		(HB)
MAY 15 2008	Stone	Macaulay	Antonians	Crown as agent (W)
JUN 26 2008	Stone	Macaulay	Antonians	(Crown as agent) (W)
SEP 02 2008	Stone	Gasmond	Antonians	(Crown as agent) DS
SEP 25 2008	TH	Zuidema	Snordin	(Crown as agent) (W)
DEC 02 2008	DLH	Black	Antonians	Crown as agent (W)
DEC 02 2008	DLH	McInchul		DS
DEC 18 2008				ST
DEC 29 2008	Finlay	Lima	Antonians	SAY
FEB 05 2009	DLH	ABBOTT	ANTONIANI	STAX (ST)

**Z 154(3) Impnd.**



## Appendix "A"

### Information Regarding the Canadian Environmental Protection Act, 1999

#### Subsection 272(1)

#### Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations

#### Subsection 11(1), 11(3), 11(6)(a) and 36(1)

#### Count 3

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of November 1, 2005 and November 30, 2005, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RU55348-5 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

#### Count 4

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of November 1, 2005 and November 30, 2005, did unlawfully fail to submit the required documentation to wit: fail to submit a copy of the movement document; RU55348-5 with Parts A and B completed, as required by subsections 11(1) and 11(2) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, within three working days after the hazardous waste or hazardous recyclable material was shipped to the authorized facility; to the Minister, contrary to section 11(3)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 5**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of December 1, 2005 and December 31, 2005, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RU55157-0 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 6**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of December 1, 2005 and December 31, 2005, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RU55158-8 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 7**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of December 1, 2005 and December 31, 2005, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RU55159-6 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 8**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007 at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of January 1, 2006 and January 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RU55010-1 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 9**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of January in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of January 1, 2006 and January 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to submit a copy of the movement document; RU55010-1 with Parts A and B completed, as required by subsections 11(1) and 11(2) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, within three working days after the hazardous waste or hazardous recyclable material was shipped to an authorized facility; to the Minister, contrary to section 11(3)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 10**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of January 1, 2006 and January 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RU55018-4 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 11**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of January 1, 2006 and January 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to submit a copy of the movement document; RU55018-4 with Parts A and B completed, as required by subsections 11(1) and 11(2) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, within three working days after the hazardous waste or hazardous recyclable material was shipped to an authorized facility; to the Minister, contrary to section 11(3)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 12**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of January 1, 2006 and January 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RU55017-6 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 13**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of January 1, 2006 and January 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to submit a copy of the movement document; RU55017-6 with Parts A and B completed, as required by subsections 11(1) and 11(2) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, within three working days after the hazardous waste or hazardous recyclable material was shipped to an authorized facility; to the Minister, contrary to section 11(3)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 14**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of January 1, 2006 and January 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document RU55016-8 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 15**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of January 1, 2006 and January 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to submit a copy of the movement document RU55016-8 with Parts A and B completed, as required by subsections 11(1) and 11(2) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, within three working days after the hazardous waste or hazardous recyclable material was shipped to an authorized facility; to the Minister, contrary to section 11(3)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 12**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of January 1, 2006 and January 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RU55017-6 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 13**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of January 1, 2006 and January 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to submit a copy of the movement document; RU55017-6 with Parts A and B completed, as required by subsections 11(1) and 11(2) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, within three working days after the hazardous waste or hazardous recyclable material was shipped to an authorized facility; to the Minister, contrary to section 11(3)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 16**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of February 1, 2006 and February 28, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN48566-5 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 17**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of March 1, 2006 and March 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN10098-3 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 18**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of April 1, 2006 and April 30, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RU54892-3 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.



**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.  
Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 19**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of May 1, 2006 and May 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN10138-7 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 20**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of June 1, 2006 and June 30, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN10015-7 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

## **Appendix "A"**

### **Information Regarding the Canadian Environmental Protection Act, 1999**

#### **Subsection 272(1)**

#### **Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.**

#### **Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)**

##### **Count 21**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of July 1, 2006 and July 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN10019-9 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

##### **Count 22**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of September 1, 2006 and September 30, 2006, did unlawfully fail to complete the required documentation to wit: fail to complete Part A of the movement document; BN48944-4, indicating the reference number prior to the shipping of the hazardous waste or hazardous recyclable material, contrary to section 11(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

##### **Count 23**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of September 1, 2006 and September 30, 2006, did unlawfully fail to complete the required documentation to wit: fail to complete Part A of the movement document; BN48943-6, indicating the reference number prior to the shipping of the hazardous waste or hazardous recyclable material, contrary to section 11(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 24**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of September 1, 2006 and September 30, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN10423-3 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 25**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of September 1, 2006 and September 30, 2006, did unlawfully fail to submit the required documentation to wit: fail to submit a copy of the movement document; BN10423-3 with Parts A and B completed, as required by subsections 11(1) and 11(2) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, within three working days after the hazardous waste or hazardous recyclable material was shipped to an authorized facility; to the Minister, contrary to section 11(3)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 26**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of September 1, 2006 and September 30, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RU98164-5 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 27**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of September 1, 2006 and September 30, 2006, did unlawfully fail to submit the required documentation to wit: fail to submit a copy of the movement document; RU98164-5 with Parts A and B completed, as required by subsections 11(1) and 11(2) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, within three working days after the hazardous waste or hazardous recyclable material was shipped to an authorized facility; to the Minister, contrary to section 11(3)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 28**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of October 1, 2006 and October 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN47015-4 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 29**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of December 1, 2006 and December 31, 2006, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN47100-4 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 30**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of January 1, 2007 and January 31, 2007, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RT51434-9 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 31**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of February 1, 2007 and February, 2007, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN47211-9 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 32**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of March 1, 2007 and March 31, 2007, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN47246-3 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 33**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the dates of April 1, 2007 and April 30, 2007, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN47292-9 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 34**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of May 1, 2007 and May 31, 2007, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; JN29262-7 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 35**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of June 1, 2007 and June 30, 2007, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RT49340-3 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 36**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of July 1, 2007 and July 31, 2007, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; RT08793-2 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 37**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of August 1, 2007 and August 31, 2007, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; AS49407-8 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.



**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 38**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of September 1, 2007 and September 30, 2007, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; JN29475-5 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 39**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of October 1, 2007 and October 31, 2007, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN45266-5 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 40**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of December in the year 2007, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of November 1, 2007 and November 30, 2007, did unlawfully fail to submit the required documentation to wit: fail to obtain a copy of the movement document; BN25727-0 with all Parts completed and ensure that copies of the completed movement document were sent, within three working days after the hazardous waste or hazardous recyclable material was delivered to the authorized facility, to the Minister, contrary to section 11(6)(a) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 41**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of November 1, 2005 and November 30, 2005 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified in movement document RU55348-5 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 42**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of November 1, 2005 and November 30, 2005 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document RU55347-7 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 43**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of December 1, 2005 and December 31, 2005 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document RU55157-0 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 44**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of December 1, 2005 and December 31, 2005 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document RU55158-8 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 45**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of December 1, 2005 and December 31, 2005 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document RU55159-6 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 46**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of January 1, 2006 and January 31, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document RU55010-1 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 47**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of January 1, 2006 and January 31, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document RU55018-4 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 48**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of January 1, 2006 and January 31, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document RU55017-6 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 49**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of January 1, 2006 and January 31, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document RU55016-8 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 50**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of February 1, 2006 and February 28, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document BN48566-5 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 51**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of March 1, 2006 and March 31, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document BN10098-3 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 52**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of April 1, 2006 and April 30, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document RU54892-3 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.  
Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 53**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of May 1, 2006 and May 31, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document BN10138-7 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 54**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of June 1, 2006 and June 30, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document BN10015-7 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.



**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 55**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of July 1, 2006 and July 31, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document BN10019-9 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 56**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of September 1, 2006 and September 30, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document BN48944-4 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.**  
**Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 57**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of September 1, 2006 and September 30, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document BN48943-6 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 58**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of September 1, 2006 and September 30, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document BN10423-3 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Appendix "A"****Information Regarding the Canadian Environmental Protection Act, 1999****Subsection 272(1)****Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.****Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)****Count 59**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of September 1, 2006 and September 30, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document RU98164-5 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

**Count 60**

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of October 1, 2006 and October 31, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document BN47015-4 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

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## Appendix "A"

### Information Regarding the Canadian Environmental Protection Act, 1999

#### Subsection 272(1)

#### Export and Import of Hazardous Waste and Hazardous Recyclable Material Regs.

#### Subsection 11(1), 11(3)(a), 11(6)(a) and 36(1)

#### Count 61

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of December 1, 2006 and December 31, 2006 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document BN47100-4 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

#### Count 62

That RPR Environmental Inc. and Patrick Whitty (Director of RPR Environmental Inc.) located at 164-166 South Service Road, Stoney Creek, Ontario L8E 3H6 did on or about the 1<sup>st</sup> day of February in the year 2008, at the city of Hamilton in the said region and elsewhere in the province of Ontario and after exporting hazardous waste or hazardous recyclable material between the date of January 1, 2007 and January 31, 2007 and after the acceptance and disposal of the hazardous waste or hazardous recyclable material by an authorized facility, did fail to submit the required documentation to wit; fail to provide a written, dated and signed confirmation of disposal or recycling within 30 days after the day on which the disposal of the hazardous waste or recycling of the hazardous recyclable material identified within movement document RT51434-9 is complete, to the Minister, contrary to section 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 272(1) of the *Canadian Environmental Protection Act, 1999*.

#### Count 63

And That Patrick Whitty, Director of RPR Environmental Inc., on or about the 1<sup>st</sup> day of February in the year 2008, at the City of Hamilton in the said region and elsewhere in the province of Ontario, did fail to take all reasonable measures to ensure that RPR Environmental Inc. complied with section 11(1), 11(3)(a), 11(6)(a) and 36(1) of the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* and did thereby commit an offence pursuant to subsection 280.1(1)(a) of the *Canadian Environmental Protection Act, 1999*.

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OSCJ/OCJ-HAMILTON

PAGE 06/06

Sworn before me at the  
Assermenté devant moi

City

Hamilton

(Continued) Page No. 2

(suite) Page n° 2

this 26th day of February 20 08  
le 26 jour de février 20 08

*[Signature]*  
A Justice of the Peace in and for the Province of Ontario/Juge de paix dans et pour la province de l'Ontario

*[Signature]*  
Informant/Dénonciateur

☐ Appearance Notice/  
Citation à comparaître ☐ Promise to Appear/  
Promesse de comparaître ☐ Recognizance for  
Engagement de 20 Confirmed on  
Confirmé(e) le 20 J.P.

Date Date Crown Elects to Proceed  
Choix de la Couronne ☐ Summarily  
Procédure sommaire ☐ By Indictment  
Mise en accusation ☒ Summary Conviction Offence(s)  
Infraction punissable sur déclaration de culpabilité par procédure sommaire

Date Date	Accused Accusé(e)	Elects Trial by Chefs d'un procès devant			Abs. Juris.	Pleas/Pleadoyer	
		Gen. Division Juge	Judge & Jury/Juge et jury	Provincial Division/provinciale Juge On Courts Juge pour les chefs d'accusation		Guilty to Counts/ coupable pour les chefs d'accusation	Not Guilty to Counts/ non coupable pour les chefs d'accusation
5 Feb 2009						# 42	

Committed (or) Ont. Sid. Trial "On Counts/ Interim(s) (ou) renvoyé(s) à son procès" pour les chefs d'accusation	Ball Cautionnement	Discharged on Counts libéré(e) pour les chefs d'accusation	Found Guilty on Counts reconnu(e) coupable pour les chefs d'accusation	Not Guilty on Counts Non coupable pour les chefs d'accusation
		# 42		

☐ With consent of accused and prosecutor, without taking or recording  
Avec le consentement de l'accusé(e) et du poursuivant sans recueillir ou consigner ☐ (a) any evidence (or)  
(a) de preuve (ou) ☐ (b) further evidence  
(b) de preuve supplémentaire

5 Feb 2009 - All other counts marked withdrawn.  
WHITTY  
# 42 - Absolute Discharge

*[Signature]*  
Judge/Juge J. TAKACH

**Pages 5139 to / à 5145**  
**are not relevant**  
**sont non pertinentes**

Whitty v. AGC, et al. - Notice of Discontinuance

*pour le dossier a  
Kim.*

Page 1 of 1

**Mercier-Lauzon, Melanie [NCR]**

*31236-7-5.*

**From:** Sousa, Michael [NCR]  
**Sent:** Thursday, November 24, 2011 3:46 PM  
**To:** Mercier-Lauzon, Melanie [NCR]  
**Subject:** Fw: Whitty v. AGC, et al. - Notice of Discontinuance  
**Attachments:** 10348376.pdf

For the file.  
Michael Sousa  
Justice Canada  
General Counsel/Avocat général

---

**From:** Sims, Michael [mailto:Michael.Sims@justice.gc.ca]  
**Sent:** Thursday, November 24, 2011 02:56 PM  
**To:** Sousa, Michael [NCR]; Jessome, Kimberley [NCR]  
**Cc:** Dyke, Diane <Diane.Dyke@justice.gc.ca>  
**Subject:** Whitty v. AGC, et al. - Notice of Discontinuance

Mike and Kim,

Attached for your records is the notice of discontinuance in this matter, which has been filed with the court.

We will now close our file.

Regards,

Michael

**Michael J. Sims**

Counsel | Avocat  
Department of Justice Canada | Ministère de la Justice Canada  
Tel. / Tél.: (416) 952-7116

<<10348376.pdf>>

11/24/2011

005146

File No. T-1295:11

IN THE FEDERAL COURT

BETWEEN

**PATRICK WHITTY**

Applicant

-and-

**THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA AND THE ATTORNEY  
GENERAL OF CANADA**

Respondents

**NOTICE OF DISCONTINUANCE**

**ZBOGAR ADVOCATE**

51 Crossovers St.  
Toronto Ontario  
Canada M4E 3X2

**Vilko Zbogar**

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Solicitor for the Applicant



File No. T-1295-11

IN THE FEDERAL COURT

BETWEEN

PATRICK WHITTY

Applicant

-and-

THE CHIEF ENFORCEMENT OFFICER, ENVIRONMENTAL  
ENFORCEMENT, ENVIRONMENT CANADA AND THE ATTORNEY  
GENERAL OF CANADA

Respondents

**NOTICE OF DISCONTINUANCE**

The plaintiff wholly discontinues this application in the Federal Court.

November 23, 2011



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**Pages 5150 to / à 5153**  
**are duplicates**  
**sont des duplicatas**

**Pages 5154 to / à 5157**  
**are not relevant**  
**sont non pertinentes**